Child Rights and the Law in East Africa

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Foreword

The adoption of the United Nations Convention on the Rights of the Child (CRC) in 1989 and the African Charter on the Rights and Welfare of the Child (ACRWC) in 1990 has revolutionized the perception of childhood and children's rights the world over. Until then, children's rights were seen as falling within the domain of charity and children were treated like they were the property or chattel of their parents.

The two instruments have brought about a radical shift in the conceptualization of childhood and children's rights. Now children are recognized as active beneficiaries (rather than subjects) of human rights. The two instruments recognize the importance of protection of children at both the international and national levels. They oblige States Parties thereto to domesticate the principles enshrined therein through an array of measures – constitutional, policy, legislative, judicial and administrative.

Now that the three common law countries of East Africa considered in this book – Kenya, Tanzania and Uganda – have ratified and domesticated the ACRWC and the CRC, this book has come at the right to time when States around the world including East Africa are encouraged to fulfil their obligations under the two instruments. The book examines, among other things, the extent to which the three countries have domesticated and currently implement the two instruments in their respective jurisdictions in toto. It thus looks at the constitutional, policy, legislative, judicial and administrative measures that have been undertaken by the three countries in order to effectively domesticate and implement the international child rights treaties.

I, therefore, feel highly privileged to write out the Foreword to this book on 'Child Rights and the Law in East Africa', which has been co-authored by two academics from Tanzania. One of the authors of this work is Professor Mohammed Saheb Hussain of the School of Law, University of Dar-es-Salaam; the other is Dr. Clement Julius Mashamba, a seasoned legal practitioner, Lecturer in Law and currently the 3rd Vice Chairperson of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC).

Given the background and experience of the authors and looking at the themes and contents of this book, I hope that it will serve as both a resource material in the area of child rights and law not only in East Africa but also across Sub-Saharan Africa. I earnestly trust that the book will also stimulate debate on effective domestication and implementation of international child rights across Africa.

Prof. Benyam Dawitt Mezmur

Chairperson, African Committee of Experts on the Rights and Welfare of the Child (ACERWC)

Dedication

To those children whose parents are no more in this world.

Preface

Throughout history, children have formed a very fundamental part in the development of humankind. In most societies around the world, children are considered as the backbone of the future. Senior members of society have considered it as their duty to provide them with basic social amenities, protection and guidance. However, when the movement to protect human rights arose in the 19th century and culminated in the codification of international human rights norms in the 20th century, children's rights were not deemed as an important part of rights at both the international and national levels.

It was not until 1924 when the defunct League of Nations adopted the Declaration on the Rights of the Child, followed by the United Nations' adoption of its own Declaration of the Rights of the Child in 1959. Although the two declarations had no binding force in international law, they laid down the basis for further codification of the United Nations Convention on the Rights of the Child (the CRC) in 1989 and the African Charter on the Rights and Welfare of the Child (the ACRWC) in 1990, both of which are binding treaties. The adoption of the CRC and the ACRWC has ushered in an unprecedented quest for the protection and promotion of child rights at both the international and municipal levels.

As such, the advent of the CRC and the ACRWC witnessed a move towards the enactment of child rights law around the world throughout the 1990s to date. In East Africa, there has been a sturdy move towards realizing this and new child rights legislation have been adopted and are being implemented, albeit with varying degrees of success and exactitude.

As an independent academic activity, the study of children's rights is comparatively new not only in East Africa, but in almost all sub-Saharan African countries. There are few documented studies about the domestication and implementation of the international children's rights treaties in East Africa. There are also quite few institutions that have embarked on teaching the child rights and law subject in this part of the world, despite the importance this field of law plays in the law enforcement and administration of justice.

It should be noted that although child rights and law is a relatively new subject in the conventional higher learning discourse, the topics forming part of this subject have been studied and applied in different settings for many years, making it an interdisciplinary branch of legal knowledge. From the perspectives of human rights and legal studies, this subject examines aspects of child rights protection, provision of basic services and amenities to children, prevention and elimination of violence against children, juvenile justice, involvement of children in armed conflicts, and the involvement of children in trafficking and illicit drugs. It also combines aspects of constitutional, policy, legislative, judicial and administrative measures devised, adopted and implemented by States to ensure that the child's rights and welfare are effectively realized.

This, therefore, implies that this branch of law brings into play an array of actors and players – social welfare specialists, child rights experts, law enforcement officers, psycho-sociologists, community leaders/actors and lawyers. This blend of areas of law

covered in a single branch of the law and the involvement of so many actors requires that there should be in supply documented literature on the principles, theories and practices in the area of child rights and the law as scholars, researchers, administrators and practitioners seek to expand and disseminate their knowledge on this branch of the law.

It is for the foregoing dynamics that this book has been published. It seeks to streamline the rights and protection of children in the three common law East African countries through law both now and in the future. The book also serves as a resource material in the area of child rights and the law, not only in East Africa, but also across Sub-Saharan Africa. It further seeks to stimulate debate on effective domestication and implementation of international child rights standards in East Africa.

Prof. (Dr.) Mohammed Saheb Hussain
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List of Abbreviations/Acronyms

ACERWC .... African Committee of Experts on the Rights and Welfare of the Child
ACPF ..... African Child Policy Forum
ACRWA ..... African Charter on the Rights and Welfare of the Child
AfCHPR ..... African Court on Human and Peoples' Rights
AFFC .....African Fit for Children
AIDS .....Acquired Immunodeficiency Syndrome
Cap .....Chapter
CAT ..... Convention Against Torture
CBO .....Community Based Organization
CJA .....Child Justice Act
CLRC..... Child Law Review Committee
CPU..... Child Protection Units
CROC .....Committee on the Rights of the Child
CSO.....Civil Society Organisation
DCS.....Department of Children's Services
ECHR ..... European Commission of Human Rights
EACA ..... East Africa Court of Appeal
ECCP .....Early Childhood Care and Protection
ECE ..... Early Childhood Education
ECHR ..... European Convention of Human Rights
ECSN .....Early Childhood Survival and Nutrition
edn .....Edition
eds..... Editors
EFA..... Education For All
FBO ..... Faith-Based Organization
FCC..... Family and Children Court
FGCs.....Family Group Conferences
FGM .....Female Genital Mutilation
FHRI .....Foundation for Human Rights Imitative
HIV.....Human Immunodeficiency Virus
HSSP..... Health Sector Strategic Plan
ILO .....International Labour Organisation
IMCI.....Integrated Management of Childhood Illness
IPEC .....International Programme for Elimination of Child Labour
IQ ..... Intelligent Quotient
KDHS .....Kenya Demographic and Health Survey
KLRC.....Kenya Law Reforms Commission
LCA .....Law of Child Act
MACR ..... Minimum Age Criminal Responsibility
MoE..... Ministry of Education

MoH ..... Ministry of Health
MTCT ..... Mother to Child Transmission
MVC ..... Most Vulnerable Children
NCCS ..... National Council for Children's Services
NCPWD ..... National Council for Persons with Disability
NGO ..... Non-Governmental Organization
nola ..... National Organization for Legal Assistance
OAU ..... Organisation of African Unity
ODA ..... Overseas Development Assistance
ORS ..... Oral Rehydration Salts
OVC ..... Orphaned and Vulnerable Children
p ..... Page
PEAP ..... Poverty Eradication Action Plan
pp ..... Particular Pages
R.E ..... Revised Edition
RITA ..... Registration, Insolvency and Trusteeship Agency
SADR ..... Sahawari Arab Democratic Republic
SCA ..... Supreme Court of Appeal
SRH ..... Sexual and Reproductive Health
TDMS ..... Teacher Development and Management System
U5BRI ..... Under Five British Registration Initiatives
UK ..... United Kingdom
UNESCO ..... United Nations Educational, Scientific and Cultural Organization
US ..... United States
VAC ..... Violence Against Children
VOM ..... Victim Offender Mediation

Part One

Introduction to International Child Rights Law

Chapter One

Introduction

1.0 An Overview of the Study

This study covers three common law East African countries – Kenya, Tanzania Mainland (referred to in this book as Tanzania)[1] and Uganda. There are several reasons forming the basis for selecting these countries. First, the three countries are former British colonies sharing significantly similar legal systems and traditions. Second, the three countries used to have a unified appellate court, first in the name of the Court of Appeal for Eastern Africa that was established in 1902;[2] and later, in the name of the East African Court of Appeal,[3] up until it was dissolved following the collapse of the then East African Community in 1977.[4] This means that these countries' legal systems and jurisprudence are historically inter-woven; and more or less similar.

Third, the three countries under study have continued to share a number of similarities in approaches to legally deal with children, particularly those in need of care and protection and those in conflict with the law, having derived their laws from their former British colonialists. These and many more other reasons have made it convenient for the authors to consider the three countries' approaches to

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1 For some reasons, Zanzibar is not specifically covered in this study. Where Zanzibar is mentioned, it is only for the purpose of making comparison of an issue or a principle involved in the analysis. It should be noted that Zanzibar has a dual court system applying different laws and procedures: the common law system founded on the English legal system; and the Kadhi's Courts administering Islamic laws relating to personal matters: i.e., marriage, divorce, inheritance, maintenance and custody of children under the Kadhi's Court Act (No. 3 of 1985). The judicial hierarchy of Zanzibar is such that at the lowest level there are Primary Courts, then the District Courts, Regional Magistrates' Courts (constituted under the Magistrates' Courts Act, Act No. 6 of 1985) and at the apex is the High Court of Zanzibar. The High Court of Zanzibar is established under Article 93 of the Zanzibar Constitution (1984) and functions in the context of the High Court Act (No. 2 of 1985). Zanzibar shares Tanzania's Supreme Court – the Court of Appeal of Tanzania (established under Article 117 of the Constitution of the United Republic of Tanzania (1977) and functions in the context of the Appellate Jurisdiction Act (1979), Cap. 141 R.E. 2002 and the Tanzania Court of Appeal Rules (2009) – with its counter-party (Tanzania Mainland). The Court of Appeal hears all appeals from the High Courts of Zanzibar and the High Court of the United Republic of Tanzania (which has jurisdiction for Tanzania Mainland only). However, the Court of Appeal of Tanzania has no power to hear appeals emanating from the decision of the High Court of Zanzibar in respect of enforcement of human rights and in matters originating from the Kadhi's Courts (See Article 99(b) of the Zanzibar Constitution (1984).

2 Initially, the Court of Appeal for Eastern Africa had jurisdiction to hear appeals from the British East Africa Protectorate and Uganda. Its seat was then located in Zanzibar although appeals emanating from Zanzibar were referred to Bombay until 1914 where only appeals from the British Courts in Zanzibar were determined by this court. Appeals from the Sultan's courts were sent to Bombay up until 1936 when they could be heard by the Court of Appeal for Eastern Africa. In 1921, the court was reconstituted to hear appeals from Kenya, Nyasaland, Tanganyika, Uganda and Zanzibar. The court was further reconstituted in 1950 to exercise jurisdiction from seven territories, including Aden, Somali land and Seychelles. For a detailed history of this court, see particularly Read, J.S., 'Justice on Appeal: A Century Plus of Appeal Courts and Judges in Tanzania', in Peter, C.M. and H. Kijo-Bisimba (Editions), *Law and Justice in Tanzania: Quarter of a Century of the Court of Appeal* Dar es Salaam: Mkuki na Nyota/Legal and Human Rights Centre, 2007, pp. 55-80.

3 The East African Court of Appeal was established under Article 80 of the Treaty of the East African Cooperation (1967) to provide appellate services to all the partner States of the former East African Community: Kenya, Tanzania and Uganda. This legally made the East African Court of Appeal (EACA) an institution of the East African Community.

4 As an institution of the Community, the EACA had to also collapse with the Community in 1977. See particularly Mfalila, L.M.S., 'Twenty Five of the Court of Appeal and the Independence of the Judiciary', in Peter, C.M. and H. Kijo-Bisimba (Editions), *Law and Justice in Tanzania: Quarter of a Century of the Court of Appeal* Dar es Salaam: Mkuki na Nyota/Legal and Human Rights Centre, 2007, pp. 81-98 & p. 81.

domesticating and implementing international standards for the promotion and protection of children's rights.

Given the complex and sensitive nature of the subject matter of this study – i.e. the child's rights and welfare examined in the legal context – the authors have chosen to confine their analysis on the Constitutions, laws, policies and programmes in these countries. Despite the dearth of literature on child rights and the law in the three countries, it has been proved fertile to rely on the periodic reports submitted to the treaty bodies under the relevant international human rights instruments and the concluding observations coming from these bodies in gauging the progress made in the domestication and implementation of international standards on child rights and welfare in these countries.

1.1 The Legal Status of the Child in East Africa

As in many Sub-Saharan African countries, in the three common law East African countries canvassed in this book – Kenya, Tanzania and Uganda – the adoption of the United Nations Convention on the Rights of the Child (CRC) in 1989 and the African Charter on the Rights and Welfare of the Child (ACRWC) in 1990 has several ramifications in the construction and perception of childhood. Prior to this phenomenon, these countries had a common law approach to constructing and perceiving childhood – quite often through the British colonial legal lenses. In this regard, a child was perceived and defined in the context of a particular situation. For example, there was a separate definition of a child in respect of labour laws, evidence laws, minimum ages of criminal responsibility, family and marriage laws, adoption laws, etc. Quite often, the different definitions of the child tended to be lower than eighteen years.

However, with the advent of the ACRWC and the CRC, the legal status of children in the three countries under study has changed. All the countries have adopted standards set in the two international treaties in a number of ways. Firstly, all countries have ratified the two treaties without any reservations, meaning that they are obliged to domesticate and implement all standards enacted in the two treaties without any qualification.

Secondly, the three countries have both "directly" and "indirectly" constitutionalised children's rights. Whereas Kenya and Uganda have specific provisions in the Constitutions guaranteeing the rights of the child along with other related provisions,[5] Tanzania has indirectly constutionalised child rights[6] through the general approach of the guarantee of basic rights and fundamental rights and freedoms embedded in reference to "everyone" (which includes a child) is entitled to the enjoyment of all rights and freedoms enshrined in the Bill of Rights.[7]

5 See particularly Article 53 of the Constitution of the Republic of Kenya (2010) (henceforth, the Constitution of Kenya); and Article 34 of the Constitution of the Republic of Uganda (1995) (henceforth, the Constitution of Uganda).

6 However, Article 42 of the Draft Constitution of the United Republic of Tanzania, which was unveiled on 3 June 2013, proposes to enact certain child rights.

7 See particularly Articles 12-26 of the Constitution of the United Republic of Tanzania (1977) (henceforth, the Constitution of Tanzania).

Thirdly, all three countries have enacted specific legislation guaranteeing the rights and welfare of the child in their jurisdictions.[8] Besides, these countries have also enacted "child"-related laws to complement the child-specific laws. These enactments have been in respect of issues pertaining to child protection: anti-trafficking,[9] criminalisation of sexual abuses and exploitation,[10] prevention and elimination of violence against children, child labour and employment,[11] promotion and protection of the child's right to education,[12] etc.

Fourthly, the three countries have also adopted and are implementing a number of policies, plans of actions, strategies and programmes aimed at promoting and protecting the rights of the child in their jurisdictions. Fifthly, all three countries have submitted reports to the treaty bodies monitoring the two main international instruments protecting child rights (i.e. the ACRWC and the CRC). The countries have also received concluding observations from these bodies and they have endeavoured to implement them and report back on the status of implementation in their subsequent reports.

1.2 Research Methodology Used in this Book

The subject covered in this book is rather complex, involving relatively intertwined stakeholders, both international and municipal legal principles, and a myriad of problems and challenges facing children in the three countries under study. Now that the protection of children's rights is well entrenched in international law as well as in state laws, the study applies the "legal centralism approach." This approach centres on the laws that are made and enforced by the state.[13] Viewed in this context, as John Griffiths points out, under the legal centralism principle 'law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administrated by a single set of state institutions.'[14]

Using this approach, this study examines international and state laws, norms, institutions, international and national publications, and other international legal instruments relating to the rights and welfare of the child, with a view to critically assessing what the constitutional and legal regimes in the countries under study provide. This approach has enabled this study to unearth challenges, problems, gaps and best practices inherent in the legal protection of children's rights in the three countries.

In this regard, the study has utilized mostly library research work complemented with field research. In this context, primary data were obtained from the review and analysis of relevant international human rights instruments and municipal laws, law

8 See particularly the Ugandan Children Act (1996), the Kenyan Children Act (2001) and the Tanzanian Law of the Child Act (2009).

9 See particularly the Counter Trafficking in Persons Act (2010) (Kenya), Ant-trafficking in Persons Act (2008) (Tanzania); and Anti-Trafficking in Persons Act (2008) (Uganda).

10 See particularly the Sexual Offences Act (2006) (Kenya), the Sexual Offences (Special Provisions) Act (1998) (Tanzania), which is now made part of the Penal Code; and Uganda Penal Code Act (1950).

11 See particularly the Kenyan Labour Relations Act (No. 14 of 2007, Cap. 234); Employment and Labour Relations Act (Act No. 6 of 2004), Cap. 366 R.E. 2002 (Tanzania) and Employment Act (2006) (Uganda).

12 See particularly the Kenyan Education Act, Cap. 211, Revised Edition 2012; Ugandan Education Act (2008); and the Education Act, Cap. 353 R.E. 2002 (Tanzania).

13 Bentzon, A.W., et al, *Pursuing Grounded Theory in Law: South-North Experiences in Developing Women's Law*. Oslo: Tano Aschehoug, 1998. p.31.

14 Griffiths, J., 'What is Legal Pluralism.' *Journal of Legal Pluralism*. Vol. 24, 1986. pp. 1-55, &p. 3.

reports, journals, periodicals, textbooks, declarations, Parliamentary Hansards, general comments and concluding observations of relevant international treaty bodies, and state reports on children's rights. This entailed maximum use of the library and the internet that was complemented by data obtained from the field used in making relevant analyses, observations and conclusions. Paper presentations and group or target-oriented discussions were also made by authors at various workshops and seminars as secondary sources for the research.

The study has also used a comparative approach to studying the legal systems relating to children in countries other than Kenya, Tanzania and Uganda, whereby respective child laws and practices in respect of protection of children's rights and welfare have been analysed in order to find out challenges, gaps and problems encountered and how they are addressed in the process. This approach has also helped us to identify the best practices for the three common law East African countries to emulate from in order to improve their child legal protection systems.

In order to get a comprehensible, comparative picture on the best practices in the legal protection of child rights, the authors visited and interacted with the United Nations Committee on the Rights of the Child (CROC), the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) as well as child rights practitioners in a number of African countries. In particular, one of the authors[15] has participated in presentation of alternative reports relating to Tanzania's implementation of the CRC and the ACRWC before the CROC and ACERWC, respectively; and has been participating in public hearings before the African Court on Human and Peoples' Rights (AfCHPR) from March 2012,[16] to date. The same author has been representing the ACERWC as its liaison officer with the Court as well as well as acting as counsel in one of the matters before the Court.[17]

These visits to the CRC, ACERWC and AFCHPR provided the authors with valuable information and contacts with officials of the Court. They were able to interview a number of stakeholders on the working of the these treaty bodies, including parties, judges, experts, the court registry officials and advocates. Insofar as the interviews provided general and specific experiences the respondents had in the working and mandate of these bodies, the same have been used holistically to stimulate ideas and heads of inquiry relating to the effectiveness of the bodies in the area of human rights and children's rights protection within their respective jurisdictions. As such, the nature of such interviews made it necessary to omit the names and descriptions of respondents from the main body or bibliography of this work.

In the end, the materials so obtained were subjected to critical scholarly inquiry and analysis to enable the authors to make a realistic analysis of the domestication and implementation of international child rights standards in Kenya, Tanzania and Uganda.

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15 Clement Mashamba has been involved in the preparation of state reports and alternative reports to various treaty bodies, including the ACERWC and the CROC, for the past fifteen years.

16 In March 2012, the AfCHPR conducted its first public hearing of a case under rule 43(1) of its Rules in *Femi Falana Femi Falana v African Union,* Application No. 001/2011. More information on this matter is available at http://www.african-court.org/fr/images/documents/Sensitization_Visits/Press_Releases_2012/English/press _release _on_public.pdf (Accessed on 18 June 2013).

17 *Tanganyika Law Society, Legal and Human Rights & Rev. Christopher Mtikila v The United Republic of Tanzania*, applications No's. 009 and 011/2011.

Chapter Two

The Child in International Law

2.0 Introduction

The adoption of the UN Convention on the Rights of the Child (CRC) in 1989 and the African Charter on the Rights and Welfare of the Child (ACRWC) in 1990 has revolutionised the conception of children's rights worldwide. The two instruments have resulted in a radical shift from the doctrine of *parens patriae* – "the state as parent" – and the paternalistic approach to addressing children's rights and welfare to modern-day conception of children's rights resulting in *recognition* of children as beneficiaries (rather than subjects) of human rights.

From the early conception of children's rights in the common law, which insisted on the needs as opposed to the rights of the child, the CRC and the ACRWC have brought about the importance of the child's rights in the day-to-day life of humankind. Therefore, the child occupies a central role in international human rights law as well as in the municipal law. In order to appreciate this role, this Chapter examines the status and legal protection of the child and childhood in international human rights law from a historical point of view.

2.1 The Legal Status of the Child in Early Common Law

Modern conceptions of the rights of the child could be embedded in the reasoning of the early 20th century Polish pedagogue, Janusz Korczak,[18] who opined that: 'Children are not made human beings, they are born human beings.'[19] Historically speaking, children's rights were not recognised under the common law and the entire medieval society until around the seventeenth century.[20] During this period and before, in most of the European countries, 'the special nature of children was ignored and children were treated as miniature adults.'[21] As British legal theory historians have indicated, the historical origins of the British common law system actually reveal a 'brutal indifference to a child's fate.'[22]

According to Rebecca Rios-Kohn: 'It is well documented that until approximately the nineteenth century, children were treated like property or chattel but were valued by their families for their contributions through their work.'[23] This approach to children's rights and welfare was well articulated by Blackstone to the effect that the father might 'indeed have the benefit of his children's labour while they live[d] with

18 Dr. Janusz Korczak was a writer, educator, founder of an original system of education, and patron of children.

19 Quoted in Nowak, M., *Introduction to the International Human Rights Regime* Leiden/Boston: Martinus Nijhoff Publishers, 2003, p. 91.

20 Rios-Kohn, R., 'Comparative Study of the Impact of the Convention on the Rights of the Child: Law Reform in Selected Common Law Countries' in United Nations Children Fund, *Protecting the World's Children: Impact of the Convention on the Rights of the Child in Diverse Legal Systems* New York: Cambridge University Press, 2007, p. 39; and Cleland, A., *Child Abuse, Child Protection and the Law* Edinburgh: W. Green, 2008, p. 2.

21 Flekkoy, M. and N. H. Kaufman, *Rights and Responsibilities in Family and Society* London: Jessica Kingsley Publishers, 1997, p. 15.

22 Rios-Kohn, op. cit.

23 *Ibid*.

him, and [were] maintained by him: but this [was] no more than [the father was] entitled to from his apprentices or servants.'[24] It is worth noting that:

> Although the principle of the best interests of the child has deep Anglo-Saxon roots, a review of the historical development of parenthood and childhood under early common law shows that the notion of children's rights did not exist whatsoever. Children had a low status within society and within the family. The law, which usually reflects the values and traditions of a society, treated them accordingly.[25]

Therefore, at common law children were treated as are treated in most developing countries today, where they were/are 'forced to work as a result of their level of poverty. Child labour was not only acceptable, but it also was promoted at the highest level; for example, by Parliament, which stated that a working child was more useful to his family.'[26] As it is the case in most developing countries today, it was justified by society's perception 'that for those children of the lower classes, education was not necessary as child labourers were deemed essential to the country's economy. Thus, the vast majority of working children had very little schooling. In 1840, only 20 per cent of children had gone to school and, finally, in 1870, the Education Act was passed in England, requiring all children between the ages of five and ten to attend school.'[27]

Later developments in the conceptualisation of childhood have resulted in what is today called "the social construction of childhood",[28] whose development 'allows those who work with – and make laws for – children to consider how we think about children and what society expects of them and for them.'[29] This construction of childhood emerged from the highly critiqued conceptualisation of childhood made by Aries,[30] who suggested that children in medieval society dressed as adults and were thus treated as such by the age of seven years,[31] 'and therefore that the idea of childhood did not exist at that time.'[32] Further developments in conceptualisation of childhood later resulted in the concept of protection of children, as a primary aim, which, as Cleland points out, 'was a familiar territory for the law in the early part of the 20th century.'[33]

2.2 The Legal Status of the Child in International Law

As noted above, children's rights were until recently seen as falling within the domain of charity.[34] Before the 19th century, children were regarded as part of the family; thus, needing no specific protection. But with the increase in violation of children's

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24 See Blackstone, W., *Commentaries on the Laws of England* Oxford: Clarendon Press, Book I, Ch. 16 (Originally published in 1765-1769).

25 Rios-Kohn, op. cit, pp. 39 & 40.

26 *Ibid*.

27 *Ibid*, p. 40.

28 Cleland, A., *Child Abuse, Child Protection and the Law*, op. cit; and James, A. and A. Prout (eds), *Constructing and Reconstructing Childhood: Contemporary Issues in the Sociological Study of Childhood*, 1991, p. 27.

29 Cleland, *Ibid*, pp. 2 & 3.

30 See particularly Archard, D., *Children: Rights and Childhood*, 1993, p. 19 (arguing that what Aries regarded as a failure to recognise childhood as a concept was simply a different understanding of that concept).

31 Aries, P., *Centuries of Childhood*, original translation (1979).

32 Cleland, op. cit, p. 2.

33 *Ibid*, p. 5.

34 Sloth-Nielsen, J. and B.D. Mezmur, 'Surveying the Research Landscape to Promote Children's Legal Rights in an African Context' *African Human Rights Law Journal* Vol. 7 No. 2, 2007, pp. 330-353.

rights – particularly of those children in conflict with the law – it was increasingly felt that children also needed special protection as offered to other vulnerable sections of society like women, the elderly and persons with disabilities. As a result of this new approach, child justice reformers in the US in the late 19th century onward and in England in the early 20th century propagated for reform of the criminal justice system with a view to affording special protection to children who came into contact with the criminal justice system. This resulted in the establishment of the juvenile court – first in the US and then in the UK and other European countries.[35]

The development in the criminal justice system towards recognising the rights of offending children influenced the thinking of many scholars and policy makers at the international level. This new thinking was geared towards the need to legally protect the rights of the child worldwide with a view to detaching the child from the hitherto widely-held view that the child's rights were to be realised through his or her parents.[36] Consequently, in 1924 the League of Nations adopted the Declaration of the Rights of the Child, followed by the 1959 United Nations Declaration on the Rights of the Child. As a result of this development, the UN declared 1979 the International Year of the Child, culminating in the adoption of the UN Convention on the Rights of the Child (CRC)[37] in November 1989 – forty-one years after the Universal Declaration of Human Rights (UDHR) was adopted in 1948 by the UN General Assembly. Notably, the CRC was the first ever binding children's rights instrument to be adopted by the UN General Assembly. One year later, in 1990, Africa adopted its own children's rights instrument – the African Charter on the Rights and Welfare of the Child (ACRWC).[38] As it has been argued:

> Quarrying the mine of their legitimacy from the inspiration of the UDHR, the two instruments have now formed a very central part to the claim for children's rights at the municipal, regional and international levels. Many Constitutions and laws that were enacted after the two instruments were adopted have made reference to, or contained principles envisaged in, the two instruments.[39]

These principal international children's rights treaties were preceded by other international human rights instruments, which provided for the protection of the rights of the child in general and juveniles in conflict with the law in particular. Besides, almost all international human rights instruments adopted before and after

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35 *See* particularly Mashamba, C.J., 'A Study of Tanzania's Non-Compliance with its Obligation to Domesticate International Juvenile Justice Standards in Comparison with South Africa'. Ph.D. Thesis, Open University of Tanzania, 2013.

36 The attachment of children's rights to their parents resulted in the passing of certain liabilities from parents on to children in most pre-modern societies. However, this perception was attacked by Justice Sachs in *S v M* (CCT 53/06) [2007] ZACC 18 (26 September 2007) where he noted that a child 'cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them [...] the sins and traumas of fathers and mothers should not be visited on their children.' Para 18.

37 The CRC was adopted and opened for signature, ratification and accession by UN General Assembly resolution 44/25 of 20 November 1989 and entered into force on 2 September 1990, in accordance with Article 49. As of June 2008, 192 States had ratified the CRC, with only two countries – Somalia and the United States – being not States Party to it.

38 The ACRWC came into force on 29 November 1999 and now has been ratified by 47 countries on the continent. List of countries that have ratified the ACRWC is available at http://www.africa-nion.org/roo/Documents/Treaties/List/African%20Charter%20on%20the%20Rights%20and%20Welfarere%20of%20the%20Child.pdf (Accessed on 14 June 2013).

39 Mashamba, C.J., 'Domestication of International Children's Rights Norms in Tanzania' *The Justice Review* Vol. 8 No. 2, 2009, pp. 1-17.

the adoption of these two instruments contain provisions protecting children's rights.[40] Traditionally, the promotion and protection mandate of children's rights is vested in treaty bodies established under the provisions of the relevant treaties as discussed in the succeeding sections.

2.3 Legal Protection of the Child in International Law

The United Nations (UN) system for the protection of children's rights is embedded in the general human rights protection mechanism as well as through the specific children's rights protection mechanism under the CRC. This part, as such, discusses the two sets of protection of children's rights under the UN human rights system.

2.3.1 The UN Human Rights Protection Mechanism

The United Nations human rights protection mechanism contains two systems: the UN Charter-based system; and the UN treaty-based system. Under the Charter-based system, the UN Charter of 1945 sets the basis for human rights in a nutshell. One of the main objectives of the UN Charter is to secure international peace, development and human rights.[41] Unlike other subsequent UN instruments, the UN Charter does not emphasise on protection, but rather promotion of, and universal respect for, human rights.[42]

To be able to pursue this objective, the UN created the Economic and Social Council (ECOSOC), 'which, along with other many tasks, is primarily responsible for human rights issues.'[43] Under Articles 56, 62 and 68 of the UN Charter, ECOSOC is empowered, *inter alia*, to set up commissions for the protection of human rights universally.[44] In this section we, thus, examine the UN human rights protection mechanism.

2.3.1.1 An Historical Overview

Although it was mandated to oversee human rights protection and implementation at the global level, in practice, ECOSOC soon delegated this mandate to the Commission on Human Rights[45] that was established under the provisions of Article 68 of the UN Charter. Although the Commission, which was founded in 1946, was *de facto*

40 *See*, for example, the Convention on the Rights of Persons with Disabilities, which was adopted on 13 December 2006 during the sixty-first session of the General Assembly by resolution A/RES/61/106 (Kenya signed this treaty on 30 March 2007 and ratified it on 9 May 2008; Tanzania signed it on 30 March 2007, its Optional Protocol on 29 September 2008 and ratified the Convention and its Optional Protocol on 10 November 2009; Uganda signed both the Convention and Protocol on 30 March 2007 and signed the two on 25 September 2008) (http://www.un.org/disabilities/countries.asp?navid=17&pid=166, Accessed on 31 July 2013); and International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) (adopted on 1990 and entered into force on 1 July 2003). Only Uganda is State Party to the CMW having acceded to it on 14 November 1995; Tanzania is yet to be party thereto (http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&lang=en, Accessed on 31 July 2013).

41 *See* Article 1(3) of the UN Charter (1945).

42 *Ibid*. Articles 13 and 55.

43 Nowak, M., *Introduction to the International Human Rights Regime*, op. cit, p. 73.

44 For a detailed discussion on this subject see Matsheza, P. and L. Zulu, *Human Rights Enforcement and Implementation Mechanisms* Harare: Human Rights Trust of Southern Africa, 2001. pp.18-27.

45 In 2006 the Commission on Human Rights was, however, replaced by the Human Rights Council (HRC), which was created by UN General Assembly Resolution 60/251 as an inter-governmental/political body. Its mandate is, more generally, to protect and promote human rights globally.

a principal body regarding the promotion of human rights universally, it required 'formal approval from ECOSOC in all its decisions.'[46] As Nowak rightly reflects:

> For many years, the Commission took the term 'promotion of human rights' far too literally, considering every action that went beyond advisory services (e.g. delegating experts and organising seminars upon the invitation of individual states) as inadmissible interference with the domestic jurisdiction of states in accordance with Article 2(7) of the [UN] Charter. [Emphasis in the original text].[47]

As such, during the first decades of its existence the Commission's main achievement was to set standards – 'i.e. to carry out a comprehensive *universal codification of human rights*, which was largely completed by the end of the Cold War.'[48] As a result of this task, up until the end of the Cold War towards the end of the 1980s, the UN has been able to establish an extensive network of international human rights instruments ranging from the *International Bill of Human Rights*[49] to special conventions,[50] bodies and procedures to monitor States Parties' adherence to these treaty obligations. The Commission has also, from 1960s, established a number of thematic and country-specific mechanisms, such as special rapporteurs, and working groups. These mechanisms are aimed at fostering worldwide protection of human rights, 'which are based directly on the UN Charter and increasingly diffused the argument of inadmissible interference in national matters (at least with gross and systematic human rights violations).'[51] In principle:

> This gradual development was endorsed by the express recognition of the legitimacy of international measures for the protection of human rights during the 1993 Vienna World Conference on Human Rights. At the same time, the UN High Commissioner for Human Rights was established, hailing a new era for the UN human rights system, which from promotion and protection was to move on to international enforcement, and finally, to the prevention of human rights violations.[52]

This integration has, in effect, resulted in making the human rights concept at the UN system a reality as well as a field of operation, with many significant field operations having been undertaken over the past sixty years ranging from humanitarian to international criminal law enforcement aimed at universal protection of human rights. In fact, with this integration function, human rights 'are gradually assuming the significance the authors of the UN Charter and the Universal Declaration of Human Rights intended for them, but which then got lost in the times of the Cold War.'[53]

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46 Nowak, op. cit. p. 73.

47 *Ibid*.

48 *Ibid*.

49 *The International Bill of Human Rights* consists of the UDHR, the International Covenant on Economic, Social and Cultural Rights of 1966 (ICESCR) and the International Covenant on Civil and Political Rights of 1966 (ICCPR).

50 Currently, there are 8 core international human rights treaties under the UN human rights system: International Covenant on the Elimination of All Forms of Racial Discrimination (CERD); International Covenant on Economic, Social and Cultural Rights (ICESCR); International Covenant on Civil and Political Rights (ICCPR); Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); Convention on the Rights of the Child (CRC); International Convention on the Protection of the Rights of All Migrant Workers and their Families (CMW); and Convention on the Rights of Persons with Disabilities.

51 Nowak, op. cit, pp. 74 & 75.

52 *Ibid*, p. 75.

53 *Ibid*.

These achievements apart, the UN Charter did not define the term "human rights," rather it presupposed it. The definition of human rights was, thus, to be embedded in the UDHR as we are going to see below.

2.3.1.2 Extending the Concept of Human Rights in International Law

As we have already seen, one of the major tasks of the Commission on Human Rights was to promote human rights, and in so doing, it was expected to develop a universally acceptable definition of human rights. In the very beginning, the idea to accomplish this task was framed in three successive steps: 'to pronounce a non-binding declaration as a basis for a legally binding convention, and create international implementation mechanisms.'[54] Given the contending nature of the world order then, it was agreed on consensus that a non-binding universal declaration was feasible, with the drafting of two binding covenants to happen later. So, the UDHR was to be adopted in 1948 while the two binding conventions (i.e. the ICCPR and ICESCR) took almost twenty years later to be adopted in 1966 and ten more years thereafter to enter into force in 1976.

The UDHR was drafted along the contentious divides between the Eastern and Western Blocs then forming the crux of the Cold War. While the West emphasised on the human rights concept born of the Age of Enlightenment (i.e. civil and political rights or "first generation" rights), the East favoured the so-called "second generation" rights (economic, social and cultural rights).[55] Therefore, on a par, Articles 1-21 of the UDHR contained more or less the "first generation" rights and with the "second generation" rights being accepted as more or less on equal footing with the former. As Manfred Nowak wonders:

> In doing so, they pre-empted the doctrine of interdependence and indivisibility of all human rights, which was not formally recognised until the 1993 Vienna World Conference, and in fact, is still a matter of controversy for most industrialised countries.[56]

In addition, in terms of Article 28 of the UDHR it is recognised that everyone, including a child, is entitled to a 'social and international order in which the rights and freedoms set forth in this Declaration can be fully realised.' In effect, this provision has laid down the basis for the "third generation" or "collective" rights claim. It is also to date 'considered the foundation for the legitimacy of the international human rights regime in general.'[57] Interestingly, unlike the subsequent two UN conventions

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54 *Ibid*.

55 The notion of labelling economic, social and cultural rights as second generation rights was developed for the first time by Karel Vasak in the late 1970s. Vasak and other scholars, who support the generations' theory, counter the proponents of the theory that gives emphasis that civil and political rights are the only rights, by arguing that the generations' theory has allowed for the progressive development of the concept of human rights rather than its intensity as feared earlier on. According to this school, human rights, without the ability to progress into higher heights relative to individual development is a dead concept. See Vasak, K., *The International Dimension of Human Rights* (Vol. 1) Westport, Connecticut: Greenwood Press, 1977. Prof. Hansungule, commenting on this school of human rights theory, is of the opinion that: 'Perhaps, this is the soundest argument in defence of the generations' theory, namely, to provide for the concept's constant development.' See Hansungule, M., 'Introduction to Basic Human Rights', a paper presented to the SAHRIT workshop on State Party and Shadow Reporting held in Pretoria, South Africa, 20 – 22 March, 2006. See also Mashamba, C.J., 'Enforcing Social Justice in Tanzania: The Case of Economic and Social Rights'. LL.M. Thesis, Open University of Tanzania, 2007.

56 Nowak, op. cit, p. 76.

57 *Ibid*.

forming the *International Bill of Rights*, the UDHR contains rights that the former did not formally enshrine – like the right to property[58] and the right of asylum.[59]

Although the UDHR – being a mere resolution of the UN General Assembly – is not binding under international law, 'it still represents an authoritative interpretation of the term "human rights" in the UN Charter, and thus can be considered indirectly constituting international treaty law.'[60] In addition, the UDHR has also formed the basis for the core activities of all the UN human rights bodies over the past sixty years, including the Commission on Human Rights (now the Human Rights Council) itself.

At the same time, some of the UDHR's provisions – such as the prohibition of torture and slavery – 'today enjoy the status of customary international law, yet despite certain legal opinions to the contrary.'[61] Furthermore, many of the Constitutions enacted immediately after the adoption of the UDHR – particularly those of Asian and former African colonies – have referred to the UDHR as a source of moral, political and legal significance.[62]

Indeed, the UDHR has ever since constituted a major step forward in the promotion of human rights and the rule of law at the international, regional and national levels. It evidently comprises, in one consolidated text, nearly the entire range of what today are recognized as human rights and fundamental freedoms.[63] Traditionally, all binding human rights treaties under the UN human rights system have established treaty bodies mandated to monitor the implementation of the respective instruments at the domestic level. This is the case with reference to the CRC as analysed below.

2.3.2 The Major UN Children's Rights Instruments

All children's rights instruments under the UN human rights protection mechanism fall under the treaty-based human rights system. Under the UN human rights protection mechanism, there have been developed and adopted a handful of international human rights instruments expressly providing for children's rights. These are the UN Convention on the Rights of the Child (CRC),[64] together with its three Optional

58 Article 17 of the UDHR.

59 *Ibid*. Article 14.

60 Nowak, op. cit., p. 76.

61 *Ibid*. But with the increase in ratifications of the ICCPR and the ICESCR, this academic debate on the status of the UDHR in international law is gradually losing ground.

62 See for instance, Article 9(f) of the Constitution of the United Republic of Tanzania (1977).

63 Eide, A. and A. Rosas, 'Economic, Social and Cultural Rights: A Universal Challenge', in Eide, A., et al (Editions), *Economic, Social and Cultural Rights: A Text Book* 2nd Edition Leiden/Boston: Martinus Nijhoff Publishers, 2001. p.15.

64 Adopted by the UN General Assembly on 20 November 1989, G.A. res. 44/25, Annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force September 1990.

Protocols;[65] the UN Guidelines for the Prevention of Juvenile Delinquency (the *Riyadh Guidelines*); the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the *Beijing Rules*); the UN Rules for the Protection of Juveniles Deprived of their Liberty (*the JDL* Rules); and the UN Guidelines for Action on Children in the Criminal Justice System. However, in the discussion below we confine ourselves to the CRC only, as it is a binding international instrument with a treaty monitoring body – i.e. the United Nations Committee on the Rights of the Child (CROC).

2.3.2.1 The UN Convention on the Rights of the Child (CRC)

This part critically considers the adoption of the CRC, its normative principles, obligations of States Parties under the CRC, and the procedural framework for monitoring the implementation of the CRC.

a) Adoption of the CRC

The CRC was adopted by the United Nations General Assembly on 20 November 1989. It came into force on 2 September 1990, less than a year after its adoption, becoming the only international human rights instrument to come into force at such a short period.[66] As Goonesekere contends, the CRC 'was also the only Convention whose coming into force was accompanied by a major world conference that focused on implementation of the rights guaranteed by the treaty.'[67] In September 1990, Heads of State and Government from around the world gathered in New York at the World Summit for Children, where they adopted a Declaration 'with specific goals and targets on implementation' to be achieved within the next decade.[68]

At this Summit UNICEF 'played a major role in the Summit meeting, and initiated a process that helped to ensure that the CRC was ratified by all countries, except Somalia and the United States of America, by 2000.'[69] In fact, this near-universal

65 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000, entered into force 12 February 2002 (Kenya signed it on 8 September 2000 and ratified it on 28 January 2002; Uganda acceded to it on 6 may 2002; and Tanzania acceded to it on 11 November 2004); Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000, entered into force 18 January 2002, in accordance with Article 14(1). (Kenya signed it on 8 September 2000 and has not ratified it; Uganda acceded to it on 30 November 2001; and Tanzania acceded to it on 24 April 2003); and Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, adopted by General Assembly resolution /RES/66/138 of 19 December 2011; it was opened for signature in Geneva, Switzerland, on 28 February 2012 and remains open for signature thereafter at United Nations Headquarters in New York (It is yet to come into force: in accordance with Article 19(1) it 'shall enter into force three months after the deposit of the tenth instrument of ratification or accession.'). The latter Optional Protocol has received 25 signatures and 6 ratifications as at 31 July 2013 (http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-d&chapter=4&lang=en, Accessed on 31 July 2013). All the three East African common law countries have neither signed nor ratified it.

66 Goonesekere, S., 'Introduction and Overview.' In United Nations Children's Fund, Protecting the *World's Children: Impact of the Convention on the Rights of the Child in Diverse Legal Systems* New York: Cambridge University Press, 2007, pp. 1-33, p. 1.

67 *Ibid*.

68 *Ibid*.

69 *Ibid*. Both Somalia and the US have signed the CRC. In fact, the CRC is the only human rights treaty signed by all states of the world. Nowak, op. cit, pp. 92 & 93.

ratification within just a decade 'is unique in the history of a human rights treaty.'[70] As Doek contends, '[n]o other human rights treaty comes close to universal ratification' and 'the CRC is at the same time the human rights treaty with widest coverage.'[71]

b) A Critique on the CRC

The CRC, which is 'the primary source for children's rights in international human rights law',[72] has in effect erased the obscurity of children's rights in the area of international human rights law. This means that with the adoption of the CRC, children's rights 'have come to be regarded as part and parcel of international human rights law.'[73] As the CROC has noted, the CRC 'reflects a holistic perspective on early childhood development based on the principles of indivisibility and interdependence of all human rights.'[74] Now, the CRC has influenced national Constitutions and legislation, whereby states around the world have been incorporating therein its underlying principles and standards.[75]

Although it has received near-universal ratification and domestication, to many scholars in Africa and Asia, the CRC is sometimes perceived as 'a Convention that originated on the West and articulated legal norms and values on children that had evolved in the West.'[76] This is evidenced by the construction of some provisions in the CRC, particularly on adoption (Article 20) and on the role of extended family (Article 5). This argument is further verified by the fact that during the 10 years of its drafting Africa, for instance, was represented only by Algeria, Egypt, Morocco and Senegal.[77]

Furthermore, 'specific provisions on aspects peculiar to Africa were not sufficiently addressed in the UN instrument.'[78] These aspects include harmful traditional practices; the impact of armed conflicts on children's rights and welfare; and responsibilities of children to parents, guardians, relatives and the society at large, which have been sufficiently addressed by the ACRWC.[79] As Kameli Filali, former member of the CROC and currently Vice-President of the African Union Commission on International Law (AUCIL), argues:

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70 Goonesekere, *Ibid*.

71 Doek, J., 'The Protection of Children's Rights and the United Nations Convention on the Rights of the Child: Achievements and Challenges' *Saint Louis University Public Law Review* Vol. 22, 2003.

72 Tomkin, J., *Orphans of Justice – In Search of the Best Interests of the Child When a Parent is Imprisoned: A Legal Analysis* Geneva: Quaker United Nations Office, 2009, p. 12.

73 Sloth-Nielsen, J. and B.D. Mezmur, 'Surveying the Research Landscape to Promote Children's Legal Rights in an African Context' *African Human Rights Law Journal* Vol. 7 No. 2, 2007, pp. 330-353, p. 331.

74 CROC, 'Day of Discussion in Implementing Child Rights in Early Childhood', 17 September 2004, para 1.

75 For instance, the Constitutions that have categorically imbedded the CRC in their domains include the Constitutions of Ghana, Kenya, Namibia, South Africa and Uganda. Article 42 of the Tanzanian Draft Constitution (2013) also contains child rights. Many laws have also been enacted with specific provisions extended thereunto from the CRC: e.g. the Tanzanian Law of the Child Act (2009), the Kenyan Children Act (2001) and the Ugandan Children Act (1996).

76 Goonesekere, op. cit. *See* also Alston, P. (Edition), The Best Interests of the Child Oxford, Clarendon Press, 1994; and Chirwa, D.M., 'The Merits and Demerits of the African Charter on the Rights and Welfare of the Child' *International Journal on Children's Rights* Vol. 10, 2002.

77 Mezmur, B.D., 'The African Children's Charter versus the UN Convention on the Rights of the Child: A Zero-sum-Game?' *SA Public Law* Vol. 23, 2008, pp. 1-28, p. 22 (This Article is also published in The Justice Review Vol. 8 No. 2, 2009); and Sloth-Nielsen and Mezmur, op. cit (note 3).

78 Sloth-Nielsen and Mezmur, *Ibid*.

79 *See*, for instance, Article 31 of the ACRWC.

> The ACRWC originated because the member states of the African Union believed that the UNCRC missed important socio-cultural and economic realities particular to Africa. [Therefore, the ACRWC] emphasises the need to include African cultural values and experiences when dealing with the rights of the child.[80]

All in all, the CRC is a very useful international human rights instrument in elevating the rights of the child at the global level. The fact that it received near-universal ratification and the fact that many countries around the world have incorporated most of its substantive principles and standards into their legal systems, 'signals that the rights which contribute towards the protection of children have outgrown the discretionary powers of national legislators.'[81] This reality has been intensified by the popularity the CRC has received during the years of its existence over and above other international human rights instruments. This suggests a 'high level of normative consensus among the various nations of the world (particularly in Africa) on the idea and content of children's rights as human rights.'[82]

c) Normative Principles of the CRC

The CRC is the first human rights instrument to contain both civil and political rights, on the one hand, and economic, social and cultural rights, on the other. By this fact, it can correctly be argued that the CRC:

> …attempts to meet the different needs of children and juveniles not only by establishing special guarantees for the protection of children (e.g. from violence in the family or at school, from abuse, exploitation, neglect or unacceptably poor circumstances), but also by protecting children in the development of their identity, autonomy and active participation in social life (e.g. by the right to privacy, freedom of expression, information, religion, association and assembly or by the right to be heard in judicial proceedings).[83]

This integration of core human rights into a single treaty is the benefit that the CRC received from the hitherto developments in international human rights law. The CRC also benefited from the new trends in consolidating and strengthening the universality and indivisibility of human rights. Set up in this context:

> The CRC therefore does not adopt a completely culturally relativist approach but sets out, in general, universal standards and norms of achievements. Civil and political rights and socio-economic rights are included as equally important rights. Significantly, the Convention focuses on implementation and monitoring of children's rights through adequate allocation of national resources and cooperation and solidarity among the State, families and communities, civil society, and the international community. The concept of "evolving capacity" as a child grows from childhood to adolescence, and the definition of childhood in terms of an upper limit of 18 years, also focus on children's participation in implementing these norms and on monitoring performance.[84]

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80 Filali, K., 'Regional Child Rights Instruments on the African Continent: The African Charter on the Rights and Welfare of the Child' *AUCIL Journal of International Law* Issue No. 1, 2013, p. 30.

81 Sloth-Nielsenand Mezmur, op. cit, p. 331.

82 *Ibid*.

83 Nowak, op. cit

84 *See* Goonesekere, op. cit, p. 2.

In principle, the CRC contains provisions that are essentially the logical outcome of the new approach in the development of international human rights standards.[85] Indeed:

> The CRC contains a comprehensive listing of obligations that states are prepared to recognize towards the child. These obligations are of both direct and indirect nature. Direct in such matters as those pertaining to providing education facilities and ensuring proper administration of juvenile justice. And indirect in cases which enable parents, the wider family or guardians to carry out their primary roles and responsibilities as caretakers and protectors of children.[86]

The range of rights covered by the CRC, in this regard, is described as the "Four Ps" – provision, protection, prevention and participation. As observed by Nigel Cantwell, it can thus be said that:

> …Children have the right to be provided with certain things and services, ranging from a name and nationality to health care and education. They have the right to be protected from certain acts such as torture, exploitation, arbitrary detention and unwarranted removal from parental care. And children have the right to do things and to have their say, in other words to participate both in decisions affecting their lives and in society as a whole.[87]

The CRC has four general principles: non-discrimination (Article 2); the child's best interests (Article 3); the right to life (Article 6), survival, and development; and respect for the child's opinion (Article 12). These general principles are sometimes considered as the "four pillars" of the CRC, which are of 'fundamental importance for the implementation of the whole Convention.'[88] These pillars are extended in the basic rights and fundamental freedoms in the CRC, including the rights relating to the preservation of identity; rights in adoption; the child's right to grow up with, and not to be separated from, his parents, except where necessary and in his or her best interests; and the rights to health, education, adequate standard of living and social security. Others are rights of children in conflict with the law; the rights against child sexual abuse, exploitation, abduction, sale and trafficking; the rights of children with disabilities, child soldiers and refugee children; and rights against child labour and violence against children.

i) Who is a child under the CRC?

The CRC defines a child as 'every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.'[89] This definition has, however, received wide criticism from many scholars, who view it as 'ambiguous and weak, lacking specific protection […], such as in relation to child betrothals, child participation in armed conflict and child labour.'[90] Interestingly, a very strong definition

85 Mashamba, C.J., 'Institutional Care and Support to Orphaned and Vulnerable Children in Tanzania: A Legal and Human Rights Perspective', op. cit. *See* also Mashamba, C.J., 'Domestication of International Children's Rights Norms in Tanzania', op. cit, p. 9.

86 *Ibid*.

87 Cantwell, N., *Introduction to the UN Convention on the Rights of the Child* Geneva: Defence for Children International, 1995, p.1.

88 Mezmur, op. cit, p. 20.

89 Article 1 of the CRC.

90 Lloyd, A., 'The African Regional System for the Protection of Children's Rights', in Sloth-Nielsen, J. (Edition), *Children's Rights in Africa: A Legal Perspective* Hampshire: Ashgate Publishing Company, 2008, pp. 33-51, p. 35 (note 4). See also Mezmur, op. cit, p. 34 (note 106).

of who a child is, is provided for by Article 2 of the ACRWC, which stipulates that a child is 'every human being under 18 years.' According to Lloyd, the definition in the ACRWC is more useful as 'there are no limitations or attached considerations'[91] as is the case with the definition in the CRC.

ii) The Best Interests of the Child

The CRC also describes the principle of "the best interests of the child" in Article 3. The Article provides expressly that:

> 3.1 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*. [Emphasis supplied.]

It can be gathered from the provisions of Article 3(1) of the CRC that the principle of the best interests of the child provides a 'yardstick by which to measure all the actions, laws and policies affecting children.'[92] On his part, Philip Alston refers to this principle as the lens through which all other rights are viewed.[93] However, the use of an indefinite article "a" immediately before the words "primary consideration" – as opposed to the use of a definite article "the" in Article 4(1) of the ACRWC – has attracted criticism that it makes the application of the principle of the best interests of the child optional under the CRC as opposed to the ACRWC, which makes it mandatory.[94]

Although the basic source of the principle of "the best interests of the child" is Article 3(1) of the CRC[95] and Article 4(1) of the ACRWC, the principle is also referred to in numerous other provisions of the CRC, the ACRWC as well as in other UN/international human rights instruments.[96] For instance, Article 18 of the CRC, which provides that both parents (mother and father) are responsible for the upbringing and development of the child, requires that the parents' basic concern in this process must be the best interests of the child. Under Article 9 of the CRC, where it is necessary to separate the child from his or her parents, such separation must be in the best interests of the child. Pursuant to Article 20, where it is found to be in the best interests of the child to be separated from the home environment, such child is entitled to special protection by the state.

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91 *Ibid*.

92 Mezmur, op. cit, p. 35.

93 Alston, P., 'The Best Interest Principle: Towards a Reconciliation of Culture and Human Rights' *International Journal of Law, Policy and the Family* Vol. 8 No. 1, 1994, p. 5.

94 See particularly Lloyd, op. cit, pp. 36 & 37; and Mezmur, *Ibid*, p. 36.

95 This aspect is discussed at length in Tomkin, op. cit, pp. 19-28.

96 For instance, Article 5(b) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) provides that States Parties shall take all appropriate measures: 'To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the *interest of the children* is the primordial consideration in all cases.' In terms of Article 16(1)(d) of the CEDAW, States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: 'The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all *cases the interests of the children* shall be paramount.' (Emphasis supplied).

iii) Non-discrimination

In Article 2(1), the CRC prohibits discrimination of children by obliging States Parties to '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 guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.' [Emphasis supplied].[97] The principle of non-discrimination is also basically entrenched in other human rights instruments, particularly in Article 2 of the ICCPR and Article 2 of the ICESCR. According to the Human Rights Committee, which oversees the implementation of the ICCPR, the concept of non-discrimination entails any distinction, exclusion, restriction or preference.[98] The principle of non-discrimination essentially entails the notion of equality, which requires that States Parties 'must take affirmative action in order to diminish or eliminate conditions that perpetuate discrimination.'[99]

The provision of Article 2(2) implies that States Parties to the CRC have an obligation to always ensure that discrimination against children on any of the listed grounds is not allowed in all actions, decisions, policies, practices and/or legislative enactments concerning children. However, unlike the ACRWC[100] (which extends the obligations to states and non-state actors), the CRC imposes the obligation to ensure that children are not discriminated against by the state. At the same time, the CRC, in Article 2(1), 'confines state parties to ensure children only "within their jurisdiction" receive rights in the CRC without discrimination.'[101]

In *RM v Attorney-General*[102] the High Court of Kenya held that: 'It is strikingly clear that Article 2 of the Universal Declaration prohibits distinction of any kind. The obvious interpretation is that no differences at all can be legally accepted.'[103] However, the court was of the view that the 'situation on the ground does not support such a restrictive interpretation of the Declaration in that the [treaty] monitoring bodies have not supported any such interpretation and in some of the constitutions of the member states […] do not support the position as stated in Article 2 [of the Declaration].'[104] According to the court:

> The member states have claimed and have been allowed 'a margin of appreciation' because differences in real life are inevitable and they are not necessarily negative. Indeed, international jurisprudence and supporting case law demonstrates that not all distinctions

97 In its General Comment No. 18 (contained in the United Nations *Compilation of General Comments*) the Human Rights Committee (at page 135 para 7) defines "discrimination" in the following regards: 'that the term discrimination […] should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing of all rights and freedoms.'

98 Human Rights Committee, General Comment No. 3, Thirteenth Session, 1981, available at http://unhchr.ch/doc.nsf/0/c95ed1e8e114cbec1256ed00467eb5?OpenDocument (Accessed on 5 April 2013).

99 Tomkin, op. cit, p. 18.

100 Article 26(2) and (3), ACRWC.

101 Lloyd, op. cit, p. 37; Chirwa, op. cit; and Mezmur, op. cit, p. 35.

102 (2006) AHRLR 256 (KeHC 2006).

103 *Ibid*, para. 66.

104 *Ibid*.

> between persons and groups of persons can be regarded as discrimination in the strict sense or true sense of the term.[105]

Thus, General Comment No. 18[106] of the Human Rights Committee lays what appears to be a peremptory international norm *jus cogens* in these words:

> […] non-discrimination, together with equality before the law and equal protection of the law without any discrimination constitute a basic and general principle relating to the protection of human rights.

Discrimination against children is also prohibited where it is founded in the actions of his or her parents.[107] Emphasizing on this prohibition, Justice Sachs notes that a child 'cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them [...] the sins and traumas of fathers and mothers should not be visited on their children.'[108]

iv) The Right to Life, Survival and Development

The principle of life, survival and development of children entrenched in a number of international instruments, including in Article 6(1) of the ICCPR and Article 6(1) of the CRC, which states that:

> 'States Parties recognize that every child has the inherent right to life.' As Tomkin correctly points out, the use of the word "inherent" denotes that 'it is not a right bestowed upon the individual by society but rather an existing right that society is under obligation to protect.'[109] Under Article 6(2) of the CRC, States Parties are obliged to 'ensure to the maximum extent possible the survival and development of the child.'

As it can be seen from the wording of these provisions, the right to life enshrined in paragraph (1) and the right to survival and development enshrined in paragraph (2) of Article 6 of the CRC 'are interrelated, interdependent, and connected to and defined by other rights in the CRC.'[110] In principle:

> The right to life is evidently a fundamental human right, without which all the other rights in the CRC become meaningless. This inherent right to life, as recognised in the ICCPR, is further elaborated upon by the CRC. The State has a positive obligation not only to protect the life of the child but also to provide adequate resources to ensure the child's survival and development.[111]

In addition, the right to life, survival and development as enshrined in the CRC strives to ensure that 'children have the capacity to ascertain their rights and ensure the protection of their welfare.'[112] This principle does 'not only prioritise children's rights to survival and development but also puts emphasis on the right to develop

105 *Ibid*.

106 United Nations, *Compilation of General Comments,* p. 134 para. 1.

107 Article 2(2) of the CRC expressly provides that: 'States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.'

108 *S v M* (CCT 53/06) [2007] ZACC 18 (26 September 2007), para 18.

109 Tomkin, op. cir, p. 13. See also Detrick, S.L., *A Commentary on the United Nations Convention on the Rights of the Child* The Hague: Kluwer Law International, 1999, p. 126.

110 *Ibid*. See also Nowak, M., *Article 6 – The Right to Life, Survival and Development* Leiden: Nijhoff, 2005, pp. 1 & 14.

111 Tomkin, op. cit, p. 13.

112 Mezmur, *Ibid*, p. 37.

to their fullest potential in every respect, including their personalities, talents and abilities.'[113] This principle underpins that States Parties to the CRC should ensure that the inherent right to life guaranteed in Article 6(1) is guaranteed by abolishing, *inter alia*, the death penalty. By extension, States Parties are obliged to ensure that, in order to guarantee this right, there is maximum survival and development of the child in their respective jurisdictions.[114] It also requires that States Parties should ensure that the child's life is prolonged,[115] which encompasses the obligation on States to take appropriate measures to protect the child from violence and abuse as envisaged in Article 19 of the CRC.[116]

In respect of the child's right to development under the CRC, the CROC has noted that it should be defined in a similar manner as human development defined in Article 1 of the United Nations Declaration on the Right to Development (1986).[117] Accordingly, it entails a comprehensive process of realising children's rights to allow them to 'grow up in a healthy and protected manner free from fear and want, and to develop their personality, talents and mental and physical abilities to their fullest potential consistent with their evolving capacity.'[118] In this framework, the CROC has emphasised that the term "development" should be 'interpreted in a broad sense, adding a qualitative dimension: not only physical health, but also mental, emotional, cognitive, social and cultural development.'[119] In order to ensure this, parents should be proactive and thus play an integral role in their children's development;[120] consistent with Article 18(1) of the CRC, which clearly stipulates that:

> 18(1) States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

Viewed in this context, the CRC thus 'calls upon States Parties to respect the parents' role as primary carers of the child, provided that the environment is such that it is suitable for the child to realise her or his full potential. Furthermore, […] the relationship of the child with her or his parent is essential to develop the child's sense of security and place in society.'[121]

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113 Mashamba, C.J., *Introduction to Family Law in Tanzania* Dar es Salaam: IPPL/nola, 2010. p. 84.

114 Article 6(2), CRC.

115 During the negotiations prior to the adoption of the CRC, there was much debate about the use of the word "survival" in Article 6, which later became apparent (from the *travaux preparatoires*) that the rationale behind the word "survival" is 'to place a positive obligation on States to ensure that appropriate measures are taken to prolong the life of the child.' Tomkin, Op. cit, p. 13. See also Report of the Working Group on a Draft Convention on the Rights of the Child, E/CN.4/1988/28, para 21.

116 *Ibid*, p. 14.

117 *Ibid*. See also Nowak, M., *Article 6 – The Right to Life, Survival and Development*, op. cit, p. 2.

118 Nowak, *Ibid*.

119 Office of the High Commissioner for Human Rights, 'Fact Sheet No. 10', available at http://www.unhchr.ch/html/menu6/2/fs10.htm (Accessed on 5 April 2013).

120 Nowak, M., *Article 6 – The Right to Life, Survival and Development*, op. cit, pp. 37&38.

121 Tomkin, op. cit, p. 15.

v) Child Participation

Another equally fundamental principle of the CRC is participation of children in decision-making or in action concerning their rights and welfare.[122] This principle 'sets out the principle that children should be listened to on any matter or decisions which concerns or affects them, and that their views should be given due consideration in accordance with their age and maturity.'[123]

Interestingly, the CRC 'also tries to find a balance in the sensitive triangle of children-parents-state.'[124] For instance, Article 5 (together with Article 18 in particular) provides a framework for the relationship between the child, his or her parents and family, and the State.[125] According to Hodgkin and Newell, Article 5 provides the CRC with a flexible definition of "family" and introduces to the Convention two vital concepts: parental "responsibilities" and the "evolving capacities" of the child.[126] The article provides that:

> 5. States Parties shall *respect the responsibilities, rights and duties of parents* or, where applicable, *the members of the extended family or community as provided for by local custom*, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with *the evolving capacities of the child*, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention. [Emphasis supplied.]

The article, in the opinion of Hodgkin and Newell, also 'signals clearly that the Convention regards the child as the active subject of rights, emphasizing the exercise "by the child" of his or her rights.'[127]

In the broad sense, 'this article expounds that maintenance, care, custody and protection of the child is the primary responsibility and duty for parents, guardians and/or relatives.'[128] The CROC has expanded the interpretation of the article in its General Comments. The role of parents in relation to the capacities and rights of babies and younger children is explained in the Committee's General Comment No. 7 on "Implementing Child Rights in Early Childhood" thus:

> The responsibility vested in parents and other primary caregivers is linked to the requirement that they act in children's best interests. Article 5 states that parents' role is to offer appropriate direction and guidance in 'the exercise by the child of the rights in the … Convention'. This applies equally to younger as to older children. Babies and infants are entirely dependent on others, but they are not passive recipients of care, direction and guidance. They are active social agents, who seek protection, nurturance and understanding from parents or other caregivers, which they require for their survival, growth and well-being. Newborn babies are able to recognize their parents (or other caregivers) very soon after birth, and they engage actively in non-verbal communication. Under normal circumstances, young children form strong mutual attachments with their parents or primary caregivers. These relationships offer children physical and emotional security, as well as consistent care and attention. Through these relationships children construct a

122 Article 12(1) of the CRC.

123 Mashamba, C.J., *Introduction to Family Law in Tanzania*, op. cit.

124 Nowak, op. cit, p. 93.

125 Mashamba, C.J., *Introduction to Family Law in Tanzania*, op. cit, p. 86.

126 Hodgkin, R. and P. Newell, *Implementation Handbook for the Convention on the Rights of the Child* 3rd Edn. Geneva: United Nations Children's Fund, 2007. p. 75.

127 *Ibid*.

128 Mashamba, C.J., *Introduction to Family Law in Tanzania*, op. cit, p. 87.

> personal identity and acquire culturally valued skills, knowledge and behaviours. In these ways, parents (and other caregivers) are normally the major conduit through which young children are able to realize their rights.[129]

Under Article 18 of the CRC, both parents (father and mother) have common responsibilities for the upbringing and development of their children. The article provides, *in extenso*, that:

> 18.- 1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.
>
> 2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.
>
> 3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.

From the foregoing analysis it can be summed up that the CRC 'corresponds with the universal human rights in many areas and in addition, also includes a number of rights specific to children',[130] including the child's rights to participation.

d) Obligations of States Parties to the CRC

It is a general rule of international human rights law that every single human right has a corresponding duty and a duty-holding party. The nature and contents of duties are important in national and international human rights promotion and protection.[131] Traditionally, the prime duty-holder of human rights under international law is the state, which derives from the fact that states are the signatories to international human rights treaties; thus, bound by the said treaties.[132]

Under international human rights law, there are three categories of state obligations or duties. In terms of the provisions of Article 26 of the Vienna Convention on the Law of Treaties (1960): 'Every treaty in force is binding upon the parties to the treaty and must be performed in good faith.' The said state obligations include: first and foremost, the obligation to *respect*; secondly, the obligation to *protect*; and, thirdly, the obligation to *fulfil*, human rights.

The obligation to respect human rights requires States to refrain from interfering with human rights. For instance, the right to housing is violated if the State engages

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129 *See* Committee on the Rights of the Child, General Comment No. 7, 2005: 'Implementing Child Rights in Early Childhood'. CRC/C/GC/7/Rev.1, para. 16.

130 Nowak, op. cit. p. 93.

131 Mashamba, C.J., 'Enforcing Social Justice in Tanzania: The Case of Economic and Social Justice', op. cit.

132 *See* particularly Mashamba, C.J., 'The Mandate of the ACERWC and How CHRAGG Can Collaborate with the ACERWC in Order to Highlight the Issue of Children Detained in Adult Prisons in Tanzania'. A Briefing Paper Presented at the UNICEF-PRI Workshop on 'Developing Advocacy Strategies' held at UNICEF Conference Hall, Dar es Salaam, 26 & 27 May 2011.

in arbitrary forced eviction.[133] The obligations to *protect* and *fulfil* human rights require States to prevent violations of such rights by third parties. For instance:

> …. the failure to ensure that private employers comply with basic labour standards may amount to a violation of the right to work or the right to just and favourable conditions of work. The obligation to *fulfil* requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights. Thus, the failure of States to provide essential primary health care to those in need may amount to a violation.[134]

The wording of the foregoing paragraph implies that both the obligations to *protect* and *fulfil* human rights impose a positive duty on the State to respectively *intervene* and *provide for* basic necessities in order to prevent violations of the rights by third parties.[135] It is proper to maintain, therefore, that:

> By this, the state is obliged to make policies and legislation in order to regulate the relationship between individuals and ensure that individuals do not violate each others' rights; for example, the state is obliged to act if a landlord illegally evicts a tenant. Again, the courts can protect from improper invasion, in this case, from other parties than the state. The duty to fulfil human rights means that the […] State must take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realisation of the rights.[136]

On its part, the African Charter on Human and Peoples' Rights, unlike other human rights instruments, imposes a positive duty on States Parties thereto to respectively intervene and provide for basic necessities in order to prevent violations of human rights; and it does not allow for state parties to derogate from their treaty obligations even during emergency situations. For instance, in the matter of *Commission Nationale des Droits de l'Homme et des Libertes v Chad*,[137] where there was a communication alleging that there had occurred accounts of killings and wanton torture of civilians as a result of the civil war between the security services and other rebel groups in Chad, the African Commission on Human and Peoples' Rights held that: 'even a civil war in Chad cannot be used as an excuse by the state violating or permitting violations of rights in the African Charter.'

The duty to *promote* human rights is another *positive* duty, which requires the State to actively support the rights, raise public awareness about the rights and how to access them, and cultivate amongst its citizens a culture of respect for the rights and freedoms of others. It may take many forms, such as educational activities, media awareness programmes, and public awareness raising campaigns.[138] In many jurisdictions to date, most of the promotional obligation for human rights is done by national human rights institutions (NHRI's), like the Indian Human Rights Commission, the Tanzanian Commission for Human Rights and Good Governance, the Ghanaian Commission

133 Paragraph 6 of the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights.

134 *Ibid*.

135 Mashamba, C.J., 'Tanzania's Obligations for Juvenile Justice Reform in the Contexts of the Juvenile Justice and Access to Justice Studies under the CRC/ACERWC'. A Briefing Paper Presented at the Child Justice Forum, Bagamoyo, 13 September 2011.

136 Yigen, K., 'Enforcing Social Justice: Economic and Social Rights in South Africa' *International Journal of Human Rights* Vol. 4, No. 2, Summer 2000.

137 (2000) AHRLR 66 (ACHPR 1995).

138 See the decision of African Commission on Human and Peoples' Rights in *Social and Economic Rights Action Centre (SERAC) and another v Nigeria* (2001) AHRLR 60 (ACHPR 2001).

for Human Rights and Administrative Justice, and the South African Human Rights Commission.[139]

In the context of this analysis, the CRC contains explicit and unambiguous positive obligations for states parties to undertake to ensure that the child's rights and freedoms are realised.[140] A cursory perusal of the provisions of the CRC indicates that most of the articles containing substantive rights are phrased in obligatory terms: "States Parties shall undertake …"; "States Parties shall ensure …" and "States Parties undertake to …" respect children's rights or take appropriate measures or actions for child rights protection. In this sense, "measures" which States Parties are obliged to undertake include enacting legislation, adopting policies and undertaking programmes aimed at realising children's rights in their jurisdictions. This also includes an obligation on States Parties to allocate sufficient budgets for child-related matters.

e) Procedural Framework for Monitoring the Implementation of the CRC

Under the UN human rights protection mechanism, each of the *core* human rights instruments has a treaty monitoring body. Traditionally, treaty bodies are independent bodies of experts, who are elected from amongst nationals of the States Parties to the respective international human rights treaty. The experts' work for the treaty bodies – usually, referred to as committees – is 'usually done on honorary and voluntary basis.'[141] Conventionally, the only mandatory monitoring procedure provided in all the *core* treaties under the UN human rights system 'is that of examining states reports.'[142] As Nowak points out:

> Each treaty provides that states submit initial reports on the steps they have taken to implement the rights recognised by the treaty within one or two years of the entry into force of the treaty, to be followed by regular periodic reports every two to five years. The reports are to point to progress, as well as to problems and difficulties that may arise in the context of implementation of the treaty. They are also to include sufficient legal, statistical and other accurate information as may be useful for the Committees in gaining a comprehensive impression of the human rights situation and implementation of the relevant treaty at the domestic level.[143]

The reports are, ideally, to be a result of a comprehensive national discussion process involving a wide range of state and non-state actors such as parliament, national human rights institutions, and the civil society. However, in most cases, many states have been preparing the reports behind closed doors involving only government officials. This has resulted in many reports to lack a comprehensive, critical and objective human rights assessment, 'which is the real objective of every state reporting procedure'[144] under the UN human rights system as well as under the regional human rights systems.

In this arrangement, the duty of the treaty monitoring bodies 'is to critically examine the state reports in public sessions'[145] and issue concluding observations and recommendations for the relevant states and publish them in their annual reports.

139 Mashamba, C.J., 'Enforcing Social Justice in Tanzania: The Case of Economic and Social Rights'. Op. cit.

140 Mezmur. Op. Cit, p. 25.

141 Nowak. Op. cit, p. 96.

142 *Ibid*, p. 97.

143 *Ibid*.

144 *Ibid*.

145 *Ibid*.

After the concluding observations and recommendations are issued, governments 'are expected to pay heed to these recommendations and give an account of their state of implementation in the follow-up report. NGOs also play an important monitoring role in this, particularly at the national level.'[146]

The treaty bodies also publish "general comments";[147] or "general recommendations"[148] on specific provisions in the treaties, which, along with the decisions taken during the complaints procedures, 'constitute the main source of interpretation for the rights and other provisions contained in the respective treaties.'[149]

In case of the CRC, it is monitored by the CROC, which is established under Article 43(1). The CROC is comprised of eighteen experts 'of high moral standing and recognised competence in the field covered by [the] Convention.'[150] These experts are elected by States Parties from among their nationals who serve in their personal capacity. In electing the members to the Committee, regard should be had to 'equitable geographical distribution, as well as to the principal legal systems.'[151] The tenure of members of the Committee is four years, with a possibility of re-election.[152] The CROC meets in Geneva, Switzerland, three times per annum (January, May and September) for a period of three weeks per each session.[153]

Under Article 44 of the CRC, States Parties are obliged to submit to the Committee, through the Secretary-General of the UN, 'reports on the measures they have adopted which give effect to the rights recognised herein and on the process made on the enjoyment of those rights.' The periodicity for state reporting is two-phased : (i) within two years of the entry into force of the Convention for the State Party concerned; and (ii) thereafter every five years.[154] The contents of a report should comply with the requirements of Article 44(2), which stipulates that:

> 2. Reports made under the present article shall indicate factors and difficulties, if any, affecting the degree of fulfilment of the obligations under the present Convention. Reports shall also contain sufficient information to provide the Committee with a comprehensive understanding of the implementation of the Convention on the country concerned.

Unlike the African Committee of Experts on the Rights and Welfare of the Child (ACERWC),[155] the CROC has been without a functioning inter-state or individual complaints communication procedure.[156] The procedure has been contained in the Optional Protocol to the Convention on the Rights of the Child on a Communications

146 *Ibid*.

147 See particularly Article 40(4) of the International Covenant on Civil and Political Rights (ICCPR); Article 19(3) of the Convention against Torture (CAT); and Article 45(d) of the CRC.

148 See particularly Article 19 of the International Covenant on Economic, Social and Cultural Rights (ICESCR); Article 9(2) of the Convention against Racial Discrimination (CERD); and Article 21(1) of the Convention on the Elimination of all forms of Discrimination against Women (CEDAW).

149 Nowak, op. cit, p. 99.

150 Article 43(2) of the CRC.

151 Nowak, op. cit.

152 *Ibid*. See also Article 43(6) of the CRC.

153 Mashamba, C.J., 'Introduction to Shadow Reporting'. A paper presented at a Mentoring Course for nola Lawyers, held in Morogoro, 4 & 7 August 2008.

154 Article 44(1)(a) and (b) of the CRC.

155 Lloyd, op. cit.

156 Nowak, op. cit, p. 92; and Lloyd, *Ibid*, p. 48.

Procedure (2011), which is yet to enter into force for lack of sufficient numbers of ratifications.[157]

Nonetheless, the CROC issues very useful General Comments in interpreting the CRC. It also holds an annual Day of General Discussion, which involves a number of stakeholders, including NGOs. The CROC further actively involves NGOs in the pre-sessions, which are held in camera between the CROC and the representatives of the NGOs. The aim of these pre-sessions is to enable the CROC to receive alternative information to complement the States Parties' reports; and, thus, prepare lists of issues or questions to be taken to the respective States Parties for consideration during the open sessions.[158] Under Article 44(5) of the CRC, the CROC is obliged 'to submit to the [UN] General Assembly, through the Economic and Social Council, every two years, reports on its activities.'

2.3.3 Protection of Children's Rights in "Other" UN Human Rights Treaties

Apart from having child rights-specific international human rights instruments, the UN treaty-based human rights system also has a number of instruments containing certain provisions that protect the rights of the child. As we have seen above, the CRC was adopted as a direct influence of the UDHR and as a result of the world community's endeavour to have a child rights-specific mechanism for the protection of children's rights; and, as such, it now forms part and parcel of the UN human rights protection mechanism in place today. So, it is not accidental that children's rights are also protected in other international and regional human rights instruments.

As such, children's rights are also protected in the context of 'rights catalogued and guaranteed in the international human rights instruments[159] as well as those in the [UDHR].'[160] These international human rights instruments form the international normative framework for children's rights. In principle, some of these instruments also 'contain certain child specific rights which amplify their relevance for children's rights protection.[161] To the extent that they have been ratified by the relevant […] states, these universal human rights instruments hold guarantees for the right[s] of children in those states.'[162]

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157 In accordance with Article 19(1), this Optional Protocol 'shall enter into force three months after the deposit of the tenth instrument of ratification or accession.' As at 31 July 2013 there were only 6 ratifications and 37 signatories to this Protocol. A List of the Status of Ratifications of this Protocol is available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-d&chapter=4&lang=en (Accessed on 31 July 2013).

158 Mashamba, C.J., 'Introduction to Shadow Reporting', op. cit.

159 Some of these instruments include International Covenant on Economic, Social and Cultural Rights of 1966 (ICESCR); the International Covenant on Civil and Political Rights of 1966 (ICCPR); the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the Convention on the Elimination of Forms of Racial Discrimination (CERD); the Convention against Torture and Other forms of Cruel, Inhuman and Degrading Treatment or Punishment (CAT); and the International on the Protection of the Rights of All Migrant Workers and their Families (CMW). Other instruments that can also be used to base child rights actions whenever they enter into force, are the African Youth Charter (adopted in July 2006); and the Convention on the Rights of Persons with Disabilities (adopted in 2006 and came into force in November 2007).

160 Ebobrah, S.T., 'Taking Children's Rights Litigation Beyond National Boundaries: The Potential Role of the ECOWAS Community Court of Justice', op. cit, p. 142.

161 See for instance, Articles 10 and 13 of ICESCR; Article 24 of ICCPR; Article 16 of CEDAW; and Articles 29 and 30 of CMW.

162 Ebobrah, op. cit, p. 143.

All these instruments have treaty bodies, which oversee the implementation of the respective treaties at the municipal level. Thus, through the state reporting mandate the treaty bodies also ensure that children's rights are adequately protected, along with adults'.

Chapter Three

Legal Protection of the Child in the African Regional Human Rights System

3.0 Introduction

Since the inception of colonialism in the late 19th century, the concept of human rights in Africa has been overshadowed by contending views. While some scholarly works on the subject of human rights in Africa have contended that there is a remote realisation of the principle of universality over "indigenousness" of human rights in Africa,[163] some have 'engaged the impracticability of certain categories of human rights in and for Africa and the mass of impediments to human rights protection in African states.' [164]

Some scholarly works about the African human rights history have concentrated on 'documenting the history and spate of state-sponsored violations of human rights particularly as they relate to democratisation, electioneering and the political process'[165] in Africa.[166] However, as a contribution to the ever increasing body of human rights norms at the international level, the African human rights system should be regarded as unique and a potent tool for vindicating human rights in an African context. In this Chapter we, therefore, briefly discuss the African human rights system and its essence in making children's rights a reality in an African context.

3.1 The African Human Rights System

This part examines the role of the African human rights system in the protection of the rights and welfare of the child by briefly looking at the history of human rights, and particularly children's rights, in the continent; particularly from the time when the Organisation of African Unity (OAU) was established. The potent role of the African human rights system and its main human rights treaties is also examined along with the work of the African human rights treaty bodies.

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163 See, for instance, Shivji, I.G., *The Concept of Human Rights in Africa* London: CODESRIA, 1989; Cobah, J.A.M., 'African Values and the Human Rights Debate: An African Perspective' *Human Rights Quarterly* Vol. 9 No. 3, 1987, pp. 309-31; Howard, R., *Human Rights in Commonwealth Africa* Ottawa: Rowman and Littlefield, 1986; and Busia Jr, N.K.A., 'The Status of Human Rights in Pre-Colonial Africa: Implications for Contemporary Practices', in McCarthy-Arnolds, E. et al. (Editions), *Africa, Human Rights and the Global System* Westport, CT: Greenwood Press, 1994.

164 Olowu, D., 'The Regional System of Protection of Human Rights in Africa', in Sloth-Nielsen, J., *Children's Rights in Africa: A Legal Perspective* Hampshire: Ashgate Publishing Limited, 2008, pp. 13-32. See also Busia Jr, *Ibid*; Eze, O., *Human Rights in Africa: Some Selected Problems* New York: St. Martin's Press, 1984; Eze, O., 'Human Rights Issues and Violations the African Experience', in Shepherd Jr., G.W. and M.O.C. Anikpo (Editions), *Emerging Human Rights: The African Political Economy Context* Westport, CT: Greenwood Press, 1990; Donnelly, 'The Right to Development', in Welch Jr., C.E. et al (Editions), *Human Rights and Development in Africa*. Albany, NY, State University of New York, 1984; and El-Obaid, E.A. et al, 'Human Rights in Africa: A New Perspective on Linking the Past to the Present' *McGill Law Journal* Vol. 41, 1996, pp. 819-54.

165 Olowu, *Ibid*.

166 Gutto, S.B.O., *Human Rights for the Oppressed: Critical Essays on Theory and Practice from Sociology* Lund: Lund University Press, 1993, pp. 47-49; and Udombana, N.J., 'Articulating the Right to Democratic Governance in Africa' *Michigan Journal of International Law* Vol. 24, 2003, pp. 1209-70.

3.1.1 An Historical Overview

The African human rights system is premised around the key functions of the African Union (AU), whose membership comprises of all African states, except Morocco. Established in 2002, the AU is a successor of the Organisation of African Unity (OAU), which was founded in 1963.[167] The OAU placed special emphasis on fighting colonialism, racism and apartheid. But its Charter did not make any mention whatsoever to human rights.[168] This justifies the interest of powers that be at that time in Africa. At that moment, the main interest of the independent states in Africa was to gain and maintain political power; thus, the OAU Charter's focus was 'on the protection of the state, rather than the individual.'[169] Although African leaders at independence propagated the right to self-determination for Africans from European colonial powers, 'they were not inclined to take this right further than political independence.'[170] In this regard:

> They did not grant their own peoples the right to self-determination vis-à-vis the new African States (as the Biafra war in Nigeria showed in all brutality), nor did they allow African people any individual rights within these new states that might be enforced by regional monitoring bodies.
>
> Instead, they seemed to be of the opinion that by abolishing colonialism and apartheid they would automatically guarantee individual human rights as well. Sadly enough, the most serious and systematic violations of human rights, such as those committed by atrocious regimes of Idi Amin in Uganda and "Emperor" *Bokassa* in Central Africa, had to occur to convince African leaders that these assumptions had been long.[171]

This tendency, in fact, was a result of a long-established legal system that was premised around fragmenting society along patriarchal systems and divide-and-rule tactics employed by the colonial powers across Sub-Saharan Africa during colonialism. At independence, the new African elites, who formed part of the local colonial administration, retained the colonial legal systems for their benefit and disliked the incorporation of basic rights and fundamental freedoms in their domestic legal systems.[172] As Bowd rightly points out:

> The continued application of colonial legal systems suited the new elite ruling class [in Africa] because throughout the period of colonialism it was often these elites who had been tasked with the management of the country under supervision of a semi-absent landlord. In maintaining the existing systems, such elites found themselves in an advantageous position from which they could, with relative ease, ensure their position and consolidate power: not always for the benefit of the populations they were meant to be serving.[173]

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167 In May 2013 the AU marked the 50th anniversary of its existence.

168 Nowak, op. cit, p. 203. See also Olowu, op. cit, p. 15; Evans, M.D. and R.H. Murray, *The African Charter on Human and Peoples' Rights: The System at Work* Cambridge: Cambridge University Press, 2002; and Murray, R., *Human Rights in Africa: From the OAU to the African Union* Cambridge: Cambridge University Press, 2004.

169 Du Plessis, M., 'A Court Not Found?' *African Human Rights Law Journal* Vol. 7 No. 2, 2007, pp. 522-543, p. 523.

170 *Ibid*.

171 Nowak, op. cit.

172 See particularly Bowd, R., 'Status Quo or Traditional Resurgence: What is Best for Africa's Criminal Justice Systems?', op. cit., p. 43; and Shaidi, L.P., 'Traditional, Colonial and Present-day Administration of Criminal Justice', op. cit, p. 16.

173 Bowd, *Ibid*.

This thinking was, consequently, extended even to the legal set up of the OAU. As a result, during the two decades of African independence, many African elites turned out to be dictators, violating human rights with impunity in the process.[174] In particular, systematic violations of human rights were more overt in Guinea, Equatorial Guinea, Mobutu's Zaire [now Democratic Republic of Congo], Chad and Mauritania.[175] This reality compelled several legendary heads of states in Africa – particularly, Julius Nyerere (Tanzania) and Leopold Senghor (Senegal) – to initiate a human rights campaign for Africa that materialised in the adoption of the African Charter on Human and Peoples' Rights (ACHPR) in Banjul, The Gambia, in 1981.[176] The Charter, also known as the Banjul Charter, came into force in 1986. The Charter is now ratified by all 53 members of the AU,[177] except Morocco, which is the only African country that is not a member of the AU after it pulled out of the defunct OAU due to the recognition and admission of the Saharawi Arab Democratic Republic (SADR) into the OAU.[178]

The adoption of the ACHPR is very important in enriching the "African regional human rights system," which means 'the past, present and ongoing collective or concerted efforts by African peoples and states to secure human rights and freedoms for all peoples under a coherent arrangement [are achieved].'[179] This system 'revolves around diverse institutions and normative frameworks' within the AU set up based on 'treaties that are elaborated and explained by other non-binding documents, such as resolutions, declarations and guidelines.'[180] The normative principles of human rights in these instruments are enforced by diverse institutions of the AU, which are: the AU itself, the African Commission on Human and Peoples' Rights (AComHPR), the African Court on Human and Peoples' Rights (ACTHPR),[181] and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC). These institutions are also complemented by a number of existing specialised agencies or personnel 'whose mandates are specifically aimed at human rights protection and promotion in Africa.'[182]

3.1.2 The African Regional Human Rights System at Work

The potent role of the African regional human rights system is discussed at some length in the succeeding sections.

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174 See particularly Hussain, M.S. and C.J. Mashamba, 'The African Regional Human Rights System: In Search for an Effective Court of Human and Peoples' Rights' *Law Profiles Journal* Vol. 3 Issue 7, July 2012.

175 See particularly Olowu, op. cit, p. 15; Heyns, C., 'The African Regional Human Rights System: The African Charter' *Penn State Law Review* Vol. 108, 2004, pp. 679-702; Shivji, I.G., *The Concept of Human Rights in Africa*, op. cit; and Udombana, N.J., 'A Harmony or Cacophony? The Music of Integration in the African Union Treaty and the New Partnership for Africa's Development' *Indiana International and Comparative Law Review* Vol. 23, 2002, pp. 185-236.

176 Nowak, pp. 204 & 205.

177 On 9 July 2011 the state of South Sudan was declared, becoming the 54th member state of the AU.

178 See particularly Olowu, op. cit; Zoubir, Y.H., 'The Western Sahara Conflict: A Case Study of Failure of Prenegotiation and Prolongation of Conflict' *California Western International Law Journal* Vol. 26, 1996, pp. 173-213, pp. 189 & 90; and Munya, P.M., 'The Organisation of African Unity and its Role in Regional Conflict Resolution and Dispute Settlement: A Critical Evaluation' *Boston College Third World Law Journal* Vol. 19, 1999, pp. 537-91, p. 563 & 564.

179 Olowu, op. cit. p. 14.

180 *Ibid*. 14.

181 As shall be seen later in this Chapter, the Court was merged by the African Union Court of Justice to form a composite African Court of Justice and Human Rights.

182 Olowu, op. cit. p. 15.

a) The Potent Role of Regional Human Rights Systems

The African regional human rights system is amongst the three currently existing regional human rights systems in the world. The other two are the American and European regional human rights systems. As Shelton argues, these regional human rights systems are thought to be essentially potent than the UN human rights system,[183] 'because they are able to take better account of regional conditions.'[184]

The UN itself has recognised regional arrangements for the protection of human rights through a resolution made by the UN General Assembly at its 92nd Plenary Meeting held in December 1992.[185] This was reaffirmed at the June 1993 World Conference on Human Rights in Vienna, where it was stated, *inter alia*, that regional and sub-regional human rights systems can play a very potent role in the promotion and protection of human rights; and, as such, they should complement and reinforce universal human rights standards.[186]

b) The Normative Framework of the African Charter on Human and Peoples' Rights

The normative framework for the African regional human rights system is premised in the objectives of the AU,[187] which are set out in Article 3 of the Constitutive Act of the AU. Accordingly, one of the objectives of the AU is to 'promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments.'[188] The reference to "other relevant human rights instruments" includes the African Charter on the Rights and Welfare of the Child (ACRWC).

It is in this context that at the apex of the institutional arrangement for the African regional human rights system is the Assembly of Heads of State and Government. Below the Assembly are other principal organs of the AU that have 'critical roles to play in the promotion and protection of human rights in Africa.'[189] These organs include: the Executive Council; the AU Commission that serves as the Secretary of the AU; the African Court on Human and Peoples' Rights; the Pan-African Parliament; the Peace and Security Council; the African Commission on Human and Peoples' Rights; the African Committee of Experts on the Rights and Welfare of the Child; the Economic, Social and Cultural Council (ECOSOCC); and other specialised and technical institutions. Under the AU set-up, the human rights, democracy and good governance mandate is under the Political Affairs portfolio.

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183 Shelton, D., 'The Premise of Regional Human Rights Systems', in Weston, B.H. et al (Editions), The Future of International Human Rights Ardsley, NY, Transnational Publishers, 1999. pp. 351-98.

184 Olowu, op. cit. p. 15.

185 UN General Assembly Resolution A/RES/47/125.

186 Mezmur, o. cit, p. 22; Olowu, op. cit, p. 15; Sloth-Nielsen and Mezmur, op. cit. p. 351; and Weston, B.H., et al, 'Regional Human Rights Regimes: A Comparison and Appraisal' *Vanderbilt Journal of Transnational Law* Vol. 20 No. 4, pp. 585-637.

187 Adopted in Lome, Togo, on 11 July 2000 and entered into force on 26 May 2001. The Assembly of the AU held its inaugural meeting in Durban, South Africa in July 2002.

188 Article 3(h) of the Constitutive Act of the AU. See also Olowu, D., 'Regional Integration, Development and the African Union Agenda: Challenges, Gaps and Opportunities' *Transnational Law and Contemporary Problems* Vol. 13 No. 1, 2003, pp. 211-53; and Murray, R., *Human Rights in Africa: From the OAU to the African Union* Cambridge: Cambridge University Press, 2004.

189 Olowu (2008), p. 16.

As stated in Article 3(h) of the Constitutive Act of the AU, the African Charter on Human and Peoples' Rights (ACHPR) is specifically "conceived as the bedrock" of the human rights protection agenda in Africa.[190] It is, in fact, a 'primary human rights instrument for Africa.'[191] As Akinseye-George points out, the Charter has positively impacted on 'the development of constitutional law with particular reference to human rights'[192] in an African context, whereby most African countries have incorporated some of its norms into their constitutions and laws.

Conceptually, the ACHPR 'bears greater resemblance to the contents of the Universal Declaration of Human Rights (UDHR) of 1948 than to the European and inter-American regional human rights systems.'[193] Like the UDHR, the ACHPR emphasises on *equality of all human rights* in its preambular paragraph in the following regards:

> Civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is guaranteed for the enjoyment of civil and political rights.

In principle, this foundation 'represents one of the most distinctive features of the normative renditions of the ACHPR.'[194] In this regard, the ACHPR endorses the underlying principles of *universality, inalienability, interdependence and indivisibility* of human rights.

Another distinctive feature of the ACHPR is its inclusion of *duties* of the individual person 'towards his family and society, the state and other legally recognised communities and the international community.'[195] In this regard, the ACHPR emphasises that the 'rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.'[196] Another duty of the individual person is to 'respect and consider his fellow beings without discrimination, and maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.'[197] Article 29 of the Charter has a catalogue of duties of an individual in the following respects:

> Article 29
>
> The individual shall also have the duty:
>
> 1. To preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need;
>
> 2. To serve his national community by placing physical and intellectual abilities at its service;

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190 See Olowu, D., 'Regional Integration, development and the African Union Agenda: Challenges, Gaps and Opportunities.' Op. cit; and Murray, R., *Human Rights in Africa: From the OAU to the African Union*, op. cit.

191 Bowman, R., *Lubanga*, the DRC and the African Court: Lessons Learned From the First International Criminal Court Case *African Human Rights Law Journal* Vol. 7 No. 2, 2007, pp. 412-445, p. 426. *See* also Akinseye-George, Y., 'New Trends in African Human Rights Law: Prospects of an African Court of Human Rights' *University of Miami International and Comparative Law Review* Vol. 10, 2001-2002.

192 Akinseye-George, *Ibid*, p. 168.

193 Olowu (2008), op. cit, p. 16.

194 *Ibid*.

195 Article 27(1), ACHPR.

196 *Ibid*, Article 27(2).

197 *Ibid*, Article 28.

3. Not to compromise the security of the state whose national or resident he is;
4. To preserve and strengthen social and national solidarity, particularly when the latter is threatened;
5. To preserve and strengthen the national independence and the territorial integrity of his country and to contribute to its defence in accordance with the law;
6. To work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of the society;
7. To preserve and strengthen positive African cultural values in his relations with other members of society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well-being of society;
8. To contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity.

Furthermore, the ACHPR contains human rights as well as peoples' rights, which is unique as compared to other regional human rights instruments. Whereas "human rights" in the ACHPR are couched as entitlements of "every individual"[198] and "of all peoples",[199] "peoples' rights," or "solidarity rights" or "collective rights" are framed as the inalienable right to self-determination and socio-economic development;[200] the right to economic, social and cultural development as well as the right to development;[201] the right to national and international peace and security;[202] and the right to a satisfactory environment.[203]

Interestingly, the ACHPR does not contain derogation clauses, as is the case with many international human rights treaties, which means that 'no African government is permitted to abridge these rights even during emergencies.'[204] This argument was reinforced by the African Commission on Human and Peoples' Rights in *Media Rights Agenda and Constitutional Rights Project v Nigeria,*[205] where it held that '[i]n contrast to other international human rights instruments, the ACHPR does not contain a derogation clause. Therefore limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances.'[206] While the

198 *Ibid*, Articles 2-18.

199 *Ibid*, Articles 19-24.

200 *Ibid*, Articles 19 & 20.

201 *Ibid*, Article 22.

202 *Ibid*, Article 23.

203 *Ibid*, Article 24. See particularly Kiwanuka, R.N., 'The Meaning of "People" in the African Charter on Human and Peoples' Rights' *American Journal of International Law* Vol. 82, 1980, pp. 80-101; Benedek, W., 'Peoples' Rights and Individual Duties as Special Features of the African Charter on Human and Peoples' Rights', in Kunig, P. et al. (Editions), *Regional Protection of Human Rights by International Law: The Emerging African System* Baden-Baden: Nomos Verlagsgesellschaft, 1985, pp. 59-94; Mutua, M., 'The Banjul Charter and the African Cultural Fingerprints: An Evaluation of the Language of Duties' *Virginia Journal of International Law* Vol. 35, 1995, pp. 339-80; Heyns, op. cit; and Olowu, op. cit, p. 17.

204 Olowu, *Ibid*, p. 17. See also Umuzorike, op. cit, p. 910. See particularly the decision of the African Commission on Human and Peoples' *Rights in Commission Nationale des Droits de l'Homme et des Libertes c Chad*, op. cit.

205 Communication 105/1993 (October 1998). Reported as (2000) AHRLR 200 (ACHPR 1998).

206 *Ibid*, para 67.

ACHPR contains certain "claw-back" clauses[207] in some civil and political rights, 'there are no such claw-back clauses in respect of the economic, social, cultural and collective rights provisions in Articles 15 to 24. These guarantees are all in plain, unrestricted, and unconditional language.'[208]

In terms of obligations imposed on states parties, Article 1 of the ACHPR establishes the fundamental obligation of states to 'recognise the rights, duties and freedoms enshrined in this Charter and … undertake to adopt legislative or other measures to give effect to them.' This obligation is reinforced by corollary provisions of Article 62, which oblige states parties to submit biennial reports 'on the legislative or other measures' they have put in place in order to give effect to the ACHPR. To fulfil this obligation, states parties are obliged, in terms of Article 25, to 'promote and ensure through teaching, education and publication, the respect of the rights and freedoms' in the ACHPR. In addition, Article 26 obliges states parties 'to guarantee the independence of courts[209] and … allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms' in the ACHPR.

c) Human Rights Implementation in Africa: The Role of the Human Rights Commission

The ACHPR's principal implementation mechanism is available through the AComHPR, which is established under Article 30 with the tripartite mandate to promote, to ensure and to interpret the human and peoples' rights in the ACHPR.[210] Established in 1987, the AComHPR is comprised of 11 members acting in their individual and personal capacities.[211] These members are elected by the Assembly of Heads of State and Government[212] to serve for a period of six years and may stand for re-election (Article 36). For the past two decades of its existence, the Commission has been 'the quasi-judicial body of the African Charter [on Human and Peoples' Rights], responsible for implementing and enforcing the rights provisions in the African Charter.'[213]

Headquartered in Banjul, The Gambia, the Commission discharges its mandate in a tripartite arrangement through examining state reports under the state reporting procedure. The Commission also examines complaints from states and individuals

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207 These are provisions whereby a state may limit rights and freedoms to the extent permitted by municipal law. Much has been written about "claw-back" clauses in the ACHPR. See particularly Ankumah, E., *The African Commission on Human and Peoples' Rights: Practice and Procedures* The Hague: Martinus Nijhoff, 1996; Buergenthal, T., *International Human Rights in a Nutshell* 2nd edn. St. Paul, MN, West Group, 1995, pp. 52 & 53; and Flinterman, C. and C. Henderson, 'The African Charter on Human and Peoples' Rights', in Hanski, et al (Editions), *An Introduction to the International Protection of Human Rights: A Textbook* 2nd edn. Turku: Institute for Human Rights, Abo Akademi University, 1999, pp. 390 & 391.

208 Olowu, op. cit, p. 19.

209 In *Media Rights Agenda and Constitutional Rights Project v Nigeria* the AComHPR held that: 'A government that governs truly in the best interest of the people … should have no fear of an independent judiciary. The judiciary and the executive branch of government should be partners in the good ordering of society. For governments to oust the jurisdiction of the courts on a broad scale reflects a lack of confidence in the justiciability of its own actions, and a lack of confidence in the courts to act in accordance with the public interest and rule of law.' *Ibid*, para. 81.

210 Article 45(1) – (3), ACHPR.

211 *Ibid*, Article 31.

212 *Ibid*, Article 33.

213 Du Plessis, op. cit, p. 529.

under the complaints procedure; and it also undertakes promotional activities. Viewed in this context:

> The state reporting procedure enables the Commission to examine measures a state party has put in place to secure the provisions of the ACHPR. The complaints procedure permits the consideration of both inter-state complaints (Articles 47-54) as well as individual complaints (Articles 55-6). … The Commission's promotional mandate enables it to 'undertake studies and researches on Africa's problems in the field of human and peoples' rights' and to pursue educative programmes; to formulate normative human rights standards and to embark on co-operative programmes that would enhance human rights protection in Africa (Article 45).[214]

However, over time, the fulfilment of the mandate of the Commission has been imperilled by the lack of timely or sheer failure of state reporting by many states in Africa.[215] Besides:

> Even when states do submit reports, they frequently fail to send competent representatives to present them.[216] This leads to long delays, and some reports have become very [out] dated by the time they are examined.[217]

In order to minimise the impact of this problem, the Commission later adopted a radical approach to this. At its 23rd Session in 1998 it decided that it 'would henceforth consider states' reports without the presence of representatives once affected states had been given adequate opportunity to attend and had failed to respond.'[218] It also decided to issue "Concluding Observations" in conformity with UN human rights treaty bodies.

Other impediments of the Commission in its state reporting mandate is the lack of effective follow-up mechanisms, in that the Commission does not have the mandate or mechanism to make follow up on the implementation of its recommendations.[219] This weakness has been criticised as lacking 'seriousness [and] incisiveness' and as constituting 'a reduction of the whole exercise [of examining states' periodic reports] into a rigmarole.'[220] Parallel to this impediment is the problem of disregard of the decisions of the Commission by the concerned African states. For instance, the Commission reported at a joint meeting with African Human Rights Court held in June 2006, that by then 'only in about one or two cases had the Commission's report been formally recognised and responded to.'[221] As Kanyeihamba (one of the pioneer judges of the African Human Rights Court) points out: 'In respect of the

214 Olowu, op. cit, p. 19.

215 For an updated status of state reporting, visit 'Status of Submission of State Periodic Reports to the African Commission on Human and Peoples' Rights' as of 31 December 2010. Available at <http://www.achpr.org/state_periodic_reports.doc> (Accessed on 31 March 2012).

216 Viljoen, F., 'Overview of the African Regional Human Rights System', in Heyns, C. (Editor.), *Human Rights in Africa* The Hague: Kluwer Law International, 1998. pp. 128-205, p. 189.

217 Olowu, op. cit.

218 *Ibid*.

219 Du Plessis, op. cit, p. 529; and Nmehielle, V.O.O., *The African Human Rights System, its Laws, Practices and Institutions* 2001. p. 246.

220 Quashigah, K., 'The African Charter on Human and Peoples' Rights: Towards a More Effective Reporting Mechanism' *African Human Rights Law Journal* Vol. 2 No. 2, 2002. pp. 261-300, p. 278.

221 Kanyeihamba, G.W. 'Assessing Regional Approaches to the Protection of Human Rights: The Case of the Still Born African Court on Human and Peoples' Rights' *East African Journal of Peace and Human Rights* Vol. 15 No. 2, 2009, pp. 278-295, p. 282.

overwhelming majority of the Commission's reports, the response from those it had addressed them was a conspicuous silence.'[222]

This problem is compounded by the fact that the decisions of the Commission are not binding, compelling the Commission to seek 'amicable resolution and, should that fail, makes non-binding recommendations which the Assembly of Heads of State and Government should adopt.'[223] As it can be rightly observed, in Africa:

> It becomes apparent that those states which have perpetrated human rights violations have the power to lobby like-minded states to potentially veto the adoption of these recommendations, hence our particular criticism that human rights in Africa are at the behest of states.[224]

So, given this kind of diplomacy and political good-will amongst African states, human rights protection within the African regional human rights system has been compromised in most cases.

To the contrary, the individual complaints procedure of the Commission 'has been kept remarkably active.'[225] This is evidenced by the number of cases it has examined and the decisions coming from this process. As reported by the Chairperson of the Commission's Working Group on Communications, Commissioner Zainabo Sylvie Kayitesi, at the occasion to mark the 25th anniversary of the Commission held in Yamoussoukro, Code d'Ivoire, 9-22 October 2012, since its inception the Commission has received four hundred and nineteen (419) communications.[226] Out of these communications, the Commission has determined two hundred and eight (208) communications and issued Provisional Measures on twenty-two (22) communications.[227]

It has also ruled inadmissible eighty-two (82) communications, struck out fourteen (14) communications and has referred two (2) communications to the African Court on Human and Peoples' Court.[228] At the time it marked its 25th anniversary, the Commission had seventy-six (76) communications pending determination.[229] In a way, this is a huge success on the part of the African Human Rights Commission.

However, this procedure is constrained by a sheer imbalance in decisions taken by the Commission, which tend to favour civil and political rights at the expense

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222 *Ibid*.

223 Du Plessis, op. cit. p. 529. See also Viljoen, F. and L. Louw, 'The Status of the Findings of the African Commission: From Moral Persuasion to Legal Obligation' *Journal of African Law* Vol. 1. 2004, pp. 9&10.

224 Du Plessis, *Ibid*.

225 Olowu, op. cit, p. 20.

226 Kayitesi, Z.S., 'Report of the Chairperson of the Working Group on Communications', presented during the 52nd Ordinary Session of the African Commission on Human and Peoples' Rights on the occasion to mark the 25th anniversary of the Commission held in Yamoussoukro, Code d'Ivoire, 9-22 October 2012. See also African Commission on Human and Peoples' Rights, 'Statistics on the Implementation of the African Charter on Human and Peoples' Rights: 30 years later 1981-2011' (unpublished report, which is on file with the authors).

227 *Ibid*.

228 For instance, in *The Matter of the African Commission on Human and Peoples' Rights v Great People's Republic of Libyan Arab Jamahiriya* Application No. 004/2011 (African Court on Human and Peoples' Rights, 15 June 2011) available at http://www.african-court.or (Accessed on 15 January 2013), the African Human Rights Commission successfully applied for provisional measures to the African Court on Human and Peoples' Rights, which in March 2011 issued an order for provisional measures against the Government of Libya. This case is discussed at length in Juma, D., 'Provisional Measures under the African Human Rights System: The African Court's Order Against Libya' *Wisconsin Journal of International Law* 2012.

229 Kayitesi, op. cit.

of socio-economic rights.[230] This is manifested in its decisions in *Malawi African Association, Amnesty International v Mauritania*[231] and *Free Legal Assistance Group and 3 others v Zaire.*[232] In these cases, the Commission granted effective remedies to violations of civil and political rights more than it did to socio-economic rights, 'losing one of numerous opportunities it had to elaborate on the content of economic, social and cultural rights as well as to chart the path of granting appropriate remedies and relief for established violations.'[233]

Although the Commission has been praised by many scholars[234] on its decision in *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* (known famously as the SERAC case),[235] Olowu criticises it for 'uncritically adopting the "progressive realisation" paradigm adopted by the CESCR [the Committee on Economic, Social and Cultural Rights], which … has no legal or factual basis in the ACHPR."[236] According to Olowu, the decision 'is bereft of any substantial remedy for the established violations, which may explain why there has been no tangible outcome from the decision in the troubled Niger-Delta region, long after its delivery.'[237]

The inter-state communication mechanism under the ACHPR, which was designed to enable African states to play a watchdog role, has remained dormant all over this time. In this respect, the Commission has received only reports filed by DRC against Burundi, Rwanda and Uganda;[238] and by Ethiopia against Eritrea,[239] both alleging violations of the ACHPR provisions.

In the former case, which was its first inter-state communication, the Commission found the respondent states to have violated a number of human and peoples' rights, including the right to self-determination, the right to development and the right to peace and security. In this communication, the DRC alleged grave and massive violations of human and peoples' rights committed by armed forces of the respondent states in its provinces where there had been rebel activities.

After holding the respondent states liable for violation of human and peoples' rights, the Commission recommended that adequate reparations should be paid 'according to the appropriate ways to the complainant state for and on behalf of the victims of the human rights by the armed forces of the respondent states while the armed forces of the respondent states were in effective control of the provinces of the complainant state, which suffered these violations.'

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230 Olowu, D., 'Emerging Jurisprudence on Economic, Social and Cultural Rights in Africa: A Critique of the Decision of *SERAC and another v Nigeria' Turf Law Revie*w Vol. 2 No. 1, 2005. pp. 29-44.

231 (2000) AHRLR 149 (ACHPR 2000).

232 Communication No.'s 25/89; 47/90; 56/91; and 100/93, Ninth Annual Activity Report: 1995-1996.

233 Olowu (2008), op. cit, p. 20.

234 *See*, for instance, Bekker, G., '*The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria' Journal of African Law* Vol. 47, 2003; Coomans, F., 'The Ogoni Case Before the African Commission on Human and Peoples' Rights' International and Comparative Law Quarterly Vol. 52 No. 3, 2003, pp. 749-60; and Shelton, D., 'Decision Regarding Communication 155/96 *SERAC v Nigeria*. Case No. ACHPR/COMM/A044/1' *American Journal of International Law* Vol. 96, 2002, pp. 937-42.

235 (2001) AHRLR 60 (ACHPR 2001).

236 Olowu (2008), op. cit, pp. 20-21; and Olowu (2004), pp. 197 & 198.

237 Olowu, *Ibid*, p. 21. See also Olowu (2005).

238 *Democratic Republic of Congo v Burundi, Rwanda and Uganda* Communication No. 22 of 1999.

239 *Ethiopia v Eritrea* Communication No. 233 of 1999.

d) Strengthening the Human Rights Implementation in Africa: The Establishment of the Human Rights Court

The overt challenges facing the African Human Rights Commission attracted a number of criticisms and many critics recommended for the establishment of an effective African human rights court dedicated to human rights.[240] In order to address some of these major challenges in making the ACHPR more effectively and widely implemented and given legal force across and around Africa, the OAU decided to establish an African human rights court. The decision to establish the African Court on Human and Peoples' Rights was taken during the summit of Heads of State and Government of the OAU, held in Tunis, Tunisia, in June 1994.

In particular, the summit requested the Secretary-General of the OAU 'to convene a meeting of government experts to ponder, in conjunction with the African Commission, over the means to enhance the efficiency of the African Commission and to consider in particular, the establishment of an African Court on Human and Peoples' Rights.'[241] This idea came to fruition in 1998 when the OAU Assembly of Heads of State and Government 'finally adopted the Protocol establishing an African Court on Human and Peoples' Rights.'[242] As indicated by many scholars, 'it is the lack of an effective enforcement mechanism under the African Human Rights Charter that necessitated the adoption of the Protocol on the African Human Rights Court.'[243]

However, this Protocol 'never effectuated an actual functioning court.'[244] The Court materialised when the OAU, which was widely regarded as an ineffective regional body,[245] was replaced by the AU in 2002. The AU was more pro-active in establishing the Court, whereby the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (the African Human Rights Court Protocol) became operational when it entered into force on 25 January 2004. It expressly states that the African Human Rights Court shall 'complement the protective mandate of the African Commission on Human and Peoples' Rights …'[246] Viewed in this context, the African regional human rights court is now composed of three reinforcing bodies: the Commission, which is a quasi-judicial human rights institution;[247] the African Human Rights Court, which is the 'main judicial institution';[248] and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), which oversees the implementation

240 See, for instance, Adjetey, F.N., 'Religious and Cultural Rights: Reclaiming the African Woman's Individuality: The Struggle between Women's Reproductive Autonomy and African Society and Culture' *American University Law Review* Vol. 44, 1995, p. 1375.

241 Kanyeihamba, op. cit, pp. 289 - 90.

242 Akinseye-George, op. cit, p. 170.

243 Nmehielle, V.O., 'Development of the African Human Rights System in the Last Decade' Human Rights Brief Vol. 6 No. 11, 2004.

244 Bowman, op. cit, p. 426.

245 *Ibid*.

246 Article 11 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights. The import and effectiveness (or lack of it) of the principle of complementarity between the African Commission and the ACHPR is critically elucidated in Ebobrah, S.T., 'Towards a Positive Application of Complementarity in the African Human Rights System: Issues of Functions and Relations' *The European Journal of International Law* Vol. 22 No. 3, 2011, pp. 663-688.

247 *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000).

248 Viljoen, F., 'A Human Rights Court for Africa, and Africans' *Brooklyn Journal of International Law* Vol. 1, 2004; and Bowman, op. cit, p. 427.

of the ACRWC. Both in theory and expectation, these bodies 'create an operable judicial system for Africa.'[249]

The first ever judges of the Court were elected upon a directive of the summit of Heads of State and Government of the AU held in Banjul, The Gambia, in June 2006 and were sworn on 2 July 2006 in the same city before all Heads of State and Government.[250] As many African scholars are enthusiastic about the prospects of the African Human Rights Court,[251] one can only view it as a more effective mechanism to boost the image of the Commission, at least by looking at the Court's mandate and the mechanism put in place for enforcement of its judgments.[252] The Court has a mandate to render advisory opinions on any legal matters pertaining to the ACHPR or any other relevant human rights instrument. In so doing, the Court has jurisdiction on the interpretation of its own jurisdiction,[253] whereby its judgments are final and are not subject to appeal.[254] As an independent organ of the AU, the decisions and orders of the African Human Rights Court are binding.[255] In principle, the implementation of the judgments of the Court is monitored by the Council of Ministers of the AU on behalf of the Assembly,[256] which serves as the Executive Council of the AU and 'prepares decisions on strategic areas of focus for the Assembly'[257] of Heads of State and Government. As Du Plessis submits, under the Court's set up, non-compliance with the judgment or order of the Court 'may have resulted in an AU decision, which in turn may have led to the imposition of sanctions as envisaged under the AU Constitutive Act.'[258]

The Court, under Article 5(3) of the African Human Rights Court Protocol, 'may recognise relevant NGOs with observer status before the Commission, and individuals to institute cases directly before it, in accordance with Article 34(6) of this Protocol.' In terms of Article 34(6) of the Protocol:

> At the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the court to receive cases under Article 5(3) of this Protocol. The court shall not receive any petition under Article 5(3) involving a state party which has not made such a declaration.

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249 Bowman. *Ibid*.

250 Kanyeihamba, op. it, p. 291.

251 See particularly Nmehielle, V.O.O., 'Towards an African Court on Human Rights: Structuring of the Court' *Annual Survey of International and Comparative Law* Vol. 6, 2000, pp. 27-50; Eno, R.W., 'The Jurisdiction of the African Court on Human and Peoples' Rights' African Human Rights Law Journal Vol. 2 No. 2, 2002, pp. 223-33; Naldi, G.J. and K. Magliveras, 'Reinforcing the African System of Human Rights: The Protocol on the Establishment of a Regional Court of Human Rights' *Netherlands Quarterly of Human Rights* Vol. 16 No. 4, 1998, pp. 431-56; Udombana, N.J., 'Towards the African Court on Human and Peoples' Rights: Better Later than Never' *Review of African Commission on Human and Peoples' Rights* Vol. 8 No. 2, 1999, pp. 338-58; Udombana, N.J., 'A Harmony or Cacophony? The Music of Integration in the African Union Treaty and the New Partnership for Africa's Development', op. cit; and Viljoen, F., 'A Human Rights Court for Africa, and Africans', op. cit.

252 On the enforcement of the decisions of the Court, see particularly Ramadhani, A.S.L., 'The Enforcement of the Decisions of the Court', a paper presented at the Continental Consultation and Sensitization Seminar of the African Court on Human and Peoples' Rights, organised for Women Human Rights NGOs in Africa, held at Hotel Monte Febe, Yaoundé, Cameroon, 24-26 April 2013.

253 Article 3 of the Protocol.

254 *Ibid*. Article 28.

255 Kanyeihamba, op. cit, p. 27.

256 Op. cit. Article 29(2).

257 Kanyeihamba, op. cit.

258 Du Plessis, op. cit, p. 537.

Interpreting the two foregoing Articles in *Michelot Yogogombaye v Senegal*,[259] the AfCHPR held that the combined effect of these provisions is that 'direct access to the Court by an individual is subject to the deposit by the respondent State of a special declaration authorizing such a case to be brought before the Court.'[260] In this case the AfCHPR found Senegal to have not accepted the jurisdiction of the Court to hear cases instituted directly against the country by individuals or non-governmental organisations. In such circumstances, the Court held that: 'pursuant to Article 34(6) of the Protocol, it does not have jurisdiction to hear the application.'[261] A similar line of holding was made by the Court in its recent decisions in *Amir Adam Timan v The Republic of The Sudan*[262] and *Femi Falana v African Union*.[263]

In the latter case, the applicant argued that Article 34(6) of the Protocol was inconsistent with Articles 1, 2, 7, 13, 26 and 66 of the African Charter on Human and Peoples' Rights. The applicant contended that the requirement for a State to make a declaration to allow access to the Court by individuals and NGOs was a violation of his rights to freedom from discrimination, fair hearing and equal treatment as well as his right to be heard. The applicant alleged to have made several attempts to get the Federal Republic of Nigeria to deposit the declaration under Article 34(6) of the Protocol, to no avail. Furthermore, the applicant argued that his reason to file the application against the respondent was because it was the representative of the 54 member states of the African Union, thus, capable of being sued, as a corporate community, for and on behalf of its constituent members.

Striking the application out, the Court held that it lacked jurisdiction to entertain this application because the respondent, the AU, is not a member to the Protocol; and, as such, it cannot be sued on behalf of its member states. In the main, the Court held that:

> 73. At this juncture, it is appropriate to emphasize that the Court is a creature of the Protocol and that its jurisdiction is clearly prescribed by the Protocol. When an application is filed before the Court by an individual, the jurisdiction of the Court *ratione personae* is determined by Articles 5(3) and 34(6) of the Protocol, read together, which require that such an application will not be received unless it is filed against a State which has ratified the Protocol and made the declaration. The present case in which the Application has been filed against an entity other than a State having ratified the Protocol and made the declaration falls outside the jurisdiction of the Court.

Therefore, the Court held explicitly that it has no jurisdiction to entertain and determine the Application.

Although the involvement of NGOs and individuals in instituting cases at the Court is seen in some quarters as a particularly innovative element,[264] the Court's

259 Application No. 001/2008 (AfCHPR).

260 *Ibid*, para. 34.

261 *Ibid*, para. 37.

262 Application No. 005/2012 (AfCHPR) (noting that, as per the correspondence from the AU Legal Counsel, the Republic of The Sudan has not made the declaration envisaged under Article 34(6) of the Protocol; and, consequently, the Court manifestly lacked jurisdiction to receive the application submitted by the Applicant against the Respondent State. Paras 8 & 9).

263 Application No. 001/2011 (AfCHPR). Judgment in this matter was delivered on 26 June 2012. This case is discussed at some considerable length in Kilangi, A., 'Legal Personality, Responsibility and Immunity of the African Union: Reflection on the Decision of the African Court on Human and Peoples' Rights in the Femi Falana Case' *AUCIL Journal of International Law* Issue No. 1, 2013.

264 Olowu, op. cit, p. 25.

Protocol has failed to make unequivocal provision granting locus standi to these important stakeholders in the promotion and protection of human rights in Africa.[265] The declaration expected to be made by States when ratifying the Protocol in Articles 5(3) and 34(6) mentioned above have been unreasonably withheld by most African States;[266] thus, narrowing the involvement of most civil society organisations.[267] However, this could be remedied by the CSOs or individuals submitting their cases to the Commission, which may then refer them to the Court.[268] This point is founded in the fact that during the drafting of the Protocol 'many states objected or made it clear that non-governmental organisations or individuals would not have direct access to the court except with their permission.'[269]

In determining cases, the Court should apply the Constitutive Act of the AU, international treaties (whether general or particular) ratified by the concerned states,[270] international custom as evidence of general practice and accepted law. The Court may also apply general principles of law recognised universally or by African states, judicial decisions and writings of the most highly qualified publicists of various nations as well as the regulations, directives and decisions of the AU, 'as subsidiary means for the determination of the rules of law, and any other law relevant to the determination of the case.'[271] In deciding cases before it, the Court has also to bear in mind the complementarity between it and the African Commission on Human and Peoples' Rights,[272] which may include drawing inspiration from the latter's jurisprudence.[273] Litigants before the Court also have the right 'to be assisted by legal counsel and/or any other person of the party's choice'.[274]

e) Merging the Human Rights Court and the Court of Justice: Whistling in the Wind?

Even before the Court could start functioning and deliver to the intended expectations, a decision was taken to conjoin it with the African Union Court of Justice (ACJ), 'so as the two stand together as a composite Court – the African Court of Justice

265 Naldi and Magliveras, op. cit; Udombana, op. cit; Nmehielle, op. cit; Eno, 2002, op. cit; Hopkins, op. cit; and Viljoen, op. cit.

266 For instance, Tanzania has accepted the Court's competence provided only that 'all domestic remedies have been exhausted and in adherence to the Constitution.' See the AfCHPR's website: http://www.africa-court.org/en/ (Accessed on 18 June 2013).

267 As of 22 January 2013, only seven African countries – Burkina Faso, Ghana, Ivory Coast, Malawi, Mali, Rwanda and Tanzania – have made declarations in terms of Article of the Protocol granting *locus standi* to NGOs to access the Court. Rwanda signed its Declaration on 2013 January 2013, which was later duly deposited with the AU.

268 See particularly, Juma, D., 'Access to the African Court on Human and Peoples' Rights: A Case of the Poacher Turned Gamekeeper?' *Essex Human Rights Review* Vol. 4 No. 1, 2007.

269 Kanyeihamba, op. cit, p. 290.

270 See particularly *Tanganyika Law Society, Legal and Human Rights & Rev. Christopher Mtikila v The United Republic of Tanzania* Application No's. 009 and 011/2011 (Judgment delivered on 14 June 2013).

271 Kanyeihamba, op. cit, p. 291. See particularly AU/XC/AD/27/50, Addis Ababa.

272 *See* particularly Articles 2 and 8 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

273 See particularly Ebobrah, S.T., 'Towards a Positive Application of Complementarity in the African Human Rights System: Issues of Functions and Relations', op. cit, at p. 671. For the first time, the Court drew inspiration from the Commission in *Tanganyika Law Society, Legal and Human Rights & Rev. Christopher Mtikila v The United Republic of Tanzania,* op. cit, paras. 106.1, 107.1, 109 and 117.

274 See particularly rule 28 of the Rules of the African Court on Human and Peoples' Rights (2010); and *Urban Mkandawire v The Republic of Malawi* Application No. 003/2011.

and Human Rights.'[275] This decision was contrary to the original intention of the AU, which wanted to have two separate judicial institutions – the African Court on Human and Peoples' Rights and the ACJ. Originally:

> The ACJ was intended to be the principal judicial organ of the AU with its primary role being the authoritative interpretation, application and implementation of the Constitutive Act of the AU and the various Protocols. Its mandate also included the adjudication of contentious matters between state parties to the Constitutive Act on any issues referred to it by mutual agreement between states. The ACJ was not originally conceived to have competency to interpret the African Charter [on Human and Peoples' Rights], although cognisance could be taken of the Charter. The African Court, by contrast, would focus on violations of the African Charter and would be the principal arm by which the Charter would be enforced.[276]

Nonetheless, upon a suggestion by the then Nigerian president, Olusegun Obasanjo, who was then the Chairperson of the Assembly of the AU, made in July 2004, the AU agreed to merge the two courts on ground, *inter alia*, that there was a growing number of institutions at the AU, making the AU unable to support them financially and in terms of human resources.[277] As a result, the AU Commission was requested to work out the modalities on the implementation of this decision, culminating in the set up of a panel of legal experts who met in Addis Ababa, Ethiopia, on 13-14 January 2005 to chart out and recommend on the way forward. The report of the meeting was submitted by the AU Commission to the Executive Council of the AU at the summit in Abuja, Nigeria, in January 2005.[278] In this respect:

> The AU Commission recommended that the [merger] of the jurisdiction of the two courts should be retained while at the same time making it possible to administer the protocols [establishing two courts] through the same court by way of special chambers, and the necessary amendments to both protocols be effected through the adoption of a new protocol by the AU Assembly of Heads of State and Government.[279]

Further consultations between the AU organs (i.e. the Executive Council, the Permanent Representatives Committee [composed of ambassadors to the AU in Addis Ababa] and the AU Commission) and government legal experts from member states took place between January 2005 and July 2008 AU summit when Justice Ministers formally adopted a 'single legal instrument ["the Single Court Protocol"] to create an African Court of Justice and Human Rights.'[280] Under Article 1, the Single Court Protocol replaces the two protocols that established the two courts.[281] As a result of

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275 Du Plessis, op. cit, p. 538.

276 *Ibid*, p. 538.

277 See Coalition for an Effective African Court on Human and Peoples' Rights, 'About the African Court.' Available at http://www.africancourtcoalition.org/editorial.asp?page_id=16 (Accessed on 28 July 2013). See also Interights, 'African Union Adopts the Protocol on the Statute of the African Court of Justice and Human Rights.' Available at http://www.interights.org/AfricanSingleProtocolAdopted/index.htm (Accessed on 1 August 2013).

278 See 'Draft Protocol on the Integration of the African Court on Human and Peoples' Rights and the Court of Justice of the AU.'

279 Coalition for an Effective African Court on Human and Peoples' Rights, 'About the African Court.' Op. cit.

280 See Protocol on the Statute of the African Court of Justice and Human Rights. Available at http://www.interights.org/AfricanSingleProtocolAdopted/index.htm (Accessed on 28 July 2011).

281 The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, was adopted by the AU Assembly of Heads of State and Government in Ouagadougou, Burkina Faso, on 10 June 1998; and the Protocol of the Court of Justice of the African Union, was adopted by the same body in Maputo, Mozambique, on 11 July 2003.

the adoption of the Single Court Protocol, the Protocol on the Establishment of the African Court on Human and Peoples' Rights would remain in force, in terms of Article 7 of the Single Court Protocol, for a transitional period of one year to enable the African Human Rights Court 'to take necessary measures for the transfer of its prerogatives, assets, rights, and obligations to the African Court of Justice and Human Rights.'

The effect of this decision is that 'the African Court on Human and Peoples' Rights will be subsumed into the African Union Court of Justice, hence the name "African Court of Justice and Human Rights."'[282] This decision, however, has been termed as 'highly controversial.'[283] As Sceats contends, amongst the first institutions 'to voice concern was the [African] Commission [on Human and Peoples' Rights], which warned that the two courts had 'essentially different mandates and litigants' and that the decision could have "a negative impact on the establishment of an effective African Court on Human and Peoples' Rights."[284]

In addressing this challenge facing the merger of the two courts, the new court has been divided into two sections: a general section dealing with disputes over matters such as powers of the AU and breaches of states' treaty obligations; and a human rights section to deal with cases of violations of human rights. Under this arrangement, every section shall be composed of eight judges.[285]

As Du Plessis earnestly argues, the decision to merge the two courts raises several legal issues. One of those issues is the question of the binding nature of the two sets of protocols. While Article 7 of the Single Court Protocol requires that the Human Rights Court Protocol should remain in force for a prescribed period of one year, the amending Single Court Protocol will come into force thirty (30) days after it receives fifteen (15) ratifications.[286] In the words of Du Plessis:

> The decision to merge the courts brings into focus the legality of amendments to the two instruments establishing the Courts. Regard is to be had to Article 40(2) of the Vienna Convention on the Law of Treaties, which provides that any amending agreement does not bind any state already a party to the treaty which does not become a party to the amending agreement. The result would be the anomalous situation whereby state parties are party to differing treaties on the same subject, giving rise to legal uncertainty and insurmountable problems with respect to enforcement.[287]

Another critical issue regarding this merger relates to the lack of clear elaboration on the principle of complementarity between the new merged Court and the AComHPR. Although the AComHPR is one of the key entities eligible to submit cases to the Court,[288] its role as a complementary human rights organ in Africa has been neglected. To the contrary, Article 2 of the Human Rights Court Protocol provides for a system of complementarity between the AComHPR and the African Court on Human and

282 Du Plessis, op. cit, p. 538.

283 Sceats, S., 'Africa's New Human Rights Court: Whistling in the Wind?' available at http://www.abbymedia.com/news/?p=2372 (Accessed on 1 August 2011).

284 *Ibid*. Quoting African Commission on Human and Peoples' Rights, Res. 76(XXXVII)05: 'Resolution on the Establishment of an Effective Court on Human and Peoples' Rights.' Adopted in Banjul, The Gambia, on 11 May 2005. See also Du Plessis, op. cit, pp. 5390-40.

285 Article 16 of the Single Court Protocol.

286 *Ibid*. Article 9.

287 Du Plessis, op. cit, p. 539.

288 Article 30(b) of the Statute of the African Court of Justice and Human Rights (the African Court Statute).

Peoples' Rights, 'which has generally been interpreted to mean that the Court would complement and reinforce the Commission.'[289] This anomaly may, however, be atoned by amending the Rules of Procedure of the AComHPR to bring them in conformity with the Rules of Procedure of the merged Court.[290]

As many critics have observed, although the merger of the two courts was justified on minimising resources at the AU Commission, the delay in finalising this process and making the merged court functional, has in effect 'simply prolonged the wait for an African Court dedicated to human rights.'[291] It is historically regrettable that the idea and dream to have an effective African Court on Human Rights was mooted in 1961 at a conference of African jurists in Lagos, Nigeria. At this conference it was decreed that Africa needed a human rights Charter with an effective court to ensure that human rights and basic fundamental principles are effectively realised. As set forth in the Preamble to "The International Commission of Jurists, African Conference on Rule of Law: A Report of the Proceedings of the Convention:"

> In order to give full effect to the Universal Declaration of Human Rights of 1948, this conference invites the African Governments to study the possibility of adopting an African Convention of Human Rights in such manner that the conclusions of this conference *will be safeguarded by the creation of a court of appropriate jurisdiction and that recourse thereto be made available for all persons under the jurisdiction of the signatory states*.[292] [Emphasis supplied.]

Ever since the OAU decided to have a human rights court in 1998, slow pace has been made to ensure that the court is operational. Even after the court was made operational in 2006, the court has determined no significant cases, with a number of the pioneer judges having finished their tenure. This justifies the argument often advanced by many scholars on African human rights to the effect that African states are adamant to making human rights realisable in their jurisdictions. For instance, Du Plessis is of the view that:

> It is trite that human rights protection is routinely viewed as being at the behest of states on the African continent. This is more obvious from the failure of states responsible for human rights violations to implement the recommendations of the African Commission [on Human and Peoples' Rights].[293]

In the view of Justice Kanyeihamba, one of the first pioneer judges of the African Human Rights Court:

> Since taking the oath of office in 2006, the judges of the African Court [had] not discovered any encouraging signs that they [would] be treated differently from the Human Rights Commission. Indeed, their situation appears to be much worse than that of the commissioners. The Commission's advisory opinions can and have been ignored with impunity. The African Court's envisaged jurisdiction would mean the delivery of binding judgments and orders that could adversely affect Member States and for this reason, its role as seen and expected by its legal fraternity, its judges, and indeed, the world at large,

289 Du Plessis, op. cit, p. 541.

290 *Ibid*, pp. 541&542.

291 *Ibid*, p. 542. See also Sceats, op. cit.

292 Available at http://www.africancourtcoalition.org/editorial.asp?page_id=16 (Accessed on 28 December 2012).

293 Du Plessis, op. cit, p. 541.

> *is resented and opposed by many states of the African Union, even though outwardly they express lukewarm support.*[294] [Emphasis supplied.]

This attitude by African leaders and politicians will risk the human rights section of the merged court to being regarded as of "second class" to its counterpart: the general section. This is because of the historical fact that in the AU set-up and decision machineries, human rights issues have been perceived as less significant 'than the border disputes and other matters of "high state" [concern] which are likely to occupy the general section.'[295] Going by the experience of the pioneer judges of the Human Rights Court, the AU organs have been regarding the human rights bodies of the AU as subordinate to them; thus, receiving low status, which compromises their effectiveness.[296]

Leaving this pessimism apart, the key task of the human rights section of the merged Court 'is to hear cases brought against African states for failure to respect human rights.'[297] The judgments and orders of the Court shall be binding; whereby, in terms of Article 43(6) of the Merged Court's Statute, the Executive Council of the AU is charged with the monitoring mandate of these judgments. In terms of Article 45, the Court may, 'if it considers that there was a violation of a human or peoples' rights, order any appropriate measures in order to remedy the situation, including granting fair compensation.'

In addition, the Court may also, by virtue of the provisions of Article 55 of the Statute, issue advisory opinions 'in open court, notice having been given to the Chairperson of the [African Union] Commission and Member States, and other International Organisations directly concerned.'

One of the problematic procedural matters pertaining to the proceedings of the Court is failure to grant direct access to individuals victims of human rights abuses and NGOs. It is very saddening that at the very late stage of negotiations for the merger Protocol 'African states voted to deny automatic standing to individual victims of human rights abuses and NGOs.'[298] As is the case with the African Human Rights Court's Protocol, although Article 30(f) of the Statute of the African Court allows individuals and NGOs accredited to the AU or its organs to submit cases to the court, Article 8(3) of the Single Court Protocol [in a more or less similar tone as to Article 34(6) of the Human Rights Court's Protocol], provides that:

> 8.3. Any Member State may, at the time of signature or when depositing its instrument of ratification or accession, or at any time thereafter, *make a declaration accepting the competence of the Court to receive cases under Article 30(f) involving a State which has not made such a declaration*. [Emphasis supplied]

This rule is prohibitive of individuals and NGOs from directly accessing the merged Court in two respects: first, individuals victims of human rights abuses and NGOs can only have *locus standi* if the state from which they are nationals or in which they operate has made a declaration to the effect that they may bring cases to the Court.

294 Kanyeihamba, op. cit. p. 282.

295 Sceats, op. cit.

296 Kanyeihamba, op. cit, p 281.

297 Sceats, op. cit.

298 *Ibid*.

This aspect – which was orchestrated by Egypt and Tunisia[299] – is prohibitive to NGOs and individuals victims of human rights abuses to directly access the court. Given the high level of hatred to human rights and the NGOs spearheading respect for these rights prevalent in most African countries, few African countries are expected to make declarations allowing NGOs and individuals to submit cases to the Court.[300]

This argument is backed up by the experience evidenced by most countries that ratified the African Human Rights Court's Protocol, which has a similar provision in Article 34(6). For instance, of the 24 states that ratified the African Human Rights Court's Protocol, only six – Burkina Faso, Ghana, Malawi, Mali, Rwanda and Tanzania – entered the necessary declarations allowing such access. This means that unless states do make such declarations, this limitation will 'render access to justice [under the merged Court] illusory for human rights victims.'[301]

Second, the NGOs must first be *accredited* to the AU or its organs. Experience has indicated that only few NGOs are accredited to the AU and its organs; and the process of accreditation is not so much known to most NGOs around Africa as well as the accreditation process is not that much smooth and speedy. As Sceats argues, the requirement for accreditation 'constitutes a major difference between the Court and the European Court of Human Rights, where direct access for individuals (and NGOs and other entities which can show they themselves are a "victim" of human rights abuse) is now compulsory.'[302] In a more liberal tone, the AComHPR has 'long permitted NGOs to bring cases under the African Charter [on Human and Peoples' Rights], even where they are not directly affected by the alleged violation (in other words, unlike in the European Court of Human Rights, standing is not restricted to "victims").'[303]

Recognising the negative implications of this limitation, in June 2008 the Coalition for an Effective African Court of Human and Peoples' Rights – a consortium of African NGOs – sent an open letter to the AU Assembly and Executive Council condemning the denial of direct access to individuals, in particular as 'a step back in access to justice for all in Africa [that] dilutes the effectiveness of the continental judicial system and runs contrary to the provisions on access to justice in several international human rights instruments.'[304]

This apart, entities that can have direct access to the Court, in terms of Article 29, are States Parties; the Assembly of Heads of State and Government of the AU; the Pan-African Parliament; and Staff of the AU on appeal 'in a dispute and within the limits and under the terms and conditions laid down in the Staff Rules and regulations' of the AU. Presumably, the latter applies to matters to be submitted to the general section of the merged Court. Entities that can submit cases to the Court under Article 30

299 *Ibid*, p. 9.

300 Currently, only seven countries – Burkina Faso, Ghana, Ivory Coast, Malawi, Mali, Rwanda and Tanzania – have deposited declarations under the current Protocol.

301 Interights, 'African Union Adopts the Protocol on the Statute of the African Court of Justice and Human Rights', op. cit.

302 Sceats, op. cit, p. 9.

303 *Ibid*, p. 10.

304 Coalition for an Effective African Court of Human and Peoples' Rights, 'Open Letter to the AU Assembly of Heads of State and Government, 11th Ordinary Session, and the Executive Council of Ministers, 13th Ordinary Session.' 20 June 2008. Available at http://www.africancourtcoaltion.org.editorial.asp?page_id=141. (Accessed on 29 December 2012).

include the African Commission on Human and Peoples' Rights; the Committee of Experts on the Rights and Welfare of the Child; and African Intergovernmental Organisations accredited to the AU or its organs.

Inasmuch as the Court is yet to start working, as its founding Protocol has not entered into force, only expectations can be expressed at this stage. However, the merged Court is very significant in furthering the cause of human rights in Africa. When the Court becomes operational, it will expectedly make a reality the dream that has haunted Africa for an effective African Human Rights Court since the Lagos 1961 Conference of Jurists. However, given all the obvious concerns raised in this analysis facing the merged Court, the future of this Court will 'certainly depend on the quality of the case law [it is going to] generate.'[305]

Nonetheless, in terms of its working relationship with the African peoples, the Court's limited access by individuals victims of human rights abuses and NGOs may render it distant from the lives of the African peoples; thus, reducing its credibility before the very people it is intended to serve. This will, therefore, require rethinking the need to remove the above limitation. It is also expected that States Parties found in violation of human rights by the merged Court would respect and effectively implement its decision to avoid rendering it obsolete as has been the case with the AComHPR.

3.2 The African Charter on the Rights and Welfare of the Child

The African Charter on the Rights and Welfare of the Child (ACRWC) is the first and only single regional human rights treaty to specifically protect and promote the rights and welfare of the child in the world.[306] It was adopted in 1990 by the Organisation of African Unity (OAU) to provide for a specific and comprehensive mechanism for the protection and promotion of children's rights and welfare at the African regional level.

In order to fairly discuss the ACRWC, this work will discuss it from three angles: the historical framework of the Charter; its normative framework; and the procedural framework.

3.2.1 Historical Framework of the ACRWC

The adoption of the ACRWC was a significant historical milestone that manifested the need for legal protection of children in an African context. It was a further step in this regard, following the promulgation of the Declaration of the Rights and Welfare of the African Child in 1979. The Declaration was adopted by the Assembly of Heads of State and Government of the OAU at its 16th Ordinary Session. Before the adoption of the ACRWC, the OAU Secretariat also had recognised and streamlined various children's rights in its programmes, including child trafficking, child labour [working in collaboration with ILO under the IPEC], and children in situations of armed conflict.

African states also were committed to international children's rights in terms of both ratification and implementation of the CRC. In the drafting process of the ACRWC, CSOs – under the auspices of the African Network for the Prevention and

305 Sceats, op. cit, p. 12.

306 Lloyd, A., 'The African Regional System for the Protection of Children's Rights', op. cit, p. 33.

Protection against Child Abuse and Neglect (ANPPCAN) – were involved and their views were considerably incorporated in the final draft of the Charter.

Amongst the widely cited reasons for adopting the ACRWC is the under-representation of African States during the preparatory work on the CRC.[307] Only four African countries – Algeria, Egypt, Morocco and Senegal – participated fully in the preparatory work on the CRC. Furthermore, in this preparatory work, issues peculiar to Africa were not clearly taken into account. These issues relating to child soldiers, early marriage, female genital mutilation/excision, illiteracy, as well as the role of the family, in particular the extended family.[308] Therefore, when the decision to formulate a charter for African children was taken up, it took into account all these issues. As of January 2013, the ACRWC had been ratified by 46 out of the 53 AU member states.[309]

From the historical realities, the ACRWC 'recognises children in Africa as direct bearers of rights and, in turn, children bear responsibilities to others.'[310] As Lloyd points out, this 'may be considered a controversial addition by Western thinkers, but it reflects the underpinning of African society, and positive conclusions can be drawn from this addition, once one understands the African concept of human rights.'[311] The adoption of the ACRWC means that African states have an obligation to implement two international children's rights instruments concurrently.[312] They, thus, implement both the CRC and the ACRWC in a complementary mode.

3.2.2 The Normative Framework of the ACRWC

In principle, the ACRWC adequately addresses issues relating to the rights and welfare of the child on the continent in an African context.[313] The African Charter reinforces the protection given to children by the CRC regarding, for example, the child's best interests principle, the participation of children in armed conflicts, marriage and children marriage promises, refugee and internally displaced children, protection of children against apartheid and discrimination, as well as socio-economic and cultural rights. In this part, we are not going to discuss all the substantive rights that are similarly provided in the CRC (as considered in Chapter Two of this book), but only those with some degree of difference with the latter.

As already noted above, the ACRWC is more concise and clear in defining who a child is. In Article 2, it defines a child as 'every human being under 18 years.' Concerning parental responsibilities, there is a terminological difference between the two children's rights instruments. While the CRC imposes obligations on parents in the context of "child's custodians," the ACRWC extends the parental responsibilities to "other people in charge of the child". In fact, this is in appreciation of the concept of extended family in the African context, which misses in the CRC. Parallel to parental

307 *See*, for instance, Mezmur, op. cit; Sloth-Nielsen and Mezmur, op. cit; and Lloyd, op. cit.

308 Lloyd, *Ibid*. See also Chirwa, op. cit.

309 Status as of 22 August 2011. The ratification list is available at http://www.acerwc.org.

310 Lloyd, *Ibid*, p. 33.

311 *Ibid*.

312 Mashamba, C.J., 'Domestication of International Children's Norms in Tanzania' *The Justice Review* Vol. 8 No. 2, 2009, pp. 1-17, p. 9.

313 A recent work to treat this subject at some length is Sloth-Nielsen, J. (Edition), *Children's Rights in Africa: A Legal Perspective* Hampshire: Ashgate Publishing Company, 2008.

responsibilities, the ACRWC imposes responsibilities on the child, which include the duty to respect parents and the duty towards the society, community and the nation.[314] In this context, it can be argued that the concept of duties answers to the idea of the child's participation in his family, community, and society inherent in Africa.[315]

Unfortunately, the Charter does not explicitly provide for a child's right to social security, as appears in Article 26 of the CRC; nor does it provide for the right to diversion in a comprehensive form as is the case with Articles 37 and 40 of the CRC.[316]

3.2.3 Obligations of States

Article 1 of the ACRWC contains 'a comprehensive, inclusive and progressive provision for the general obligations and responsibilities of state parties.'[317] The obligations imposed on states parties to the ACRWC include taking necessary measures to implement provisions and principles in the Charter. The "measures" envisaged by the Charter include adoption of legislation, review and introduction of policies and other administrative or programmatic measures, including budgetary allocation, for children in accordance with laid down constitutional processes.[318]

Imperative to these obligations, is the duty imposed on African states to promote positive cultural values and traditions 'as well as measures which promote those traditions and values which are inconsistent with the rights, duties and obligations contained in the ACRWC.'[319] "Necessary steps" advanced in the Charter as part of obligations of states; pertain to introduction and implementation of mechanisms at the national or local level for coordination of policies and programmes relating to children's rights and welfare.

(a) The Procedural Framework of the ACRWC

Like the CRC, the ACRWC's implementation is monitored by a specialised treaty body – the African Committee of Experts on the Rights and Welfare of the Child (ACERWC). The ACERWC was established in 2001 in accordance with Part II of the ACRWC. The ACERWC has more extensive mandate than the UN Committee on the Rights of the Child (CROC), which until recently 'only has the jurisdiction to receive and comment on state reports submitted periodically.'[320] Apart from receiving and commenting on state reports, the ACERWC has the mandate to receive and consider individual communications and conducts ad hoc missions and onsite visits of states 'considered to be violating their treaty obligations.'[321] Nonetheless, basing on the principle of complementarity that exists, the two instruments protecting the rights of

314 Article 31 of the ACRWC.

315 *See* particularly Sloth-Nielsen, J. and B.D. Mezmur, 'A Dutiful Child: The Implications of Article 31 of the African Children's Charter' *Journal of African Law* Issue 2, 2008, pp. 159-189.

316 See particularly Chirwa, D.M., 'The Merits and Demerits of the African Charter on the Rights and Welfare of the Child' *The International Journal of Children Rights* Vol. 10, 2002, pp. 157-177.

317 Lloyd, op. cit p. 35.

318 Article 1(8) of the ACERWC Guideline for Initial State Reports.

319 Lloyd. Op. Cit, p. 36.

320 Lloyd, A. Op. Cit, p. 33.

321 *Ibid*.

the child in Africa should not be seen as opposing each other. On the contrary, they are complementary and mutually reinforcing.[322]

(b) Composition of the ACERWC

The ACERWC is composed of 11 independent members of high moral standing, integrity, impartiality and competence in matters pertaining to the rights and welfare of the child.[323] These members serve in their personal capacity and are elected from amongst nationals of member states.[324] Immediately after the ACRWC came into force on 29 November 1999, the OAU requested members to submit nominations; but by November 2000 only five names had been deposited. This delayed the establishment of the ACERWC until 2001. The tenure of committee members is five years only. Unlike under the CRC, the tenure of the members of the ACERWC is not renewable.[325]

It is important to note, while assessing the work of the ACERWC, that it takes the principle of independence of its members seriously, unlike the African Commission on Human and Peoples' Rights (AComHPR). The history of the AComHPR reveals that Ambassadors and Ministers from States Parties have been elected to serve as commissioners. But the short history of the ACERWC reveals a sharp contrast to this practice. During the Committee's first composition, of the 11 members 3 resigned after they were elected to ministerial and diplomatic positions while still serving on the Committee.[326] As Lloyd concludes: 'It is positive to note that the members [of the ACERWC] take their role seriously and comply with such provisions. Not all human rights protection and monitoring bodies have adhered so rigorously to the requirements of impartiality and independence of committee members.'[327] The ACERWC has adopted its own rules of procedure to enable it to carry out its mandate smoothly and effectively.

The ACERWC was established by the OAU at the time of its transformation to the AU. While the focus of the OAU was on political stability, peace and security, the AU focus has been more human rights-centred. This transition has impacted on the functioning of the ACERWC in many ways; significant to this analysis being budgetary deficiencies and inadequate staff to support its secretariat.[328] For instance, the Committee's first secretary was recruited in mid-2007 after five years of tussles amongst the committee members and the AU Commission.[329] Lloyd reveals that lack of certain funding has been one of the stumbling blocks the ACERWC has been facing since its establishment. According to Lloyd:

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322 Mashamba, C.J., 'A Study of Tanzania's Non-Compliance with its Obligation to Domesticate International Juvenile Justice Standards in Comparison with South Africa'. Ph.D. Thesis, Open University of Tanzania, 2013.

323 Article 33(1) of ACRWC.

324 *Ibid*, Article 35.

325 There are efforts and indications to increase the tenure of members of the ACERWC. It should be noted that all the tenure of members of the other human rights organs of the AU (the AfCHPR and the AComHPR) as well as the African Union Commission on International Law (AUCIL) is more than one terms.

326 Lloyd, op. cit, p. 41.

327 *Ibid*.

328 Mashamba, C.J., 'African Regional Human Rights Protection Mechanism: The Mandate of the ACERWC in Promoting Children's Rights in Africa.' A paper Presented to LL.M. Students (Human Rights) at Makumira Tumaini University, Arusha, 23 March 2012.

329 Lloyd, op. cit, p. 43.

> Due to the problems arising during the transitional period of the AU, the ACERWC has been [financially] resourced mainly through donations, inter-agency participation and collaboration. This has affected the work it has undertaken: there was a lengthy work plan from the outset, but when finance was not available, the ACERWC had to reduce its plans and rework priorities according to the donations received and conditions attached to some of the funding.[330]

At the same time, members did not appreciate 'that any proposal they want to undertake in the name of the ACERWC, such as country visits, should be circulated to the Chairperson of the Commission of the AU to prepare an estimated costing.'[331] This has delayed funding through the AU Commission, derailing the work of the ACERWC in effect. However, of late, the ACERWC has been receiving immense support from development partners through the African Children's Charter Project.

The above challenges apart, the ACERWC works with stakeholders including those who are not members to the ACRWC.[332] In this regard, it works with specialized institutions, inter-governmental organizations, and CSOs.[333] As Lloyd argues, this collaboration has helped the Committee to achieve its mission over the period since it was established.[334] In order to facilitate this collaboration, the ACERWC has adopted the Criteria for Granting Observer Status in conformity with Article 43 of the ACRWC and Articles 34, 37, 81 and 82 of its Rules of Procedure. These Criteria allow it to formally involve CSOs in its work relating to 'preparation of complementary reports, submission of communications or undertaking of lobbying and/or investigation missions.'[335]

(c) The Mandate of the ACERWC

The mandate of the ACERWC is four-fold: (i) general mandate; (ii) reporting procedure; (iii) communications procedure; and, (iv) investigation procedure. In the first place, the general mandate of the ACERWC is that it serves as the guardian of children's rights and welfare in Africa, whereby it can conduct any activity for the furtherance of children's rights on the continent. Like the CRC, the ACERWC has the mandate to receive and consider initial and periodical reports submitted by states parties in accordance with Article 43 of the ACRWC. To be able to discharge this mandate effectively, the ACERWC has adopted Rules of Procedure for this purpose.[336] This mandate seems to be repetitive of the same mandate under the UN Committee on the Rights of the Child. In appreciation of this, the ACERWC has decided that:

> [I]n order to avoid repetition, and in order to encourage governments to fulfil their obligations towards both committees, whilst recognising the specific nature of the several

330 *Ibid*, p. 43.

331 *Ibid*.

332 Mashamba, C.J., 'The Mandate of the ACERWC and How CHRAGG Can Collaborate with the ACERWC in Order to Highlight the Issue of Children Detained in Adult Prisons in Tanzania.' A Briefing Paper Presented at the UNICEF-PRI Workshop on 'Developing Advocacy Strategies' held at UNICEF Conference Hall, Dar es Salaam, 26-27 May 2011.

333 Article 42, ACRWC; and Rules 78-81 of the rules of Procedure.

334 Lloyd, op. cit, pp. 3-44.

335 *Ibid*, p. 44. See also Mezmur, B.D., 'Still an Infant or a Toddler? The Work of the African Committee of Experts on the Rights and Welfare of the Child and its 8th Ordinary Session' *African Human Rights Law Journal* Vol. 7 No. 1, 2007.

336 Rules 66, 67, 68 and 69 of the Rules of Procedure of the ACERWC.

> provisions of the ACRWC, if a state party has already submitted an initial report to the CRC committee, whether that report has been reviewed or not, that state party would be invited to update the information already submitted and add information on the different provisions contained in the ACRWC.[337]

Unlike the CRC Committee, the ACERWC has the mandate to receive and consider individual communications.[338] With this mandate the ACERWC is better positioned, unlike the CRC Committee, 'to make a valuable contribution to the development of children's rights through the receipt of communications and holding individual states accountable for violating the provisions and principles contained in the ACERWC.'[339] In this sense, communications can be made by any person, group of persons or NGO recognized by the AU, by a member state, or the UN. The communication must relate to the rights and welfare of the child covered in the ACRWC.

Furthermore, the ACERWC has the mandate to undertake investigations on violations of children's rights in any AU member state, which is not under the UN CRC Committee. This power, which is similar to that in the ACHPR empowering the AComHPR to do the same thing, is provided for in Article 45 of the ACRWC. In order to effectively achieve this mandate, the ACERWC has developed specific Guidelines on the investigations procedure. However, the effective implementation of this mandate is not realistic as the undertaking of investigations must be upon agreement with the state party concerned. As Lloyd argues:

> The provisions are also wholly dependent on the extent to which states parties are prepared and willing to give full effect at a national level to any recommendations and proposals. Article 45 of the ACRWC will further require state party commitment to provide the necessary financial and logistical support to enable investigations by the ACERWC to occur.[340]

All in all, the mandate and work of the ACERWC is very important to the realization of children's rights and welfare in the African context. This is given further impetus by the provision for it to resort to other sources of information and inspiration from international law.[341]

337 Lloyd, op. cit, p. 47 (note 26).

338 Article 44 of the ACRWC.

339 *Ibid*, Article 44.

340 Lloyd, op. cit, p. 47 pp. 49-50.

341 Article 46 of the ACRWC.

Part Two

Domestication of International Child Rights Norms in East Africa

Chapter Four

The Influence of International Child Rights Law on Constitutionalisation of Children's Rights in Common Law in East Africa

4.0 Introduction

Since the CRC and the ACRWC were adopted, there has been a sturdy and growing body of expert opinion calling for reform in the area of child law, and specifically for the constitutionalisation of children's rights in general and the welfare principle in particular the world over.[342] The reason that this is seen necessary 'is to avoid any future legislation simply being construed in the same way as the existing statutory welfare principle in a manner that results in children's welfare being seen solely through the lens of family autonomy.'[343] If, instead the welfare principle 'were to be put on a constitutional footing (and therefore on an equal footing to the principle of family autonomy), then the best interests of the child genuinely could be viewed by the court as the first and paramount consideration in cases affecting children.'[344]

For instance, almost immediately after the decision in *Re JH* (an infant)[345] by the Irish High Court, Professor William Duncan wrote an article in which he characterized the presumption that the child's welfare is best protected in the marital family as a case of "parent's rights in disguise".[346] In 1993, the author of the *Kilkenny Incest Investigation Report* in Ireland, Mrs. Justice Catherine McGuinness, stated that the effect of the decision is to 'render it constitutionally impermissible to regard the welfare of the child as the first and paramount consideration in any dispute as to its upbringing or custody between parents and third parties such as health boards without first bringing into consideration the constitutional rights of the family.'[347] The following year, Hogan and Whyte, in their textbook on Irish constitutional law, expressed the view that the "adult-orientated" approach taken in the case meant that,

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342 *See* particularly O'Mahony, C., 'The Challenge of Constitutionalising Children's Rights in Ireland.' A paper presented at the 5th World Congress on Family Law and Children's Rights, Halifax, Canada, 24 August 2009. An electronic version of this paper available at http://ssrn.com/abstract=1968586 (Accessed on 10 May 2013).

343 *Ibid*.

344 *Ibid*.

345 [1985] I.R. 375. In this case, a one-week-old child was placed for adoption by an unmarried mother who was in a relationship with an older man but did not wish to marry him solely because of her pregnancy. 18 months later, the parents did marry, at which time the child was in the custody of prospective adoptive parents, but the final adoption order had not yet been issued. In proceedings that took place when the child was almost two years old, the High Court made an order dispensing with the consent of the natural mother on the grounds that a change of custody at this point carried a risk of long-term psychological harm. According to O'Mahony: 'This type of order, which is made under Section 3 of the Adoption Act of 1974, is common in cases where a natural mother withdraws her consent after a lengthy lapse of time and where the child has bonded with the prospective adoptive parents. *See*, e.g., *S v Eastern Health Board* (High Court, February 28, 1979); *McC v An Bord Uchtála* [1982] I.L.R.M. 59; *M O'C v Sacred Heart Adoption Society* [1996] 1 I.L.R.M. 297, and *JB v An Bord Uchtála* (High Court, December 21, 1998). *See* O'Mahony, C., 'The Challenge of Constitutionalising Children's Rights in Ireland', op. cit (note 12).

346 Duncan, W., 'The Child's Right to a Family—Parental Right in Disguise' Dublin University Law Journal Vol. 8, 1986, p. 76.

347 McGuinness, C., *Kilkenny Incest Investigation: Report presented to Mr. Brendan Howlin T.D., Minister for Health, by South Eastern Health Board* Dublin: Stationery Office, 1993. p. 30.

by implication, 'an appreciable but uncertain risk of long term psychological harm to the child would not appear to be a "compelling reason" for rebutting the presumption that the child's welfare is best served within the marital family.'[348]

This trend just indicates how it is important to constitutionalize child rights in modern Constitutions. In order to make this a reality, both Kenya and Uganda have constitutionalised children's rights in their domestic legal orders. Tanzania has just embarked on the constitutional review process aimed at writing a new Constitution,[349] which makes it imperative that children's rights are constitutionalised.

This Chapter, therefore, examines the constitutionalisation of children's rights in the three common law East African countries. It begins with the analysis of constitutional supremacy, as it impacts on the justiciability of children's rights. The Chapter also examines the concept and process of modern Constitution-making, and the rationale for constitutionalising children's rights in modern Constitutions. It finally analyzes the process of constitutionalisation of children's rights in the three common law East African countries. It notes that while Kenya and Uganda have already constitutionalised children rights, Tanzania is expected to do so in the on-going constitutional review and re-writing process.[350]

4.1 Constitutional Supremacy as it Impacts on the Justiciability of Children's Rights

Simply stated, constitutional supremacy is a doctrine whereby the Constitution is supreme and the government rules in accordance with the Constitution. It demands that the power of government is limited by, and executed in accordance with, the Constitution. A government that operates outside of the purview of these ideals is simply an autocratic government, which functions in violation of the rule of law. In this context, it can be simply stated that constitutional supremacy 'is where the courts have the final say and can strike down [unconstitutional] laws passed by the legislative houses.'[351]

From the constitutional supremacy it is pertinent to describe the concept of Constitution. Simply stated, the Constitution is the supreme law of the land.[352] This concept was broadly described by the Botswana Constitutional Court in *Attorney-General v Dow*[353] thus:

> A written constitution is the legislation or compact which establishes the state itself. It paints in broad strokes on a large canvas the institutions of that state, allocating powers, defining relationships between such institutions and between the institutions and the people within the jurisdiction of the state, and between the people themselves. A constitution often provides for the protection of the rights and freedoms of the people, which rights and

348 Hogan & Whyte, *Kelly's the Irish Constitution*. 3rd Edition Dublin, Butterworths, 1994. p.1053.

349 From April 2012 Tanzania embarked on the review of its current Constitution with a view to adopting a new one as envisaged under the Constitutional Review Act, Cap. 83 R.E. 2012. The constitutional review and re-writing process is overseen by the Constitutional Review Commission established under this law.

350 Already Article 42 of the Tanzanian Draft Constitution (2013) has addressed this matter.

351 *See* particularly http://wiki.answers.com/Q/Define_of_constitutional_supremacy#ixzz1vW6J2IiG (Accessed on 21 May 2013).

352 *See* particularly *Alix Jean Carmichele v Minister of Safety and Security, Minister of Justice and Constitutional Development* Constitutional Court, 16 August 2001 CCT (No. 48/100). This case has been reported as *Carmichele v Minister of Safety and Security and others*, (2001) AHRLR 208 (SACC 2001).

353 (2001) AHRLR 99 (BwCA 1992).

> freedoms have thus to be respected in all further state action. The existence and powers of the institutions of state, therefore, depend on its terms. The rights and freedoms, where given by it, also depend on it. No institution can claim to be above the constitution; no person can make any such claim. The constitution contains not only the design and disposition of the powers of the state which is being established, but embodies the hopes and aspirations of the people. It is a document of immense dimensions, portraying, as it does, the vision of the peoples' future. The makers of a constitution do not intend that it be amended as often as other legislation; indeed, it is not unusual for provisions of the constitution to be made amendable only by special procedures imposing more difficult forms and heavier majorities of the members of the legislature.[354]

Carrying further this description, the High Court of Zambia held, in *John Banda v The People*,[355] that the Constitution:

> … is the supreme law of the land, and consequently all other laws derive their force of law from it, and are therefore subordinated to it. This being the legal position, it cannot therefore be doubted that unless the Constitution is specifically amended, any provision of an Act of Parliament that contravenes the provisions of the Constitution is null and void.[356]

The constitutional supremacy underlies a constitutional democracy as opposed to a parliamentary democracy.[357] Unlike in a parliamentary democracy, where the parliament enjoys overriding supremacy over the Constitution, in a constitutional democracy the centre-piece of democracy 'is not a sovereign parliament but a supreme law (the Constitution).'[358] As the Supreme Court of Zimbabwe held in *Tendai Laxton Biti & The Movement for Democratic Change v The Minister for Justice, Legal and Parliamentary Affairs & the Attorney-General*;[359] 'In a constitutional democracy it is the courts, not Parliament, that determine the lawfulness of actions of bodies, including Parliament.'

Emerging from the foregoing constitutional principles, it is important that national Constitutions should contain children's rights so as to ensure that these rights are constitutionally grounded; and further that they cannot be "altered" by a mere amendment or repeal of a law in which they are contained. Strengthening this contention, in its General Comment No. 5,[360] the CROC has pointed out that:

> The test must be whether the applicable rights are truly realized for children and can be directly invoked before the courts. The Committee welcomes the inclusion of sections on the rights of the child in national constitutions,[361] reflecting key principles in the Convention, which helps to underline the key message of the Convention - that children alongside adults are holders of human rights.[362]

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354 *Ibid*, para 16.

355 (2002) AHRLR 260 (ZaHC 1999).

356 *Ibid*, para 14.

357 UK is amongst parliamentary democracies where the sovereign parliament overrides the constitutional order. *See* particularly *Bribery Commissioners v Ranasinghe* [1965] AC 172, [1963] 2 All ER 785 (PC, Ceylon).

358 *See* particularly *Chairman, Public Service Commission and others v Zimbabwe Teachers' Association and others* 1996 (1) ZLR 637 (SC) at 651, 1997 (1) SA 209 (ZS) at 218 & 219.

359 (2002) AHRLR 266 (ZwSC 2002).

360 CROC, General Comment No. 5: 'General Measures of Implementation for the Convention on the Rights of the Child.' CRC/GC/2003/5 (Adopted at the 34th session on 27 November 2003).

361 Interestingly, some States Parties to the CRC have suggested to the Committee that 'the inclusion in their Constitutions of guarantees of rights for "everyone" is adequate to ensure respect for these rights for children.' *Ibid*, para 21. See particularly, Section 4 of the Interpretation of Laws Act, Cap. 1 R.E. 2002.

362 *Ibid*.

However, the CROC has cautioned that: 'this inclusion does not automatically ensure respect for the rights of children. In order to promote the full implementation of these rights, including, where appropriate, the exercise of rights by children themselves, additional legislative and other measures may be necessary.'[363]

In light of this clarification by the CROC, many countries around the world have adopted constitutional measures to domesticate the provisions enshrined not only in the CRC and the ACRWC but also in other international human rights treaties. This is evidenced by the constitutionalisation of children's rights in the Bills of Rights in the recently-promulgated Constitution of Kenya and in the 1995 Ugandan Constitution (as well as the Tanzanian Draft Constitution), as considered below.

4.2 The Concept and Process of Constitution-making

Constitution-making is a vital component of national life, which seeks to improve livelihoods; and strengthen the rule of law, democracy and democratization as well as protection of human rights in a given country. In a sense, a Constitution is a law, which has the same function as custom, legislative acts, ordinances, decrees and bylaws whose development 'resembles the development of law generally, at least in one important respect: both are dominated by unwritten custom at first, and by written enactment later.'[364] Although in the past Constitutions needed not to be democratic, in the contemporary world they need to be democratic because 'the modern period we live in is dominated by a heightened consciousness about democracy, and the ultimate agenda of reform in the political sphere is democracy.'[365]

This reality makes it mandatory for modern Constitution-making processes to be conducted democratically with the popular participation of the citizenry as opposed to the past where political and constitutional reforms consisted essentially of the monolithic organisation of society (represented by single-party, military and personal-rule regimes). Now there is a radical shift from this approach of Constitution-making 'to a more open plural form, the main rationale of constitutional reform is greater democracy and the strengthening of the democratisation process.'[366] For this reason, current debate on constitutional processes and reform tends to be less about 'whether there is such a covenant or *grundnorm*, and more about whether such constitutionalism is an attempt at guaranteeing democracy.'[367]

Viewed in this context, Constitution-making is deemed as a rule-making process, which necessarily entails the principle that constitutional reform is a rule-change phenomenon. Over the past twenty or so years, Africa has witnessed a concerted level of constitutional review and making processes in many countries. Countries like Kenya, South Africa, Namibia, Rwanda and Uganda, to mention but a few, have reformed their Constitutions and written new ones. As Shivji reminisces, there have been three generations of Constitutions in Africa.[368] The first generation of Constitutions was

363 *Ibid*.

364 Mukangara, D.R., 'Forms and Reforms of Constitution-Making with Reference to Tanzania' *UTAFITI [New Series) Special Issue* Vol. 4, 1998-2001, pp. 131-150.

365 *Ibid*, p. 131.

366 *Ibid*, p. 132.

367 *Ibid*.

368 Shivji, I.G., 'Three Generations of Constitutions and Constitution-making in Africa', in Godwin G.R. (Edition), *Where is Uhuru? Reflections on the Struggle for Democracy in Africa – Issa G. Shivji* Oxford: Fahamu Press/Dar es Salaam: E&D Vision Publishing, 2009, p. 50.

independent Constitutions, followed by the second generation which comprised of constitutions that 'emerged in the process of colonial restructuring of power in the three decades following independence.'[369] The third generation consists of Constitutions that were written in the past ten years in the context of globalization and democratization in Africa.

It has been argued that most Constitutions of African states in the first two generations – and especially former British colonies or possessions – have lacked legitimacy, and 'are highly contested because, despite their facilitation of smooth transitions to new administrations, they did not involve "the people".'[370] Even where subsequent Constitutions have superseded transitional ones, it is argued, 'there has not been an involvement of "the people", and therefore the Constitutions remain aloof, imperial and oppressive. Only when "the people" participate through a national or mass constitutional conference is legitimacy realized.'[371] This argument is founded in Mukangara's caveat that:

> Although every constitution is likely to be challenged by any new generation, it is less probable that a constitution perceived to have been historically approved by the majority of a previous populace will meet with such abject sectional disapproval as does the Tanzanian and constitutions of similar states, which are perceived differently. However, the perceived "popular" beginnings of a constitution are only a small part of the explanation for its survival and endurance. An examination of the process leading to the adoption of the US Constitution may throw some light on the matter.[372]

In fact, the history and legacy of America's Constitutional Convention of 1787 in Philadelphia 'has produced images of democratic and popular participation in Constitution-making that have contributed to the respect with which the resultant American Constitution is treated.'[373] The convention that worked out the US Constitution was constituted of and discussed by 55 delegates representing 12 of the then 13 states of the American Confederation from May to September 1787. Although there were bitter struggles for and against the Constitution, and many issues about which there were struggles, including the lack of adequate constitutional safeguards for fundamental rights, the Constitution was finally approved by all states nearly three years later in 1790, amidst all these bitter differences of opinion.[374] This prompted John Adams, a later US President, to write that the US Constitution was 'extorted from the grinding necessity of a reluctant people.'

4.3 The Rationale for Constitutionalising Children's Rights in Modern Constitutions

It has been argued that, historically, the need to protect basic human rights and fundamental freedoms 'has been a feature of struggles for better laws or enlightened

369 *Ibid*.

370 Mukangara, op. cit, p. 136. *See* also Liundi, G., 'A Proposal for a New Constitutional Order.' A paper presented to a symposium of the Society for International Development. British Council, Dar es Salaam, 1994, p. 10; and Makaramba, *R. V. A New Constitutional Order for Tanzania? Why and How* Occasional Paper for Friedrich Ebert Stiftung and the Tanganyika Law Society, Dar es Salaam, 1988.

371 Mukangara, *Ibid*.

372 *Ibid*.

373 *Ibid*.

374 *Ibid*, p. 137.

governance for many centuries.'[375] So, when in the *Magna Carta* English nobles wrested from the King the concession that no one should be punished until a case had been duly made against him or her according to the law, 'they were seeking a guarantee of human rights, as indeed they were when they finally abolished the so-called divine right of monarchs.'[376] This was replicated in many subsequent constitutional provisions[377] the world over, which particularly sought to protect human rights against atrocities occasioned on civilians.

More recently, the atrocities that were made on civilians in the times of World War II necessitated the enshrinement of the principles of human rights protection and promotion worldwide in the Preamble and Articles 1(3), 55(c) and 62(2) of the United Nations Charter. The subsequent adoption of the Universal Declaration of Human Rights in 1948 (UDHR) and the two human rights instruments adopted by the UN in 1966[378] as well as the regional human rights instruments;[379] and later the CRC in 1989 and the ACRWC in 1990, justified this approach.

In modern Constitution-making, the need to constitutionalize human rights generally and children's rights particularly emanates from the assumption that 'the Constitution is the supreme law of the land and therefore any law or conduct inconsistent with it is void.'[380] Therefore, constitutionalisation of basic rights is 'an attempt to entrench such rights in not only the highest law in the country for justiciable purposes, but also to flag the primary purpose for the existence of the state, namely; the promotion and protection of human dignity, equality for all, and human rights.'[381] It is therefore pertinent that 'countries become alive to the need to strengthen democracy by ensuring Children Rights in their Constitutions as they have done with Human Rights.'[382] In principle, it can be argued that respect for a Constitution 'increases when basic rights and fundamental freedoms (including children's rights) are guaranteed in a Constitution via a Bill of Rights.'[383]

375 *Ibid*, p. 139.

376 *Ibid*.

377 *See*, for example, the first 10 amendments of the US Constitution and the Declaration of the Rights of Man and the Citizen in the French Revolution.

378 The International Covenant on Civil and Political Rights (ICCPR) (G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force 23 March 1976 and the International Covenant on Economic, Social and Cultural Rights (ICESCR) (G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force on 3 January 1976.

379 *See* particularly the African Charter on Human and Peoples' Rights (ACHPR), adopted by the OAU in 1981 and came into force in October 1986; the American Convention on Human Rights, opened for signature 22 November 1969, 1144 U.N.T.S. 123, entered into force 27 August 1979; and the European Convention for the Protection of Human Rights and Fundamental Freedoms, Opened for signature 4 November 1950, 213 U.N.T.S. 221, entered into force 3 September 1953.

380 Mutungi, O. K., 'The Constitutionalisation of Basic Rights', in Constitution of Kenya Review Commission, *Report of the Constitution of Kenya Review Commission*. Approved for Issue at the 68th Meeting of the Commission held on 10 April 2003. Available online at http://www.ldphs.org.za/resources/local-government-database/by-country/kenya/commission-reports/Devolution%20and%20constitutional%20development%20papers.pdf (Accessed on 29 January 2013), p. 174.

381 *Ibid*.

382 Muthoga, L.G., 'International Conventions of the Rights of the Child', in Constitution of Kenya Review Commission, *Report of the Constitution of Kenya Review Commission*, *Ibid*, p. 202.

383 Mukangara, op. cit, p. 141.

4.4 Constitutionalisation of Children's Rights in East Africa

As shall be seen below, all the common law East African countries considered in this book have constitutionalised children's rights. Whereas Kenya and Uganda have directly constitutionalised children's rights, Tanzania has indirectly done son.[384]

4.4.1 Constitutionalisation of Children's Rights in Uganda

Uganda embarked on writing its current Constitution in the early 1990s. The revision of the Constitution in 1995 was 'an attempt to make the supreme law of the country consistent with international and regional instruments ratified by Uganda.'[385] These included the African Charter on Human and Peoples' Rights (ACHPR) on 10 May 1986; the CEDAW in 1989; the CRC on 16 August 1990 (less than a year of its adoption); and the ACRWC on 17 August 1994. It also acceded to the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (OPSC)[386] on 30 November 2001; and ratified the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict[387] on 6 June 2002.

As a direct influence of international law, several articles in the current Constitution give special protection to vulnerable groups such as children and make it a duty of every citizen to protect these groups from any form of abuse, including sexual abuse. The Constitution also protects children under the age of sixteen years from social and economic exploitation and hazardous employment. This is relevant to the ILO Convention No. 138 on Minimum Age for Employment and ILO Convention No. 182 (1973) on the Worst Forms of Child Labour (1999).

This age varies with what is provided by the Convention, which could have arisen because of the need to protect children from work that would deny them education and development. In recognition of the state of Uganda's economy and educational infrastructure that necessitates that a child at 14 years can start work for survival for certain reasons, an addendum to the ILO ratification instrument has been prepared and submitted to ILO spelling out 14 years as the minimum for admission to employment in Uganda. A draft National Child Labour policy has been prepared and other mechanisms to intervene in child labour have been established.[388]

In particular, Section 34 of the 1995 Constitution of the Republic of Uganda includes the principle of the best interests of the child and the rule requiring children to be separated from adults while in detention among a number of children's rights. This section categorically provides that:

> 34(1) Subject to laws enacted in their best interests, children shall have the right to know and be cared for by their parents or those entitled by law to bring them up.

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384 In its bid to replicate what Kenya and Uganda have done, the Tanzanian Draft Constitution has proposed provisions specific to children's rights in Article 42.

385 Republic of Uganda, 'Implementation of the African Charter on the Rights and Welfare of the Child in Uganda', op. cit.

386 Adopted and opened for signature, ratification and accession by the United Nations General Assembly resolution A/RES/54/263 of 25 May 2000; entered into force on 18 January 2002.

387 Adopted and opened for signature, ratification and accession by the United Nations General Assembly resolution A/RES/54/263 of 25 May 2000; entered into force on 12 February 2002.

388 *Ibid*.

(2) A child is entitled to basic education which shall be the responsibility of the State and the parents of the child.

(3) No child shall be deprived by any person of medical treatment, education or any other social or economic benefit by reason of religious or other beliefs.

(4) Children are entitled to be protected from social or economic exploitation and shall not be employed in or required to perform work that is likely to be hazardous or to interfere with their education or to be harmful to their health or physical, mental spiritual, moral or social development.

(5) For the purposes of clause (4) of this article, children shall be persons under the age of sixteen years.

It is to be noted that the Constitution of Uganda, like all modern Constitutions, is the supreme law of the country and any law or any custom that is inconsistent with the Constitution is void to the extent of such inconsistency.[389] This means that by constitutionalisation of children's rights, such rights have been accorded a constitutional standing against which any inconsistency is void. In compliance with this constitutional supremacy, Uganda was one of the first African countries to harmonise child related laws with international standards by enacting the Children Act in 1996.[390]

4.4.2 Constitutionalisation of Children's Rights in Kenya

Like the 1995 Constitution of Uganda and the 1996 Constitution of South Africa,[391] the Constitution of Kenya (2010)[392] contains specific provisions protecting the rights of the child in Article 53. It introduces 'a progressive Bill of Rights (Chapter 4) that is by and large guided by international human rights standards'[393] as it enshrines both socio-economic rights[394] and civil and political rights[395] in a single text. All these rights are judicially justiciable, as opposed to the old-school of Constitution-making that tended to only make civil and political rights as judicially enforceable, leaving socio-economic rights as unjustifiable.[396] In addition to this, the Bill of Rights also enshrines other rights, including equality and freedom from discrimination, the rights of persons with disabilities, rights of older members of society, rights of minorities and rights of children.

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389 *See* particularly Article 2(2) of the Constitution of Uganda (1995).

390 *See* particularly African Child Policy Forum, *Harmonisation of Children's Laws in Eastern and Southern Africa* Addis Ababa: African Child Policy Forum, 2012, p. 184.

391 Section 28 of the Constitution of the Republic of South Africa (1996).

392 The Kenyan Constitution entered into force on 27 August 2010.

393 African Child Policy Forum, op. cit, p. 65.

394 The socio-economic rights enshrined in the Kenyan Constitution include the rights to health, education, food, social security, water and sanitation, and housing.

395 These rights include the rights to life, liberty and security of the persons, and privacy; and freedoms of conscience, religion, belief and opinion, of association and assembly.

396 The justiciability and non-justiciability of socio-economic rights in African Constitutions have been recently discussed at some considerable length in Mashamba, C.J., 'Are Economic, Social and Cultural Rights Judicially Enforceable?' *Open University Law Journal* Vol. I No. 1, July 2007; Mashamba, C.J., 'Using Directive Principles of State Policy to Interpret Socio-Economic Rights into the Tanzanian Bill of Rights' *The Law Reformer Journal* Vol. 2 No. 1, 2009; and Mashamba, C.J., 'Are Economic, Social and Cultural Rights Judicially Enforceable?' *East African Journal of Peace and Human Rights* Vol. 15 No. 2, 2009. See also YIGEN, K., 'Enforcing Social Justice: Economic and Social Rights in South Africa' International Journal of Human Rights Vol. 4, No. 2, Summer 2000.

In particular to constitutionalisation of children's rights, the 2010 Kenyan Constitution enshrines these rights in Article 53, which guarantees to every child the rights to a name and nationality from birth;[397] to free and compulsory basic education;[398] and to basic nutrition, shelter and health care.[399] It also provides a constitutional guarantee to every child to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour.[400]

In addition, the Kenyan Constitution guarantees to every child the right to parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not.[401] It further prohibits a child not to be detained, except as a measure of last resort, and when detained, to be held for the shortest appropriate period of time;[402] and separate from adults and in conditions that take account of the child's sex and age.[403] In a more emphatic note, the Kenyan Constitution guarantees a child's best interests, which are to be of paramount importance in every matter concerning the child.[404]

Parallel to the specific child rights in Article 53, children are entitled to the realisation of all other rights enshrined in the Bill of Rights in the Kenyan Constitution, including socio-economic rights contained in Article 43.[405] In a similar vein, the Constitution also recognises the right of every person, including a child, to pursue action in the courts in the event of denial of any of the rights guaranteed in the Bill of Rights.[406] In addition, the Kenyan Constitution provides for access to other institutions (like the Kenya National Human Rights and Equality Commission established under Article 59) by all persons, including children.

4.4.3 'Indirect' Constitutionalisation of Children's Rights in Tanzania

The Constitution of the United Republic of Tanzania does not "directly" protect children's rights;[407] rather it "indirectly" protects the basic rights and fundamental freedoms of every person in general terms. The term "every person", in the context of Section 4 of the Interpretation of Laws Act,[408] means any word or expression descriptive of a person, which includes a child. Therefore, children are entitled to all the rights and freedoms set out in Articles 12 to 24 of the Constitution of Tanzania. In terms of Article 13(5) of the Constitution, discrimination of persons, including children, is prohibited. It is expected, however, that the ongoing constitutional review process

397 Article 53(a) of the Constitution of Kenya (2010).

398 *Ibid*, Article 53(1)(b).

399 *Ibid*, Article 53(1)(c).

400 *Ibid*, Article 53(1)(d).

401 *Ibid*, Article 53(1)(e).

402 *Ibid*, Article 53(1)(f)(i).

403 *Ibid*, Article 53(1)(f)(ii).

404 *Ibid*, Article 53(2).

405 African Child Policy Forum, *Harmonisation of Children's Laws in Eastern and Southern Africa: Country Briefs*, op. cit, p. 66.

406 *Ibid*.

407 Legal and Human Rights Centre and Zanzibar Legal Services Centre, *Tanzania Human Rights Report 2010* Dar es Salaam, Legal and Human Rights Centre and Zanzibar Legal Services Centre, 2011, p. 177 (quoting Clement Mashamba, a human rights lawyer in Tanzania and a member of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC)).

408 Cap. 1 R.E. 2002.

will result in a new Constitution that will contain specific provisions protecting child rights.[409]

Nonetheless, the Draft Constitution, which was unveiled on 3 June 2013, has addressed this anomaly. In particular, Article 42 of the Draft Constitution proposes to provide guarantees to the child's rights to name, education and recreation, housing, shelter and health. It also proposes to protect the rights of children in conflict with the law and the child's right to protection against any form of violence and abuse.

409 This process is being coordinated by the Constitutional Review Commission (CRC), established under Section 5 of the Constitutional Review Act (Acts Nos. 8 of 2011 and 2 of 2012), Cap. 83 R.E. 2012. Already the Tanzania Child Rights Forum (TCRF) has urged the CRC to consider having a specific provision containing a Bill of Child Rights. See Tanzania Child Rights Forum, 'Tamko la Jukwaa la Haki za Watoto (TCRF) Kuhusu Haki za Watoto Katika Mchakato wa Kuunda Katiba Mpya', presented to the Constitutional Review Commission at the Karimjee Hall in Dar es Salaam on 9 January 2013. One of the authors of this book, Clement Mashamba, was the lead presenter of the position paper and has notes of the proceedings of this presentation on file.

Chapter Five

The Influence of International Child Law on Domestic Legislation in Common Law in East Africa

5.0 Introduction

The domestication of international child law in municipal law depends largely on the system applicable for the domestication of international treaties in each and every country.[410] There are mainly two systems applicable to the domestication of international treaties in municipal law, namely, the monist; by which international conventions are directly incorporated into law, and the dualist system under which treaties can only be incorporated into national law by domestic statute.[411]

The CROC, in its General Comment No. 5 on "General Measures"[412] of the implementation of the CRC, has given endorsement by its interpretation of the system by which a state can domesticate international treaties.[413] But, to a large extent, 'the system chosen by a state can be deduced from looking at the state's law and practice with respect to different international instruments.'[414] All the three common law East African countries considered in this book fall within the dualist system, which is dominant in common law countries.[415] This means that all the three countries have domesticated the principles enshrined in the CRC and the ACRWC through domestic statutes.[416] In this Chapter, we examine the law reform processes through which the three countries have domesticated international child law.

5.1 State Obligation to Domesticate International Child Law

In many countries around the world, measures have been taken or are under way to bring existing laws, relevant to children's rights, in line with the provisions of the

410 *See* particularly Odongo, G.O., 'The Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context.' LL.D. Thesis, University of Western Cape, 2005, p. 73; Mapunda, B.T., 'Treaty Making and Incorporation in Tanzania' *East African Law Review* Vol. 28-30, December 2003; and Veerman, P. and B. Gross, 'Implementation of the United Nations Convention on the Rights of the Child in Israel, the West Bank and Gaza' *The International Journal of Children's Rights* Vol. 3, 1995, p. 297.

411 Odongo, *Ibid*.

412 CROC, General Comment No. 5: 'General Measures of Implementation for the Convention on the Rights of the Child.' CRC/GC/2003/5 (Adopted at the 34th session on 27 November 2003).

413 *Ibid*, paras 18-20.

414 Odongo, op. cit, quoting Lindholt, L., *Questioning the Universality of Human Rights: The African Charter on Human and Peoples' Rights in Botswana, Malawi and Mozambique* Aldershot/Vermont: Ashgate/Dartmouth, 1997, p. 85.

415 *See* particularly Brownlie, I., *Principles of Public International Law* 4th edn. Oxford: Clarendon Press, 1995, p. 43.

416 For instance, Kenya in its Initial State Report on the CRC presented to the CROC and examined at the Committee's 27th session in 2001 explained that: 'The Constitution of Kenya does not specify the methods for transforming international treaties into municipal law. Kenya's practice follows the English one whereby for a treaty to apply, Parliament must pass an enabling Act to give effect to it.' See CROC, *Kenya Initial Report to the CROC* CRC/C/3/Add.62, 16 February 2001, para 46. On its part, Article 63(3)(e) of the Constitution of the United Republic of Tanzania (1977) empowers Parliament to ratify international treaties signed by Tanzania before they become applicable at the municipal level.

CRC and the ACRWC.[417] Whereas some countries, like Kenya, Tanzania and Uganda, have adopted composite legislation constituting provisions for protection of the rights of children in conflict with the law and those for the care and protection of children's rights in a single text, others have adopted separate legislation for the two aspects of children's rights.

All the three common law East African countries have ratified the CRC and the ACRWC.[418] This means that they are bound to implement the two children's rights instruments at the domestic level. Under both the CRC and ACRWC, all countries that have ratified these instruments have an obligation to implement them at a two-tier level. In the first place, ratifying countries have an obligation to implement these instruments through the international norm enforcement mechanism. In the second place, the ratifying countries have obligations to implement the instruments at the domestic level.[419]

As part of their international obligations, ratifying states are required to submit progressive reports to the CROC and the ACERWC.[420] The second aspect of states' obligations under the two instruments – domestic implementation – is of great significance;[421] because 'the success or failure of any international human rights treaty should be evaluated in accordance with its impact on human rights practices at the domestic level.'[422] Under both the CRC and the ACRWC, States Parties' obligations to implement these instruments in their respective jurisdictions are couched in such phraseology as States Parties shall take "measures to implement provisions and principles" in these instruments. The "measures" envisaged include adoption of legislation, review and introduction of policies and/or other administrative or programmatic measures, including budgetary allocations, for children in accordance with the laid constitutional principles and processes.

The scope of domestic obligations imposed on the ratifying states by the international children's rights law has been expounded by the CROC in its General Comment No. 5 on "General Measures"[423] of the implementation of the CRC. The CROC has expounded different mechanisms that are to be put in place and implemented at the domestic level. Accordingly:

> These include the need for a comprehensive national strategy such as a National Plan of Action (NPA) on Children, independent human rights institutions such as children's ombudspersons and national human rights commissions, making children visible in budgets, training and capacity building, international co-operation within a rights-based

417 Doek, J., 'Child Justice Trends and Concerns with a Reflection on South Africa', in Gallinetti, J., et al (Edition), *Child Justice in South Africa: Children's Rights Under Construction (Conference Report)* Bellville: Open Society Foundation for South Africa/Child Justice Alliance, August 2006, p. 12.

418 Tanzania ratified the CRC on 10 June 1991 and it entered into force in respect of Tanzania on the same date. It also ratified the ACRWC in February 2003. Uganda ratified the CRC on 16 August 1990 and the ACRWC on 17 August 1994. Kenya ratified the CRC on 31 July 1990 and the ACRWC on 25 July 2000.

419 Odongo, G.O., 'The Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context', op. cit, p. 68.

420 The mandate, reporting and monitoring mechanisms of the CROC and ACERWC are discussed at length in Chapter 3 above.

421 Heyns, C. and F. Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level*. The Hague, Kluwer Law International, 2002, p. 1.

422 Odongo, op. cit, pp. 68 & 69.

423 CROC, General Comment No. 5: 'General Measures of Implementation for the Convention on the Rights of the Child.' CRC/GC/2003/5 (Adopted at the 34th session on 27 November 2003).

> development assistance approach and local cooperation with civil society, amongst other measures.[424]

In principle, the CROC has made it clear that 'it believes a comprehensive review of all domestic legislation and related administrative guidance to ensure full compliance with the Convention is an obligation.'[425] In paragraph 18 of General Comment No. 5, the CROC has emphasised that:

> The review needs to consider the Convention not only article by article, but also holistically, recognizing the interdependence and indivisibility of human rights. The review needs to be continuous rather than one-off, reviewing proposed as well as existing legislation. And while it is important that this review process should be built into the machinery of all relevant government departments, it is also advantageous to have independent review by, for example, parliamentary committees and hearings, national human rights institutions, NGOs, academics, affected children and young people and others.

Viewed in this context, both the ACRWC and the CRC require that States Parties to take necessary measures for the full realisation of basic rights by children by particularly adopting laws, procedures, authorities and practices geared towards full realisation of children's rights in their jurisdictions.[426]

From this exposition, it can be noted that the interpretation of the obligation to undertake child law reform as requiring separate and distinct legislation dedicated to children influenced the East African law reform processes in the 1990s and 2000s. This resulted in the enactment of Ugandan Children Act in 1996; the Kenyan Children's Act in 2001; and the Tanzanian Law of the Child Act in 2009. These are composite laws, which combine provisions for child protection, care and welfare, on the one hand; and those regulating juvenile justice, on the other. The discussion that follows in this Chapter, therefore, examines the specific child law reforms in the three East African countries in the context of the CRC and the ACRWC. The aim of this Chapter is to set out a comparative examination of the relevant child law reform process and the extent to which these laws have complied with international child law.

5.2 The Child Law Reform Processes in Common Law with specific reference to East Africa

The fact that the three common law countries in East Africa – Kenya, Tanzania and Uganda – ratified the CRC without reservations 'signals the commitment of these countries to be legally bound to the full extent of the CRC's provisions.'[427] This view was given judicial authority by Justice Musumali of the Zambian High Court in *Sara Longwe v International Hotels*[428] where he held that: 'Ratification of such [instruments] by a nation state without reservations is a clear testimony of the willingness by the state to be bound by the provisions of such [a treaty].'

424 Odongo, op. cit, p. 70.

425 CROC, General Comment No. 5, op. cit.

426 Odongo, op. cit, p. 71. See also Skelton, A., 'Developing a Juvenile Justice System for South Africa: International Instruments and Restorative Justice', in Keightley, R. (Edition), Children's Rights Kenwyn: Juta and Co., 1996, p. 183.

427 Odongo, *Ibid*, p. 75.

428 (1993) 4 LRC 221.

Uganda pioneered the process to enact laws specific for children not only in East Africa but for the entire continent,[429] which influenced the enactment of child laws in most of Sub-Saharan Africa. Quoting Parry-Williams, Odongo notes that at the time of the completion of the research phase for a new child law in Uganda, 'governments in many African states were aware of the need to address the shortcomings in their (colonially inherited) child legislation and some had already embarked on the process of comprehensively reforming the laws concerning children, although none of the bodies set up to do this had [as at the time] yet presented their proposals to government with the exception of Uganda.'[430] However, whereas Uganda enacted its child law in 1996, it took several years before Kenya (in 2001)[431] and Tanzania (in 2009) enacted their child laws. The reasons for this variation are set out in the sections below.

5.2.1 The Enactment of the Uganda Children's Statute (1996)

Appreciating the fact that Uganda was the first country to enact a specific child rights legislation in Sub-Saharan Africa, this section examines the process of domestication of international child rights norms in this country. It traces the genesis of this process by looking at the participatory consultative process that was adopted in Uganda; and the outcome of this process – i.e. the 1996 Children Act. It also looks at the emerging urgent need to amend the Children Act.

5.2.1.1 Domestication of International Treaties in Uganda

Uganda is a dualist country, which means that international instruments cannot be applicable in Uganda unless there is a local legislation domesticating such instrument.[432] This notion is reflected in Article 123 of the Constitution of Uganda, which enjoins Parliament to enact laws to govern the ratification of international treaties, conventions and agreements.[433] It should be noted that Article 123 empowers the Executive to conclude treaties, while Parliament is empowered to make laws to govern their ratification and domestic implementation.[434] Using this constitutional mandate, in 1998 Parliament enacted the Ratification of Treaties Act,[435] which provides for domestication of international treaties after incorporation by an Act of Parliament.

The Ratification of Treaties Act requires all international treaties, except some specific treaties that require Parliament ratification, to be ratified by Cabinet. This means,

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429 *See* particularly African Child Policy Forum, *Harmonisation of Children's Laws in Eastern and Southern Africa* Addis Ababa: African Child Policy Forum, 2012, p. 184.

430 Odongo, op. cit (note 50). See particularly Parry-Williams, J., 'Legal Reform and Children's Rights in Uganda - Some Critical Issues' *International Journal of Children's Rights* Vol. 49 No. 1, 1993. See also Mbazira, C., *Harmonization of National and International Laws to Protect Children's Rights: The Uganda Case Study* (2006-2011) Addis Ababa: African Child Policy Forum, 2011.

431 African Child Policy Forum, *Harmonisation of Children's Laws in Eastern and Southern Africa: Country Briefs*, op. cit, p. 65.

432 *See* particularly Brownlie, I., *Principles of Public International Law* Oxford: Oxford University Press, 1990, pp. 32 & 33; and African Child Policy Forum, *Ibid*, p. 183.

433 In Article 123(1) the Constitution of Uganda provides that: 'Parliament shall make laws to govern ratification of treaties, conventions, agreements or other arrangements made under clause (1) of this article.' The said clause stipulates that: 'The President or a person authorised by the President may make treaties, conventions, or other arrangements between Uganda and any other country or between Uganda and any international organisation or body, in respect of any matter.'

434 Africa Wide Movement for Children, *An Africa Fit for Children: Progress and Challenges* Kampala: Africa Wide Movement for Children, 2012, p. 5 (note 11).

435 Act No. 5 of 1998.

therefore, that there is two-stage domestication of international treaties in Uganda, which involves the Executive and Parliament. Treaties that require parliamentary ratification include those relating to armistice, neutrality or peace and in which the Attorney-General has certified in writing that their implementation under Ugandan law would require amendment of the constitution.[436] In principle, these treaties are regarded as constitutionally significant treaties.[437] The rest of international treaties are ratified by Cabinet, which also require that they must be submitted to Parliament and deposited with the Ministry of Foreign Affairs.[438]

5.2.1.2 The Process of Enacting the Uganda Children's Statute

Uganda is a party to the CRC[439] and ACRWC;[440] and, as such, it is bound to domesticate these instruments. The domestication of these international children's rights instruments has been fulfilled through the enactment of the Uganda Children's Statute (1996)[441] (now the Children Act), which is the first comprehensive child law to be enacted in Africa[442] after the adoption of the CRC in 1989 and the ACRWC in 1990.[443] It was enacted as part of the law reform endeavours that were undertaken in Southern and Eastern African countries, which aimed at domesticating the CRC and the ACRWC. These endeavours are intended 'to synthesize common, civil and customary laws, and to modernise and codify a myriad of outdated statutes affecting children that were inherited from the colonial era...'[444]

In principle, the Uganda Children's Statute 'operationalises the provisions of the ACRWC and decentralizes matters relating to legal rights of children, care and support services for children as low as the sub county which is the lowest administrative unit, making such services more accessible.'[445]

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436 Africa Wide Movement for Children, op. cit, p. 6 (note 12).

437 *See* generally Shelton, D., *International Law and Domestic Legal Systems: Incorporation, Transformation and Persuasion* New York: Oxford University, 2012, p. 597 et seq.

438 Africa Wide Movement for Children, op. cit.

439 Uganda ratified the CRC on 17 August 1990 and it entered into force in respect of Uganda on 16 September 1990.

440 Uganda signed the ACRWC in February 1992 and ratified it on 17 August 1994.

441 (Act No.8 of 1996) Cap. 59 of the Laws of Uganda.

442 *See* particularly Odongo, G.O., 'The Domestication of International Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context', op. cit; and Child Law Review Committee (Uganda), *Report of the Child Law Review Committee of the Ministry of Labour and Social Welfare* Vol. 3, 1992.

443 For a comparative analysis of this development, see particularly Sloth-Nielsen, J., 'A Developing Dialogue – Children's Rights, Children's Law and Economics: Surveying Experiences from Southern and Eastern African Law Reform Processes' *Electronic Journal of Comparative Law* Vol. 12 No. 3, December 2008. Available at http://www.ejcl.org/123/art123-5.pdf (Accessed on 17 May 2012). Originally, this paper was prepared for the International Society of Family Law Conference, Vienna, Austria, September 2008; Sloth-Nielsen, J. and B.D. Mezmur, 'Surveying the Research Landscape to Promote Children's Legal Rights in an African Context' *African Human Rights Law Journal* Vol. 7 No. 2, 2007, pp. 330-353; and African Child Policy Forum, '*Harmonisation of Laws in Eastern and Southern Africa: Good Practice*'. 2007. available at www.africanchildforum.org

444 Sloth-Nielsen, J., 'A Developing Dialogue – Children's Rights, Children's Law and Economics: Surveying Experiences from Southern and Eastern Africa Law Reform Processes', *Ibid*.

445 Republic of Uganda, 'Implementation of the African Charter on the Rights and Welfare of the Child in Uganda'. Ministry of Gender, Labour and Social Development, November 2007, p. 2.

The Children Act was enacted as a comprehensive law to deal with all issues relating to children. It reforms and consolidates different laws,[446] which existed hitherto; thus, it 'provides guidance on how to handle children matters when they arise under specific laws. It aims at providing more protection for children.'[447]

5.2.1.3 The Genesis of the Uganda Child Law Reform

As in the other common law East African countries, in Uganda the call to have a child specific law pre-dates the CRC.[448] The first call was made in 1964 and re-echoed later 'when the then Ministry in charge of children's matters drafted the Children and Young Persons Bill which was brought forward as a draft decree in 1973 and 1977 but never enacted despite efforts to this end up to 1981.'[449] However, these early attempts did not yield any child law because, as Parry-William contends, reform of the laws concerning children in Uganda was then 'a very low issue politically and further to this, it was not seen in the international proactive context of the rights of the child but rather as reactive to an internal problem.'[450]

Therefore, up and until the country's ratification of the CRC in 1990, Uganda was 'like many developing countries saddled with old colonial laws written when the belief in the rights of the child were at a very early stage.'[451] Odongo notes that hitherto the laws relating to children were in profusion; 'but with regard to juvenile justice, the now repealed Approved Schools Act modelled on the British[452] Children and Young Persons Act, 1933, made provisions for dealing with children under the age of 16 both as offenders and as in need of care and protection. It has been argued that the lobby for reform was in recognition of the deficiency of such laws and the inappropriacy of the old colonial mechanisms for their administration.'[453]

The inappropriacy of colonially inherited child laws in Uganda was also uncovered at a UNICEF-convened national seminar that was held in Kampala in 1988,[454] one year before the CRC was adopted. This landmark occasion on the rights of the child further catalysed the lobby for child law reform in Uganda.[455] As Odongo reminisces,

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446 Kasingye, A., 'Role of the Police under Diversion: An Assessment, Successes and Failures.' A paper available online at http://www.createsolutions.org/unicef/Documents/resources/country/africa/ugandapoliceroleindiversion. pdf (Accessed on 17 February 2013).

447 Republic of Uganda, 'Implementation of the African Charter on the Rights and Welfare of the Child in Uganda', op. cit.

448 Mulenga, J., 'The Law of Uganda in Relation to the Child' (1998). Unpublished paper cited in Parry-Williams, J., 'An Account of the Child Law Review Committee, Uganda 1989-1991: The Process and Considerations in Establishing the Committee and in Compiling its Proposals'. Unpublished MSc Dissertation submitted to the University of Lancaster, 1991, p. 24 (cited in Odongo, G.O., 'The Domestication of International Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context', op. cit., note 51). See also African Child Policy Forum, *Harmonisation of Children's Laws in Eastern and Southern Africa: Country Briefs*, op. cit, p. 184.

449 Odongo, *Ibid*, p. 81.

450 Parry-Williams, J., 'An Account of the Child Law Review Committee, Uganda 1989-1991: The Process and Considerations in Establishing the Committee and in Compiling its Proposals', op. cit, p. 24.

451 Parry-Williams, J., 'Legal Reform and Children's Rights in Uganda - Some Critical Issues', op. cit, p. 49.

452 Indeed, as Parry-Williams points out, the whole of Uganda's child law before the eventual reforms after ratification of the CRC comprised of inherited English colonial legislation and most of the applicable concepts reflected English rather than Ugandan societal realities, *Ibid*.

453 Odongo, op. cit, pp. 81&82.

454 *See* UNICEF (Uganda), 'Report on National Seminar on the Convention'. 1988 (Unpublished Report on file).

455 Odongo, op. cit, p. 82.

during this occasion, attended by individuals and organizations in the government and non-government sectors, 'both the Minister of Justice and Attorney General spoke about the need for child law reform in light of the inappropriacy of colonially inherited laws and the then impending international obligations of Uganda as the CRC was, at the time, in its final process of the drafting.'[456] Consequently:

> The recommendations of the Seminar were later to prove far-reaching in the implementation of children's rights in Uganda. In the period that followed various government leaders, government departments and agencies as well as many other persons spoke out on the need for law reform. No lesser political figure than Uganda's Head of State made a number of speeches in support of these calls. During the 1988 Seminar, President Museveni noted that "as important as the need for human rights is, even more important is the need to recognize and protect the special rights of children who are the most vulnerable members of our society".[457]

In particular, this seminar called for 'the need to highlight and raise awareness on the concept of child rights and the CRC (then being drafted) in government, amongst top education officials and in NGO circles.'[458] It also recommended that 'the Ugandan government ratify the CRC and simplify the CRC into local languages when adopted. It further stressed the need to update some of the national laws on children to ensure consistency with the CRC, incorporate children's rights into the Constitution and motivated that the government set up a national committee to follow up on the implementation of the CRC.'[459]

As it transpired later, Uganda was amongst the first African countries where there was a partnership 'between government and non-government persons in the lobby for [child law] reform.'[460] Although at this stage (1988-1990) the CRC was yet to be adopted, 'it was clear that the CRC's imminent adoption at the time was central to the lobby for reform albeit even if actual knowledge of the CRC's gestation was confined to a select few. There was therefore an urge at the time to meet the expectations of an impending universal children's rights treaty.'[461]

As such, an interface of a number of factors, 'including the recognition of a deficiency of the inherited child laws, the high-level governmental support, the partnership between government and civil society and the anticipation for the need to reflect the provisions of the CRC motivated the initiation of the Ugandan child law reform process.'[462] Viewed in this context, it can be contended that the ultimate formal beginning of the Ugandan child law reform process 'should not be regarded as the result of any single influence but instead as a complex interaction of pressures.'[463]

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456 *Ibid*.

457 *Ibid*, pp. 82 & 83.

458 *Ibid*, p. 82 (note 57).

459 *Ibid*. See particularly UNICEF (Uganda), 'Report on National Seminar on the Convention', op. cit.

460 Odongo, *Ibid*, p. 83.

461 *Ibid*.

462 *Ibid*.

463 Parry-Williams. 'An Account of the Child Law Review Committee, Uganda 1989-1991: The Process and Considerations in Establishing the Committee and in Compiling its Proposals', op. cit, p. 32.

5.2.1.4 The Child Law Reform Process in Uganda

The law reform function in Uganda is a mandate of the Uganda Law Reform Commission (ULRC), which is a constitutional body established under Article 248(1) of the Constitution of the Republic of Uganda to study and keep under constant review the Acts and all other laws comprising the laws of Uganda with a view to making recommendations for their systematic improvement, development, modernization and reform. According to Section 11 of the Uganda Law Reform Commission Act, the ULRC has powers, *inter alia*, to receive, review and consider any proposals for the reform of the law, which may be referred to it by any person or authority. In respect of the child law reform, however, the ULRC was not involved. Instead, a reform-minded Minister[464] in charge of children's welfare constituted an independent Child Law Review Committee (CLRC).[465]

Interestingly, when the Minister appointed members of the CLRC in 1990, he 'took considerable guidance from a child-rights NGO[466] that had been calling for reform and was to later maintain a key influence in the CLRC's deliberations.'[467] In terms of composition, the CLRC drew its members from all relevant government ministries and areas outside government including the fields of law, sociology, psychiatry, social work, the church and the NGO sector and child care agencies.[468] Even a subsequent increase in the membership from 12 to 14 'retained this balance which in addition has been stated as having represented 'a fair spectrum of age, regional and gender balance.'[469] Notably, the CLRC's membership was expanded 'so as to include two more representatives to take on board representation of two more disciplines that had been earlier left out of the original 12 members.'[470]

Inaugurated in June 1990, barely three months before Uganda's ratification of the CRC,[471] the CLRC's broad terms of reference included the review of the then existing laws concerning child welfare in relation to international and other documents on the rights of the child and 'to propose appropriate legislation which shall be beneficial to children who are disadvantaged and in conflict with the law.'[472] The CLRC also benefited from six (6) outside consultants from within Africa and Europe, 'who helped set the CLRC's work in a broader context.'[473]

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464 *per* Odongo, op. cit, p. 83.

465 Child Law Review Committee (Uganda), *Report of the Child Law Review Committee of the Ministry of Labour and Social Welfare* Vol. 3, 1992, p. 62.

466 Save the Children Fund (UK) had been active in the child social welfare sector at the time, particularly in the context of child soldiers and child victims of wars as a result of the war in Uganda. For a detailed description of the organization's influence in the genesis of the actual reform process, see Parry-Williams, op. cit, pp. 32-37; referred to in Odongo, op. cit, p. 84 (note 62).

467 Odongo, *Ibid*.

468 Child Law Review Committee (Uganda), *Report of the Child Law Review Committee of the Ministry of Labour and Social Welfare*, op. cit, p. 66.

469 Odongo, op. cit, p. 84.

470 *Ibid* (note 64).

471 It has been argued that the ratification of the CRC in 1990 gave further impetus on the already ongoing child law reform process. See particularly African Child Policy Forum, *Harmonisation of Children's Laws in Eastern and Southern Africa*, op. cit, p. 184.

472 Child Law Review Committee (Uganda), *Report of the Child Law Review Committee of the Ministry of Labour and Social Welfare*, op. cit, pp. 3 & 4.

473 Odongo, op. cit, p. 84.

The work of the CLRC spanned almost about one and a half years (17 months), which enabled it to embark on the task of 'researching and consulting on the proposed new child legislation.'[474] Its broad terms of reference intrinsically meant that the scope of the reform process included as many issues as possible. The scope of the CLRC's work 'thus traversed the whole corpus of child law with issues of child social welfare at the state and family levels being considered alongside juvenile justice issues. The Committee divided its work into 3 areas, namely; 'young offenders', 'child care' and 'domestic relations', which when taken together confirm the broad remit of the reform endeavour.'[475]

Adopting a highly consultative and publicised reform process as well as enjoying an unprecedented high level of political support,[476] the CLRC's work involved a series of workshops held within a span of several months in mid-1990; subsequent to which a sub-committee comprising of CLRC's members was appointed. With the aid of newly appointed researchers, 'this sub-committee embarked on an analysis of existing legislation, international standards, comparative legislation from elsewhere and research articles on child law reform.'[477] Further workshops that followed in late 1990 resulted in broad proposals for reform that were adopted under the various topics mainly using the CRC as a reference point. According to Odongo:

> For example in relation to juvenile justice, under the subject 'young offenders', proposals on increasing the age of criminal capacity, separating child welfare jurisdiction from juvenile crime jurisdiction, probation issues and the debate on the abolition or retention of corporal punishment were included among the broad proposals. In addition to identifying issues requiring further research such as how best to engage in public debate, the reach of the reform process and the desired number of laws to be enacted, the CLRC's three researchers embarked on a preliminary field research study carried out in seven different parts of the country. Apart from attempting to answer these issues, these research visits also provided vital information on people's attitudes towards law reform in light of their customary practices.[478]

One of the CLRC's most seminal workshops was convened in September 1990, which was attended by the CLRC members, top government representatives and members of the civil society. Coinciding with the end of the first United Nations World Summit for Children held in September 1990 in New York, US, the workshop set the ball rolling for the drafting of the Uganda's National Plan of Action for Children. The Plan was a response to one of the most important resolutions of the Summit,[479] which called upon countries to adopt National Plans of Action to facilitate the realization of children's rights, particularly those relating to children's welfare such as health, education and basic nutrition. One of the significant results of this workshop was the increase in the number of the CLRC from 14 to 18, which was meant to further

474 *Ibid*, p. 85.

475 *Ibid*. See also Child Law Review Committee (Uganda), *Report of the Child Law Review Committee of the Ministry of Labour and Social Welfare*, op. cit, pp. 67&68.

476 See particularly African Child Policy Forum, *Harmonisation of Children's Laws in Eastern and Southern Africa: Country Briefs*, op. cit, p. 184.

477 Odongo, op. cit, p. 85.

478 *Ibid*, p. 86.

479 Notably, Uganda had sent a delegation led by the country's Head of State to the Summit. *See* Odongo, *Ibid*, p. 87 (note 71).

ensure that 'as many stakeholders as possible were represented in the CLRC with the aim of assuring legitimacy of the proposals.'[480]

In order for it to work in a more guided manner, the CLRC adopted ten broad underpinning principles to guide its work. Amongst these principles were a number of CRC provisions including 'the best interests of the child principle (Article 3), the right to participation (Article 12) and the principle of detention as a last resort and if unavoidable, for the shortest period of time' (Article 37(b)).[481] One of the principles required the CLRC to ensure that the 'CRC, the African Children's Charter and other relevant UN Rules shall be the guide in legislating for children.'[482]

Subsequent to these efforts the CLRC, with the support of a number of child rights organizations and individuals, 'submitted a memorandum to the Uganda Constitutional Commission, which from early 1990 was engaged in the process of writing a new Constitution for Uganda. Partly on account of these efforts, the final Ugandan Constitution of 1995 included an elaborate children's rights clause in which a number of the CRC's provisions relevant to [children's rights] are included.'[483]

In order to appraise itself with the practical situations in juvenile justice institutions and engage with persons in charge of the criminal justice and child social welfare systems, the CLRC members undertook field visits to courts, children's homes, reformatory and approved schools, remand homes, prisons, police stations and probation offices, not only in urban areas but remote and rural areas as well.[484]

In order to assess the issue of the practicability of its draft, the CLRC appointed its fourth task group namely, "the administrative, management and resource implications task group", whose aim was 'to undertake practical research through field visits and make recommendations regarding a number of issues.'[485] These issues included 'the costs of providing adequate probation and social welfare services, increase in court officers' workload, the number of and conditions in government institutions, service delivery, the need for and affordability of putting up more care or reception centres and such other issues.'[486] In fact:

> As a result of an examination of this issue of pragmatism, the CLRC's proposals emphasize what its report characterizes as "a choice for local solutions to local problems, through empowering village committees rather than an over-emphasis on the formal (official) system". This approach is partly evidenced in the juvenile justice provisions which provide for an increased role for village committee courts dealing with child offenders.[487]

After concerted consultations and publicity, final workshops were held towards the end of 1991. They considered the final drafts and 'set the stage for the writing of the CLRC's final report, a task that was given to the CLRC's legal and social work

480 *Ibid* (note 72).

481 *Ibid*, p. 88.

482 Principle 10 of the 'Broad guidelines' contained in Child Law Review Committee (Uganda), *Report of the Child Law Review Committee of the Ministry of Labour and Social Welfare*, op. cit, p. 70.

483 Odongo, op. cit, p. 88.

484 Child Law Review Committee (Uganda), *Report of the Child Law Review Committee of the Ministry of Labour and Social Welfare*, op. cit, pp. 71 & 72.

485 Odongo, op. cit, p. 92.

486 *Ibid*.

487 *Ibid*.

researchers.'[488] Subsequently, the CLRC submitted its final report to the relevant ministry in 1992, marking the formal end of the CLRC's work. Afterward, the CLRC's draft Bill was worked upon by drafters attached to the Ministry of Justice and later introduced for debate in Uganda's National Assembly, leading to the enactment of the Ugandan Children's Statute in 1996.[489] In a nutshell, the Ugandan Children's Act is a composite law, comprising in one text all categories of child rights, ranging from provisions relating to child welfare and adoption to those relating to juvenile justice.

5.2.1.5 The Need for Amending the Children's Act in Uganda

It can be noted, however, that since it was enacted in 1996, the Ugandan Children's Act has revealed several flaws in its implementation. In a bid to make this law effective in providing a safe and healthy environment for children, the Government has instructed the Uganda Law Reform Commission to review the law, a process that is ongoing. At the time this book was completed, a Draft Amendment Bill for the Children Act (2010) prepared by the ULRC was yet to be adopted. Through broad consultative processes with policy makers, implementers, development partners, communities, local administration and children themselves, it is envisaged that the law will even be more comprehensive on the rights and welfare of children.[490]

It should be noted that the Draft Amendment Bill seeks, *inter alia*, to amend Sections 7,[491] 8,[492] 46,[493] 56,[494] 67,[495] 73,[496] 94[497] and 106[498] of the Children's Act. The Bill also strives to prohibit corporal punishment in schools and home environments as well as in other institutions (formal or informal). The elimination of corporal punishment will entail amending Section 106 of the Children's Act, which is a positive consequence of the 2007 amendment made to the Penal Code, which expressly abolished corporal punishment.[499]

Another notable aspect of the implementation of the Children's Act in Uganda is the existence of the coordination body in the form of the National Council for Children (NCC),[500] which receives support from the Uganda Human Rights Commission. The NCC, which is a semi-autonomous institution,[501] coordinates various government

488 *Ibid*.

489 Act No. 8 of 1996.

490 Republic of Uganda, 'Implementation of the African Charter on the Rights and Welfare of the Child in Uganda'. Ministry of Gender, Labour and Social Development, November 2007.

491 Providing for harmful customary practices.

492 Providing for harmful employment.

493 Providing for intercountry adoption.

494 Providing for Minister to approve homes.

495 Providing for declaration of parentage.

496 Providing for custody of children.

497 Providing for orders of family and children court.

498 Providing for decriminalisation of certain offences in relation to children.

499 African Child Policy Forum, Harmonisation of Children's Laws in Eastern and Southern Africa. op. cit, p. 185.

500 The NCC was legally established under the National Council for Children Act (1996), Cap. 60 of the Laws of Uganda.

501 Africa Wide Movement for Children, *An African Fit for Children: Progress and Challenges* Kampala: Africa Wide Movement for Children, 2012. p. 15.

bodies, including Ministries and Local Councils 'involved in the implementation of children's rights, at both national and local levels.'[502]

5.2.2 The Enactment of the Kenyan Children Act (2001)

Like in Uganda and Tanzania, the need to reform the laws relating to children in Kenya pre-dates the adoption of the CRC. In 1984 the Kenya Law Reform Commission (KLRC) embarked upon a review of laws relating to children. As in the other two common law East African countries considered in this book, the process 'was hastened by Kenya's ratification of the CRC on 30 July 1990.[503] The early 1990s saw an increasing presence of child rights oriented non-governmental organisations (NGOs) who called for child law reform.'[504] As in the case of Uganda, an interplay of factors necessitated the child law reform in Kenya. The first factor was the desire to take into account the principles of the CRC, which 'served as an important backdrop to the reform of child law.'[505] Secondly, the need to repeal or substantially revisit colonially inherited pieces of legislation was a relevant factor.[506] Thirdly, there was the need to centrally place children's rights as a concept in the applicable laws. Research noted that while laws concerning children were numerous, the child's position as a subject of these laws was largely tangential and incidental.

According to a report by KLRC, there were then no less than 66 statutes that had provisions applicable to children.[507] Notably the need for child law reform was made more fundamental in light of the absence of provisions in the then Kenyan Constitution[508] on the rights of the child. This also led to the recommendation in the aftermath of child law reform to the effect that "the "fundamental rights" chapter of the Constitution 'should be reviewed and reformed so as to more squarely address the concerns of the CRC.'[509] It should be noted that, unlike the current Kenyan Constitution,[510] the then Kenyan Constitution contained no specific provisions on the rights of the child. Instead, the rights of the child were 'coterminous with the general traditional civil and political rights provided for each and every person in Kenya.'[511]

5.2.2.1 The Genesis of the Kenyan Child Law Reform

Like in Uganda, the child law reform process in Kenya was kick-started by the Executive upon public calls for such reform towards the end of the 1980s. Unlike in Uganda where a child-rights-minded Minister in charge of children's welfare constituted an independent Child Law Review Committee (CLRC) to reform the laws relating to children,[512] in Kenya the Attorney-General (AG) initiated the child law reform

502 African Child Policy Forum, op. cit.

503 In respect of Kenya the CRC entered into force on 2 September 1990.

504 Odongo, op. cit, p. 94.

505 *See* particularly Kenya Law Reform Commission, *A New Law on Children: Report of the Child Law Task Force.* 1993; and Odongo, *Ibid*.

506 Odongo, *Ibid*.

507 Kenya Law Reform Commission, *A New Law on Children: Report of the Child Law Task Force*, op. cit, p. 23.

508 Act No. 5 of 1969 (as amended from time to time).

509 Kenya Law Reform Commission, op. cit, p. 22.

510 Article 53 of the Constitution of the Republic of Kenya Act (2010).

511 Odongo, op. cit, p. 95 (note 97).

512 Child Law Review Committee (Uganda), *Report of the Child Law Review Committee of the Ministry of Labour and Social Welfare* Vol. 3, 1992, p. 62.

process through the traditional approach: i.e., directing the Law Reform Commission (KLRC)[513] to review the existing laws concerning the welfare of children and make recommendations for improvement so as to give effect to the CRC.[514] Acting on this directive, the KLRC established a 13-member task force to undertake the process. The task force's membership comprised of government officers, children's rights advocates, experts and representatives of key child welfare organizations and academics, which reflected an inter-disciplinary approach. It commenced its mandate by carrying out an extensive study from March 1991.[515]

5.2.2.2 The Child Law Reform Process in Kenya

Like in other former British colonies, in Kenya there were many laws touching on children's rights and welfare. So, the terms of reference of the task force sought to cover an extensive ground, incorporating a wide range of issues such as child protection, welfare, adoption and juvenile justice. The terms sought to come up with a single, consolidated child statute.[516] The terms also required the task force to take 'into account the prevailing circumstances of the country and international law on the rights of the child.'[517] Given this broad spectrum of the terms of reference of the task force, it was not envisaged to have two distinct laws on child social welfare on the one hand, and juvenile justice on the other, as it happened later in South Africa.[518]

Methodologically, the task force's work commenced with extensive research on existing literature relating to child rights and welfare both at the international and national levels.[519] Adopting a highly consultative approach, the task force collected and collated information from official administrators and the general public through public meetings during provincial visits. It also invited the 'submission of memoranda from organisations and individuals, and exchanged views with experts and practitioners from outside Kenya. In addition to the countrywide visits, the task force had the opportunity to benefit from comparative experience by undertaking a visit to Egypt in order to enlighten itself on the interaction between Islamic law and children's rights on a number of issues including adoption and affiliation.'[520] Besides, the task force convened seminars and workshops, all of which enriched its report-writing task in the end of the consultative process.

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513 The Kenya Law Reform Commission (KLRC) is established by the Law Reform Commission Act, No.2 of 1982 (Chapter 3 of the Laws of Kenya), which came into force on 21 May 1982. From inception, the Commission operated as a Department within the Office of the Attorney-General. However upon reorganization of Government Ministries and functions vide Presidential Circulars Nos. 1 of 2003 and 2008, the law reform function and the Kenya Law Reform Commission were administratively moved to the Ministry of Justice, National Cohesion and Constitutional Affairs. It is wholly funded by the Government but with regular support from Development Partners especially within the context of the Governance, Justice, Law and Order Sector Reform Programmes. For further details on the mandate of the KLRC, visit its official website: http://www.klrc.go.ke/.

514 *See* CROC, *Kenya Initial Report to the CROC*. CRC/C/3/Add.62, 16 February 2001, para 47.

515 Kenya Law Reform Commission, *A New Law on Children: Report of the Child Law Task Force.* op. cit, pp. 12 & 13.

516 *Ibid*, p. 14. *See* also Odongo, op. cit, p. 95.

517 Odongo, *Ibid*, p. 96.

518 *Ibid*. South Africa enacted two separate laws: one on juvenile justice (the Child Justice Act, Act No. 75 of 2008) and the other on child social welfare (the Children's Act, 2005).

519 Kenya Law Reform Commission, *A New Law on Children: Report of the Child Law Task Force*, op. cit, pp. 14-16.

520 Odongo, *Ibid*, p. 96; and Kenya Law Reform Commission, *Ibid*, p. 16.

Furthermore, the task force elicited views of the children, which was mainly done through a school essay competition. This competition was 'conducted to obtain some opinions of children regarding their "rights, duties and welfare".'[521] According to the task force's final report, the aim of the essay exercise was mainly to get the direct input of children for 'a law that should be their law rather than a law about them.'[522] Subsequently, the emerging crucial issues from these essays, 'generally in support of protection of children's rights, were synthesised and incorporated in the report.'[523]

In the end, the task force's report was positively comprehensive in its reach to child law issues, although it did not bring on board all issues relating to juvenile justice in the context of the CRC, particularly as regards minimum age of criminal responsibility (MACR) and diversion.[524] Odongo argues that: 'In mitigation, this lacuna may be attributed to the ambitious nature of the reform endeavour as evidenced in the task force's wide terms of reference. This militated against delving in detail in specific areas.'[525]

In May 1994 the task force submitted its report to the government, recommending, *inter alia*, for the government to enact a Children's Bill 'and the amendment of other relevant statutes not codified under this Bill.'[526] Subsequently, a Children's Bill was presented in Parliament in February 1995; but it was criticized as being insufficient by many on its first reading. At this stage, the non-governmental lobby group 'was at the forefront of the reform process this time by identifying the weaknesses and omissions in the Bill. NGOs criticized the Bill as falling short of the provisions and spirit of the CRC.'[527]

In fact, NGOs cited a number of anomalies 'including the absence of a sensitivity to religious concerns in the Bill's provisions, a number of missing children's rights including social security, free and compulsory education, the right of child refugees and displaced children, of lack of attention to the problem of children accompanying their mothers to jail and, of inadequate protection of the girl-child from a variety of disadvantages.'[528] They also critiqued the Bill for failing to address particular issues relating to the homelessness of street children.[529] In addition, detractors of the Bill pointed out that certain individual provisions of the Bill portrayed child offenders as criminals in need of punishment.[530]

Consequent to these criticisms on the first draft Bill, the Attorney-General urged the task force to conduct another round of consultations between various interest groups, including NGOs; and thereafter to reconsider the Bill 'with a view to redrafting it so that it addressed the anomalies.[531] This process dragged on between 1994 and 2001 when the final draft Children's Bill was presented to Parliament and eventually

521 Odongo, *Ibid*, p. 97.

522 Kenya Law Reform Commission, op. cit, p. 14.

523 Odongo, op. cit, p. 97; and Kenya Law Reform Commission, *Ibid*, p. 16.

524 Odongo, *Ibid*, p. 97 (note 107).

525 *Ibid*, p. 98.

526 Kenya Law Reform Commission, op. cit, para 48.

527 Odongo, op. cit, p. 99.

528 *Ibid*. *See* also CROC, *Kenya Initial Report to the CROC*. CRC/C/3/Add.62, 16 February 2001, para 50.

529 Human Rights Watch, *Juvenile Injustice: Police Abuse and Detention of Street Children in Kenya* New York: Human Rights Watch, 1997, pp. 102-103. Accordingly, these deficiencies were also recorded in Kenya Initial Report. See CROC, *Kenya Initial Report to the CROC*, op. cit, paras 48 and 50.

530 Human Rights Watch, *Ibid*.

531 CROC, *Kenya Initial Report to the CROC*, op. cit, para 52.

enacted the next year as the Children's Act.'[532] The seven-year gap has been described by Odongo as 'frustratingly long from the point of view of the rights of the child'.[533] According to him:

> The reasons for this long delay are not clear. However, it may be speculated that they entail a number of factors including the process of incorporating the concerns of different parties on the Bill's weaknesses, a waning enthusiasm on part of the government on the commitment to put in place a new children's law, technical parliamentary procedures dealing with re-introduction of and debate on Bills, and a congested legislative calendar, among other factors.[534]

In a nutshell, the Kenyan Children Act repealed three pieces of legislation: the Children and Young Persons Act,[535] the Adoption Act[536] and the Guardianship of Infants Act.[537]

Described as "as an ambitious attempt",[538] the Children Act consolidates the previous laws dealing with child care, protection, maintenance, guardianship and adoption, on the one hand; and, it contains 'novel provisions relating to the rights of the Kenyan child, the establishment of child care institutions, children's courts, particular provisions on juvenile justice and the establishment of new statutory institutions tasked with the implementation of the Act',[539] on the other hand. In a nutshell, the Kenya Children's Act has been described as seeking to 'domesticate the provisions of the CRC and the ACRWC.'[540]

5.2.2.3 The Need for Amending the Children Act in Kenya

Notably, the philosophy of the Kenyan Children Act 'entrenches the concept of the rights of the child in Kenya depicting the child as autonomous and as a bearer of a range of rights, civil, political, economic, social and cultural.'[541] The lobby by child rights activists exhibited during the enactment of the Children Act has also significantly influenced the inclusion of a comprehensive child rights clause in the Kenyan Constitution (2010). However, the Kenyan Children's Act (2001) has been evidently under review for amendments immediately after it come into force[542] to

532 Odongo, op. cit, p. 99.

533 Odongo, G.O., 'The Domestication of International Standards on the Rights of the Child: A Critical and Comparative Evaluation of the Kenyan Example' *The International Journal on Children's Rights* Vol. 12 No. 4, 2004, pp. 419-430, at p. 420.

534 Odongo, G.O., 'The Domestication of International Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context', op. cit, p. 99 (note 114).

535 Chapter 141 Laws of Kenya. This law dealt with selected issues on child care, protection and piecemeal provisions on juvenile justice.

536 Chapter 143 Laws of Kenya. This law governed the legal regime on child adoption.

537 Chapter 144 Laws of Kenya. This law made provisions for issues of custody and guardianship.

538 Odongo, G.O., 'The Domestication of International Standards on the Rights of the Child: A Critical and Comparative Evaluation of the Kenyan Example', op. cit.

539 Odongo, G.O., 'The Domestication of International Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context', op. cit, p. 100.

540 African Child Policy Forum, *Harmonisation of Children's Laws in Eastern and Southern Africa*, op. cit, p. 66.

541 *Ibid*. *See* particularly Part II of the Kenyan Children's Act.

542 See Odongo, G., 'The Kenyan Children's Act' *International Journal of Children's Rights* Vol. 12, 2005, pp. 419-430.

strengthen provisions for children in alternative care, adoption, and diversion for children in conflict with the law.[543]

As of to date, a draft Children's (Amendment) Bill (2008) has been prepared, but yet to be adopted. It seeks, *inter alia*, to 'introduce improved provisions relating to the protection of children from abuse while in alternative custodial care, the creation of child protection units, the establishment of places of safety and provisions to underpin diversion of children accused or alleged to have committed crimes from the formal justice system.'[544] Parallel to these endeavours, Kenya has also decided to separate issues relating to child justice from those pertaining to child care and protection through the proposed Child Justice Bill (2010), which is under wide consultations. This Bill seeks to put in place a dedicated legislation 'to underpin the importance of a child-specific justice system for children'[545] both in conflict with the law and those seeking civil justice. It also proposes to raise the minimum age of criminal responsibility (MACR) from the current low age of 8 to a new age of 12 years.[546]

5.2.3 The Enactment of the Tanzanian Law of the Child Act (2009)

This part examines the child law reform process in Tanzania, by particularly looking at the basis for the claim for a child law and the participation of stakeholders in this process.

5.2.3.1 The Need for a Comprehensive Child Law in Tanzania

Like in Kenya and Uganda, in Tanzania the need to have a comprehensive children's law was voiced even before the adoption of the CRC in 1989 and the ACRWC in 1990.[547] In 1986 the Law Reform Commission of Tanzania (LRCT)[548] informed the Minister responsible for Justice that 'it had established a working group to examine existing laws affecting children in Tanzania and provide recommendations for legislative revisions.'[549] In its final report on the review, which took four years to be completed, the LRCT acknowledged that 'there were already general indications and fears that

543 A. Hussein, keynote address at the first African conference on child sexual abuse, hosted by ANPPCAN, Kenya, 24-26 September 2007.

544 African Child Policy Forum, Harmonisation of Children's Laws in Eastern and Southern Africa, op. cit, p. 66.

545 *Ibid*.

546 However, the proposed 12 years as the MACR is still lower than the minimum age the CROC has suggested, which should be at least 14 years. As Prof. Jaap Doek, former Chairperson of the CRC, argues, the CROC considers 14 years to be appropriate 'as this is the age when children are considered to be *doli capax*.' *See* particularly Doek, J., 'Child Justice Trends and Concerns with a Reflection on South Africa', in Gallinetti, J. et al (Editions), *Child Justice in South Africa: Children's Rights under Construction* Newlands/Cape Town: Open Society Foundation for South Africa and Child Justice Alliance, 2006, p. 13; and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) (adopted by the UN General Assembly Resolution 40/33, 29 November 1985).

547 Whereas the CRC was ratified by Parliament in 1991, the ACRWC was ratified in 2003.

548 The LRCT was established under Section of the Law Reform Commission of Tanzania Act, Cap. 171 R.E. 2002. According to Section 4(1) of the Act, the LRCT mandate is 'to take and keep under review all the laws of the United Republic with a view to its systematic development and reform.'

549 Tumbo-Masabo, Z. and V. Leach, 'What Happened to the Children's Statute?' in Mamdani, M. et al (Editions), *Influencing Policy for Children in Tanzania: Lessons from Education, Legislation and Social Protection* Dar es Salaam: Research on Poverty Alleviation, 2009, pp. 12-18, p. 12.

the present law and practice relating to children's problems in various socio-economic circumstances had been overtaken by the ever-changing circumstances.'[550]

Notably, the LRCT's working group, which undertook the review exercise, did a very comprehensive review, having visited and undertaken a survey in at least 12 regions in the country. It also sent out questionnaires to courts, local authorities, ministries and key state institutions responsible for children's welfare. The team further visited Kenya and Zambia 'to study legislation in those countries, and reviewed the laws of the United Kingdom and New Zealand.'[551] Released at the time around which the CRC and the ACRWC were being adopted and implemented locally in various countries,[552] the review report recommended, *inter alia*, for total repeal and replacement of the laws affecting children's rights in Tanzania.[553]

Since the LRCT report was released in 1994, the Government of Tanzania expressed its intention to amend laws relating to children. In 2000 the Ministry of Constitutional Affairs and Justice adopted the LRCT recommendations. However, since then government efforts to enact a single child law became slow and sometimes with no specific focus. As such, in 2002/2003 the National Network of Organizations Working with Children in Tanzania (NNOC), supported by Save the Children, widely discussed and collected opinions and proposals from all stakeholders including children and came up with a proposed child statute,[554] which was presented to the government as well. Supporting the recommendations of the LRCT, NNOC also proposed for a comprehensive children law.[555]

5.2.3.2 The Basis for a Comprehensive Child Law

The basis for pressing for a comprehensive legislation to protect and promote children's statute is the fact that Tanzania ratified the CRC and ACRWC without any reservations, meaning that: 'Tanzania has undertaken to bring her domestic legislation in line with all the provisions of (these international instruments on the rights of the child).'[556] Certainly, this is in accord with the recommendations of the UN Committee on the Rights of the Child (the CROC), which has, on regular occasions, been

550 Law Reform Commission of Tanzania, 'Report of the Commission on the Law Relating to Children in Tanzania,' submitted to the Minister for Justice and Constitutional Affairs, Dar es Salaam, April 1994, p. 4. Available at http://www.commnlii.org/tz/TZLRC/report/R$/4.pdf (Accessed on 7 December 2009). This report is sometimes called, 'the Tenga Report' because the LRCT Working Group which produced the report was chaired by Dr. Ringo W. Tenga, an experienced advocate and law lecturer at the University of Dar es Salaam.

551 Tumbo-Masabo, Z. and V. Leach, 'What Happened to the Children's Statute?', op. cit.

552 For a detailed account on this matter see particularly Sloth-Nielsen, J. and B.D. Mezmur, 'Surveying the Research Landscape to Promote Children's Legal Rights in an African Context' *African Human Rights Law Journal,* Vol. 7 No. 2, 2007.

553 Law Reform Commission of Tanzania, 'Report of the Commission on the Law Relating to Children in Tanzania,' op. cit.

554 The position paper and CSO Alternative Child Bill was prepared by two legal experts namely Magnus Andersson (Sweden) and Clement Mashamba (Tanzania). Apart from being submitted to the Chief Parliamentary Draftsman (CPD) in May 2003, the CSO Alternative Child Bill was presented to the Parliamentary Standing Committee (Community Development) on 28 April and 10 July 2009 by the National Organisation for Legal Assistance (nola) on behalf of partner CSOs.

555 *See* Andersson, M. and Mashamba, C.J., 'Basic Elements and Principles to be Incorporated in a New Children Statute in Tanzania: A Requirements Paper to be Presented by NNOC to the Government Draftsman,' Dar es Salaam: National Network of Organisations Working with Children in Tanzania, May 2003. See also Mashamba, C.J., 'Basic Principles to be Incorporated in the New Children Statute in Tanzania.' In Mashamba, C.J. (Edition), *Using the Law to Protect Children's Rights in Tanzania: An Unfinished Business*, Dar es Salaam: National Organization for Legal Assistance, 2004.

556 Mashamba, C.J., 'Basic Principles to be Incorporated in the New Children Statute in Tanzania', *Ibid*, p. 107.

emphasizing that it is an essential aspect of States Parties thereto should ensure that all domestic legislation relating to children is "fully compatible" with the provisions and principles of the CRC.[557]

In respect of Tanzania, the CROC, in its *Concluding Observations* in respect of the country's initial report (1998) and the second periodic report (1998-2003), was concerned 'at the lack of a clear time frame (for Tanzania) to finalize the consultative process and enact "The Children's Act."[558] It should be noted that, in its second periodic report to the CROC (1998-2003), Tanzania reported that it was undertaking legislative review and collecting views of stakeholders, including children, through the national "White Paper." It was reported that the National White Paper would engender the Children's Act.[559] Nevertheless, the CROC urged Tanzania to:

> [E]ngage all efforts and resources necessary for the enactment of the Children's Act in Tanzania Mainland and a similar Act in Zanzibar, as a matter of priority. It further [urged Tanzania] to ensure that all of its domestic and customary legislation [should] conform fully to the principles and provisions of the Convention, and ensure its effective implementation.[560]

However, it was not until July 2009 when the Government introduced in Parliament a Bill to enact the Law of the Child Act (2009) (the LCA),[561] which was then read for the first time.[562] According to the long citation of the Bill, this is:

> An Act to provide for reform and consolidation of laws relating to children, to stipulate rights of the child and to promote, protect and maintain the welfare of a child with a view to giving effect to international and regional conventions on the rights of the child; to provide for affiliation, foster care, adoption and custody of the child; to further regulate employment and apprenticeship; to make provisions with respect to a child in conflict with law and to provide for related matters.

The Act was assented to by President Jakaya Kikwete on 20 November 2009, which was the day when the world commemorated the 20th anniversary of the adoption of the CRC. This historical event provides a step forward towards fulfilment of Tanzania's obligations under international human rights law towards its children. The law is expected to create an environment to ensure maximum extent possible; the survival, protection and welfare of the child. This includes physical, mental, spiritual, moral, psychological and social development.

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557 *Ibid*.

558 *See* CROC, 'Consideration of Reports Submitted by States Parties under Article 40 of the Convention – Concluding Observations of the Committee on the Rights of the Child: United Republic of Tanzania,' CRC/C/TZA/CO/2, dated 2 June 2006, para 9.

559 *See* United Republic of Tanzania, 'The Country Second Periodic Report on the Implementation of the Convention on the Rights of the Child (CRC): 1998-2003,' Ministry of Community Development, Gender and Children; August, 2004. See also United Republic of Tanzania, 'Consideration of the Second CRC Periodic Report: 1998-2003 – Answers to Questions Raised for Additional and Updated Information to be Considered in Connection to Second CRC Report during the UN CRC Committee Session on 15-19 May, 2006, in Geneva, Switzerland,' Ministry of Community Development, Gender and Children; April 2006.

560 *See* CROC, 'Consideration of Reports Submitted by States Parties under Article 40 of the Convention – Concluding Observations of the Committee on the Rights of the Child: United Republic of Tanzania,' op. cit, para 10.

561 The *Bill Supplement* in respect of this Bill was published in the *Gazette of the United Republic of Tanzania,* Vol. 90 No. 20, on 10 July 2009.

562 The Bill to enact the Law of the Child Act (2009) was introduced in Parliament on 31 July 2009 under the auspices of Hon. Magreth Sitta (MP), Minister for Community Development, Gender and Children.

5.2.3.3 The Child Law Reform Process in Tanzania

Unlike in Kenya and Uganda, the child law reform process in Tanzania was initiated and manipulated by the Executive in a highly secretive manner. As considered below, stakeholders were not adequately and widely consulted. It was only when the Bill for the enactment of the Law of the Child Act (LCA) was tabled in Parliament that Parliament invited key stakeholders to participate in the child law-making process. As a result of lack of adequate and wide consultations of stakeholders, the LCA has a number of shortcomings. In the discussion below, we examine the main factors behind this situation.

(i) Lack of Stakeholders' Participation in the Child Law making in Tanzania

Unlike in Kenya and Uganda, the comprehensive child law in Tanzania was enacted without any significant participation of stakeholders. Surprisingly, the Bill to enact this Law was made public only 4 months before its passage in Parliament.[563] Like in Kenya and Uganda, the demand for a comprehensive child law in Tanzania started before the CRC and the ACRWC were adopted. There are several reasons why the law reform took a long period of time to be completed in Tanzania, despite constant pressures from different circles, including CSOs and the UN Committee on the Rights of the Child. Amongst the reasons behind this prolonged process is the lack of political will on the part of the Government to enact the said law; and lack of coordinated lobby and pressure-groups amongst the CSOs themselves in Tanzania.[564]

(ii) Lack of Political Will to enact a Comprehensive Child Law in Tanzania

It is disappointing to note that the law reform of the child laws in Tanzania took too long a time to be achieved as compared to other politically-motivated laws.[565] Indeed, it took the Government some 23 years to reform the said laws since LRCT started to conduct an empirical study on these laws in 1986. Although the Commission presented its findings and recommendations to the Minister of Justice and Constitutional Affairs in April 1994,[566] it took the Government some other four years to act upon it when the then Deputy Attorney-General/Principal Secretary (Ministry of Justice and Constitutional Affairs), the Late Kulwa Sato Masaba, formed a Committee for Reviewing, *inter alia*, the Report of the Commission.

The Review Committee made its recommendations in 1998, proposing a number of proactive recommendations; seemingly, aiming at "overhauling" the entire children law regime so as to ground it onto internationally accepted children's

563 Whereas the Bill was published in the *Official Gazette of the United Republic of Tanzania* No. 28 Vol. 90 on 10 July 2009, the Law of the Child Act (2009) was passed in Parliament on 4 November 2009.

564 Mashamba, C.J., 'Emerging Issues in Diverting Juvenile Offenders from the Criminal Justice System: The Socio-Cultural Realties, Economics and Politics of Administration of Juvenile Justice – The Case of Tanzania,' in Sorensen, J.J. and Jepsen, J. (Editions), *Juvenile Justice in Transition: Bringing the Convention on the Rights of the Child to Work in Africa and Nepal*, Copenhagen: Danish Institute for Human Rights, 2005. See also Mashamba, C.J., 'Realising Children's Rights in the Context of the UDHR in Tanzania', *The Justice Review*, Vol. 7 No. 1, 2009.

565 For instance, a law aimed to control the conduct and perhaps the free existence of NGOs in Tanzania was passed within few months by Parliament, same as was the case with a law enacted to control and prevent terrorist activities in the country towards the end of 2002. These laws have political interests, which is why they were rushed through Parliament for 'endorsement' at such a supersonic speed.

566 Law Reform Commission of Tanzania, 'Report on the Law Relating to Children in Tanzania', op. cit.

rights principles.[567] Subsequently, the Government in November 2001 decided to convene a consultative meeting to consider and provide inputs on three reports – that is, relating to inheritance, children and marriage matters. This meeting which brought together academics, women's and children's rights activists, lawyers, social workers and governmental officials, was organised by the then Ministry of Justice and Constitutional Affairs (MoJCA)[568] in collaboration with the then Ministry of Community Development, Women and Children (MCDWC).[569] The consultative meeting actually agreed with the LRCT recommendations regarding the need to have a comprehensive child statute.[570] When the report of the consultative meeting, popularly known as the "Makaramba Report,"[571] was submitted to the MoJCA it was 'decided that a cabinet paper should be prepared to allow for cabinet's review of the recommendations before legislation was prepared for consideration by the National Assembly.'[572]

In June 2002, the Department of Social Welfare (DSW) convened a two-day workshop in Morogoro to review laws relating to child rights in Tanzania. Specifically, the workshop aimed at gathering views and opinions from stakeholders about laws relating to child rights; identifying gaps inherent in the existing laws; identifying challenges posed by different laws relating to child rights; and recommending amendments to the said laws. Again, the workshop was basically in agreement with the LRCT recommendations.[573]

However, the Government did not implement these recommendations, prompting the exasperation of the CROC, which, in its recent *Concluding Observations* in respect of the country's periodic reports, was concerned 'at the lack of a clear time frame (for Tanzania) to finalize the consultative process and enact the Children's Act.'[574]

In a very interesting turn of events, in 2008 while presenting his ministry's 2008/09 budgetary speech in the National Assembly, the Minister for Constitutional Affairs and Justice, Hon. Mathias Chikawe, said the Government had no intention of enacting a single, comprehensive child law. Instead, the Government intended to make amendments to all laws affecting or touching on children's rights and welfare. However, in his 2009/10 budgetary speech delivered in the same august house on 30 June 2009, Hon. Chikawe said that the Government had already prepared a Bill on children's rights to be tabled in Parliament at the end of the June-July 2009/2010

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567 *See* particularly Makaramba, R.V., 'Report of the Proposals of the Meeting to Review Reports of the Law Reform Commission on the Law Related to Children and the Findings of the Review Committee,' submitted to the Ministry of Justice and Constitutional Affairs, Dar es Salaam, 2001; Mashamba, C.J., 'Emerging Issues in Diverting Juvenile Offenders from the Criminal Justice System: The Socio-Cultural Realties, Economics and Politics of Administration of Juvenile Justice – The Case of Tanzania', op. cit; Tumbo-Masabo, Z. and V. Leach, 'What Happened to the Children's Statute?', op. cit; and Mashamba, C.J., 'Realising Children's Rights in the Context of the UDHR in Tanzania', op. cit.

568 The name of the ministry has been changed to Ministry of Constitutional and Legal Affairs (MoCLA).

569 The name of the ministry has been changed to Ministry of Community Development, Gender and Children (MCDGC).

570 Makaramba, op. cit.

571 Hon. Justice Robert Vincent Makaramba, who now serves as a High Court Judge, was the main facilitator of this meeting, which was held at the then TANESCO Training Institute in Morogoro on 17 to 21 November 2001.

572 Tumbo-Masabo, Z. and V. Leach, 'What Happened to the Children's Statute?', op. cit, p. 14.

573 Mashamba, C.J., 'A Study of Tanzania's Non-Compliance with its Obligation to Domesticate International Juvenile Justice Standards in Comparison with South Africa', op. cit.

574 *See* CROC, 'Consideration of Reports Submitted by States Parties under Article 40 of the Convention – Concluding Observations of the Committee on the Rights of the Child: United Republic of Tanzania,' CRC/C/TZA/CO/2, dated 2 June, 2006, para 9.

Budgetary Session.[575] This promise was supported by Hon. Margareth Sitta (the then Minister for Community Development, Gender and Children) when she addressed a stakeholders' consultative meeting held in Dar es Salaam in June 2009.[576] Eventually, the Law of the Child Act (2009) was at last passed by Parliament on 4 November 2009.

This turn of events on the part of the top government officials responsible for the children's law reform only left a lot of unanswered questions. Was the Government really committed to see to it that the child law is effectively implemented? Were these conflicting statements meant to delay the process or show some measure of honouring the Government's promise to enact the child law, which had been repeatedly made since November 2001 when the then Minister for Community Development, Women and Children made the first promise to that effect.[577] Besides, the way different ministries or government departments have been dealing with this matter shows lack of coordination of children's issues on the part of the Government,[578] which is one of the reasons for delaying the legislative process; and might impede the implementation process of the new law.

In contrast, it took the Ugandan Government only six years to enact a new child law[579] after the coming into force of the CRC. On the other hand, the South African Government finalized the enactment of the Children's Act[580] in 2005[581] and having enacted a provision in its 1996 Constitution[582] that protects children's rights.

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575 *See* Mashamba, C.J., 'Accepting the Necessary Evil: The Need for a New Statute for Promoting and Protecting Children's Rights in Tanzania,' op. cit.

576 The Minister was the guest of honour at a two-day Stakeholders' Consultative Workshop to Explore the Rationale and Need to Establish a Children's Legal Protection Centre, organised by the African Child Policy Forum and held at the Peacock Millennium Towers Hotel in Dar es Salaam, on 22 and 23 June 2009. One of the authors of this article, Clement Mashamba, was the facilitator at this meeting.

577 This researcher was present at a meeting held at the then TANESCO Training Centre, Morogoro, in November 2001, when the then Minister for Community Development, Women and Children promised participants that the Government would table, *inter alia*, the Children's Bill in Parliament in February 2002, which never happened. This was a stakeholders' consultative meeting that was organised by the Ministry of Justice and Constitutional Affairs in collaboration with the Ministry of Community Development, Women and Children to discuss Government recommendations made on three reports submitted by the Law Reform Commission of Tanzania in April 1994 on laws relating to marriage, inheritance and children.

578 In its recent Concluding Observations, the UN Committee on the Rights of the Child has raised an eyebrow as to which state institution is responsible for coordination issues concerning children in the entire United Republic of Tanzania. *See* particularly United Republic of Tanzania, 'The Country Second Periodic Report on the Implementation of the Convention on the Rights of the Child (CRC): 1998-2003,' Ministry of Community Development, Gender and Children; August, 2004; and United Republic of Tanzania, 'Consideration of the Second CRC Periodic Report: 1998-2003 – Answers to Questions Raised for Additional and Updated Information to be Considered in Connection to Second CRC Report during the UN CRC Committee Session on 15-19 May 2006, in Geneva, Switzerland,' Ministry of Community Development, Gender and Children; April 2006.

579 Ugandan Children Statute (1996).

580 Parliament passed the Children's Amendment Bill on 22 November 2007. The President signed it into law on 13 March 2008, and its official name and number is the Children's Amendment Act (No. 41 of 2007). It amends and completes the Children's Act (No. 38 of 2005), which was passed by Parliament on 14 December 2005 and signed into law by the President in June 2006. On 29 June 2007, the President published a proclamation in the Government Gazette for the commencement of certain sections of the Children's Act on 1 July 2007. Available at http://www.ci.or.za/frames.asp?section=lawreform (Accessed on 7 September 2011). The full text of the South African Children's Act can be Accessed at http://www.ci.org.za/deps/ci/plr/bills/ChildrensAct38-2005.pdf.

581 South Africa ratified the CRC in 1995 'and subsequently adopted the 1996 South African Constitution, which includes a special provision' guaranteeing the rights of the child. See particularly ESR Review Vol. 4, No. 2, 2003; Sloth-Nielsen, J. and B.D. Mezmur, 'Surveying the Research Landscape to Promote Children's Legal Rights in an African Context,' op. cit, pp. 330-353; Jonas, B., 'Towards Effective Implementation of Children's Rights in Tanzania: Lessons and Opportunities from Ghana and South Africa', LL.M. Thesis, University of Pretoria, 2006; and Saine, M., 'Protecting the Rights of Children in Trouble with the Law: A Case Study of South Africa and The Gambia,' University of Pretoria, 2005.

582 Section 28 of the South African Constitution (1996).

(iii) Some Religious Considerations

Yet there are also other factors that affected the pace of the Government in the lawmaking process. These include the fact that, although all the reviews and workshops discussed above supported the need to have a single, comprehensive child law, there was in the offing resistance from some social circles, like religious groups and traditionalists, about consolidating issues of marriage and inheritance into a single child law. Indeed:

> The social sensitivity of legislating what are customarily viewed as domestic concerns was clearly a concern among senior officials in Government, and this was the explanation for the decision to hold another round of public consultations in a white paper process after the Government considered the reports of the Law Reform Commission and the review committee.[583]

This, in effect, delayed the process; and, consequently, resulted in leaving out issues relating to child marriage and inheritance in the LCA.

(iv) Lack of Coordinated Lobby amongst the Child Rights Stakeholders in Tanzania

On their part, child rights stakeholders (including CSOs) were not vocal on the issue of not only having a child rights law but a juvenile justice one: because of lack of focused coordination amongst themselves, lack of resources (both financial and human) and their incapacity to push their advocacy agenda through the opaque government bureaucracy. For instance, NGOs had been looking for ways to participate in the preliminaries on the preparation of the Bill to no avail. The Bill was seen for the first time when the Government gazetted it on 10 July 2009. This is contrary to what was done in Kenya and Uganda towards the enactment of these countries' children's laws. In the two countries, there were extensive processes of consultation with other national departments including justice, education, health, labour, safety and security, the local communities, non-governmental organisations and service providers.

The question of coordination has, in fact, haunted Tanzanian CSOs in the advocacy for a child statute. There has been lack of a strong CSO movement advocating for prompt enactment of the law, as was exhibited by women's rights activists on the eve of the enactment of the most celebrated Sexual Offences (Special Provisions) Act (1998), popularly know as the SOSPA. The enactment of the SOSPA was greatly achieved due to strong coordination of stakeholders championed by the pulsating Tanzania Media Women Association (TAMWA). In fact:

> This example of sustained civil society pressure to bring about policy and legislative change has strong but limited lessons for children's rights in Tanzania. The principal limitation is that a statute for children's rights is not a single specific issue which would be universally agreed to resolve egregious wrong, even if the provisions of such a statute would go a long way towards protecting children and correcting abuse of children's rights. The main lesson is that the strong coordination and resolve which brought about SOSPA seems to be sorely lacking on behalf of children, both within Government and among organisations of civil society.[584]

Nonetheless, one of the more strategic and effective civil society labyrinth was championed by the National Organisation for Legal Assistance (**nola**) in the pre-

583 Tumbo-Masabo, Z. and V. Leach, 'What Happened to the Children's Statute?', op. cit, p. 17.

584 Tumbo-Masabo, Z. and V. Leach, 'What Happened to the Children's Statute?' op. cit, p. 18.

enactment period. **nola** provided both technical and *some* financial resources[585] from its stretched coffers under the Strategic Plan (2008-2012). **nola** had also collaborated with the now *dormant* National Network of Organisations Working with Children in Tanzania (NNOC) to gather and collate opinion from CSOs. It should be noted that, apart from holding several nationwide stakeholders' opinion gathering meetings, NNOC members had gone as far as to commission two child rights experts to prepare a position paper as well as an alternative draft Bill of what principles the new law should contain. The documents were submitted to the Chief Parliamentary Draftsman (CPD) for consideration and incorporation (if relevant) into the Bill to be tabled in the Legislature.

There was also another local NGO, namely the National Organization for Children Welfare and Human Relief (NOCHU). NOCHU, working on its own right between 2004 and 2006, went around the country to collect and later collated the views of different stakeholders. However, at the time the LCA was being publicly discussed in the period between July and November 2009, NOCHU had almost become defunct; and, therefore, its inputs were not put forward before the Parliamentary Standing Committee (Community Development), which coordinated, collected and collated the views of stakeholders on the Draft Bill.

On 28 April 2009 and 10 July 2009 the National Organisation for Legal Assistance (**nola**), on behalf of NNOC, presented the CSO Alternative Child Bill to the Parliamentary Standing Committee (Community Development) in Dodoma. The Committee welcomed the Bill and agreed to work in close collaboration with CSOs to see to it that the Government finalised the enactment of a comprehensive child law. On 7 and 8 October 2009 **nola** led its partner in presenting the CSOs views at a public hearing on the Bill to enact the Law of the Child Act (2009), which was organised by the Parliamentary Standing Committee on Community Development. **nola** also did the same thing on 28 October 2009 in Dodoma at a meeting involving members of the media, CSOs, line ministries and MPs.[586] Again, on 3 November 2009, **nola** and partner CSOs made a final round of lobbying with MPs in the Pius Msekwa Hall at the Bunge premises.

585 At some point, UNICEF and Save the Children supported the Task force, to which nola was a member, particularly regarding the convening of a stakeholders' consultative meeting held in Dar es Salaam on 24 and 25 September 2009. UNICEF also supported the Coordinator and some of the coordination activities at the last moment leading to the submission of the position paper in October and November 2009.

586 This meeting was organized by the Ministry of Community Development, Gender and Children.

Chapter Six

The Implementation of the Key Principles of the CRC and the ACRWC in East Africa

6.0 Introduction

As considered in Chapters One and Two, in many countries around the world, 'measures have been taken or are under way to bring existing laws, relevant to the rights of the child and the rights of children in conflict with the law, in line with the provisions of the CRC[587] and the ACRWC. Whereas some countries, like Kenya,[588] The Gambia,[589] Tanzania[590] and Uganda,[591] have adopted a composite legislation constituting provisions for protection of rights of children in conflict with the law and those for the care and protection of children's rights in a single text, others have adopted separate legislation for the two aspects of children's rights. South Africa has adopted the latter approach[592] after it ratified the CRC in 1995[593] and the ACRWC in 2000.[594]

In this context, the three common law East African countries considered in this book have adopted the key principles of the CRC and the ACRWC, which are: the child's right to life, survival and development; the best interests of the child; non-discrimination; and the right to participation, including respect for the views of the child. This Chapter, therefore, discusses the extent to which the three countries have domesticated these principles in their respective Constitutions, legislation, policy and administrative actions.

6.1 The Right to Life, Survival and Development

As considered in Chapters Two and Three, the child's right to life, survival and development is guaranteed in a number of international human rights treaties, particularly the ACRWC and the CRC. Under the ACRWC and the CRC States Parties are obliged to domesticate this right. In this part, we examine the extent to which the three common law East African countries have domesticated this right.

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587 Doek, J., 'Child Justice Trends and Concerns with a Reflection on South Africa', in Gallinetti, J., et al (Edition), *Child Justice in South Africa: Children's Rights Under Construction (Conference Report)* Bellville: Open Society Foundation for South Africa/Child Justice Alliance, August 2006, p. 12.

588 Children's Act (2001).

589 Children's Act (2005).

590 Law of the Child Act (2009).

591 Children's Act (1996).

592 Children's Act (2005) and Child Justice Act (2008).

593 South Africa ratified the CRC on 16 June 1995. 16 June of every year is the day when the Day of the African Child is celebrated on the African continent in commemoration of the massacre of black children in South African in 1976. In the post-apartheid period, the CRC was the first international human rights treaty to be ratified by South Africa. *See* particularly Sloth-Nielsen, J., 'Ratification of the United Nations Convention on the Rights of the Child: Some Implications for South African Law' *South African Journal of Human Rights* Vol. 11, 1995, p. 401; and Odongo, G.O., 'The Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context.' LL.D. Thesis, University of Western Cape, 2005, p. 72 (note 18).

594 South African signed the ACRWC on 10 October 1997, ratified it on 7 January 2000 and deposited the instrument on 21 January 2000.

6.1.1 The Domestication of the Right to Life, Survival and Development in Kenya

Consistent with the ACRWC and the CRC, the Kenyan Government has undertaken constitutional, policy, legislative and administrative measures to domesticate the child's right to life, survival and development as discussed below.

a) Legislative Measures

In general, the Bill of Rights enshrined in the Kenyan Constitution protects the right to life, survival and development in a number of provisions. Article 26 of the Constitution of Kenya guarantees every person the right to life. This article explicitly states that:

(a) Every person has the right to life;

(b) The life of a person begins at conception;

(c) A person shall not be deprived of life intentionally, except to the extent authorized by this Constitution or other written law;

(d) Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment or the life or health of the mother is in danger or if permitted by any other written law

In particular, Section 4(1) of the Children Act expressly provides for this right. It states that: 'Every child shall have an inherent right to life and it shall be the responsibility of the Government and the family to ensure the survival and development of the child.' As stipulated in Article 26(b) of the Constitution, the protection of the right to life extends to the conception period. This means that a still-born baby is also protected under the Kenyan Constitution.[595]

In principle, the inclusion of specific child rights provisions in the Kenyan Constitution, particularly socio-economic rights in Article 53 and a general clause providing for the enforceability of these rights in Article 43 also ensures that the child's right to life, survival and development 'is now part of Kenya's Constitution.'

b) Administrative Measures

In complementing the foregoing constitutional and legislative measures, the Kenyan Government has undertaken a number of measures aimed at effectively and progressively domesticating the child's right to life, survival and development in its jurisdiction. In its recent 3rd, 4th and 5th consolidated reports to the CROC (henceforth, the Kenyan consolidated report), the Kenyan Government has identified about six indicators to measure whether or not it has effectively domesticated the child's right to life, survival and development.[596] These are in respect of infant and under-five mortality; nutritional status of children; child vaccination; maternal health; maternal care; and HIV and AIDS, as elaborated below.

595 African Child Policy Forum, *Harmonisation of Children's Laws in Eastern and Southern Africa: Country Briefs*, op. cit.

596 See Republic of Kenya, '3rd, 4th and 5th State Party Report to the UNCRC Committee' in September 2012.

According to the Kenyan consolidated report to the CROC, the health indicators show that 'there has been significant improvement in the survival of children.'[597] Quoting the 2008 Kenya Demographic and Health Survey (KDHS), the Kenyan consolidated report indicates that there were remarkable declines in under-five and infant mortality rates. These gains are largely due to:

(a) Increased immunization whereby the proportion of children under one year of age fully immunized rose from 57 percent to 77 percent between 2003/05 and 2008/09; and

(b) The increased use of treated mosquito nets whereby 13.5 million bed nets were distributed, with the percentage of children sleeping under nets rising rapidly from 5 percent in 2003 to 52 percent in 2006.[598]

i) Infant and Under Five Mortality

The Kenyan consolidated report indicates that infant mortality rates 'decreased from 77 to 52 per 1,000 live births during the period 2003 to 2008/09 while under-five mortality decreased from 115 to 74 per 1,000 live births in the same period.'[599] However, through this report, the Kenyan Government acknowledges that 'the under-five mortality is still high in rural areas which stands at 86 per 1,000 live births compared to 74 per 1,000 live births in urban areas. Nyanza province has the highest child mortality of 149 per 1,000 live births.'[600]

ii) Nutritional Status of Children

The Kenyan consolidated report refers to the KDHS (2008/9), which shows that thirty percent (30%) of children under five are stunted or too short for their ages; acknowledging that: 'Stunting is more prevalent in rural areas (31%) compared to urban areas (22%). Coast province has the highest proportion of stunted children (34%) followed by [the] Eastern province with thirty three (33) percent.'[601]

iii) Child Vaccination

According to the Kenyan consolidated report, a child is considered to be fully immunized 'if vaccination includes BCG (*Bacillus Calmette-Guerin*), measles, three doses of DPT (*Diptheria, Tetanus & pertussis*)-HepB-Hib and three doses of polio excluding Polio 0 and Polio 4.'[602] The results of the KDHS 2008/2009 survey indicate that 77 percent of Kenyan children of age 12-23 months were fully vaccinated; the lowest vaccination coverage was in the North Eastern Province (48%) and Nyanza Province (65%).[603]

597 *Ibid*, para 112.
598 *Ibid*.
599 *Ibid*, para 113.
600 *Ibid*, para 114.
601 *Ibid*, para 115.
602 *Ibid*, para 116.
603 *Ibid*.

iv) Maternal Health

The Kenyan consolidated report elaborates that the results of KDHS 2008/09 indicate that 'maternal deaths reported were 488 per 100,000 live births although facility maternal mortality was 249 per 100,000 live births.'[604] The results of facility maternal deaths by region 'show that [the] North Eastern Province had the highest deaths (703), followed by [the] Coast (428), and the lowest was [the] Central Province with 122 deaths per 100,000 live births.'[605]

v) Maternal Care

Information on births delivered in a health facility, as revealed in the Kenyan consolidated report, shows that at the national level, '43 percent of the children were born in a health facility and 44 percent of the births were assisted by a health professional. The results further show that 28 percent of the births were assisted by traditional birth attendants and 21 percent by relatives/others.'[606] The ability to seek the services of professionals or deliver at a recognized health facility 'were hampered by long distances to health facility, poverty and to some extent literacy and ignorance on the part of women to seek professional services.'[607]

vi) HIV and AIDS

The Kenyan consolidated report shows that 'there has been a decline in both new infections and prevalence rate from a peak of 6.0% in 2006 and 5.1% in 2007.'[608] According to the report, Nyanza 'continues to have the highest prevalence at 14.9 percent and North Eastern province the least (0.8 percent). The age category 25-49 has the highest prevalence (9.8 percent) followed by 50-64 years (5.0 percent) and 15-24 years being the lowest (3.8 percent).'[609]

6.1.2 The Domestication of the Right to Life, Survival and Development in Tanzania

As discussed below, Tanzania has undertaken constitutional, legislative, policy and administrative measures to domesticate the child's right to life, survival and development in the context of the CRC and the ACRWC.

a) Constitutional and Legislative Measures

In compliance with the provisions of Article 6 of the CRC and Article 5 of the ACRWC, Tanzania has undertaken legislative, judicial and administrative measures to ensure that the right to life is effectively guaranteed in its jurisdiction. The right to life is guaranteed under Article 14 of the Constitution of Tanzania, which provides that every person (including a child) has the inherent right to life.[610] Based on this constitutional foundation, both the Law of the Child Act (LCA) and the Penal Code

604 *Ibid*, para 117.
605 *Ibid*.
606 *Ibid*, para 118.
607 *Ibid*.
608 *Ibid*, para 119.
609 *Ibid*.
610 *See* also Article 13 of the Constitution of Zanzibar (1984).

prohibit death penalty to be imposed on children in the administration of juvenile justice in the context of Article 5(1) of the ACRWC.[611] In particular, Section 26(2) of the Penal Code explicitly provides that: 'The sentence of death shall not be pronounced on or recorded against any person who at the time of the commission of the offence was under eighteen years of age.'[612]

b) Policy and Administrative Measures

Administratively, Tanzania has devised and implemented a number of projects, programmes and services, which have an impact on children's right to life, survival and development. These include Young Child Survival Protection and Development (YCSPD, implemented in Zanzibar); Integrated Management of Child Illness (IMCI); Expanded Programme on Immunization (EPI); Community Based Rehabilitation (CBR); Prevention of Mother to Child Transmission Programme (PMTCT); Nutrition Programme, Reproductive Child Health (RCH); and the Zanzibar Basic Education Improvement Programme (ZABEIP).[613]

6.1.3 The Domestication of the Right to Life, Survival and Development in Uganda

Like in Kenya and Tanzania, the child's right to life, survival and development in Uganda has been domesticated through a number of constitutional, policy, legislative and administrative measures as considered below.

a) Constitutional and Legislative Measures

The right to life, survival and development in Uganda is guaranteed in the Constitution, the Children's Act and a number of policies.[614] In particular, Article 22(1) of the Constitution of Uganda categorically provides that no person (including a child, of course) 'shall be deprived of life intentionally except in execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of a criminal offence under the laws of Uganda and the conviction and sentence have been confirmed by the highest appellate court.' The Constitution goes further to protect the right to life, survival and development of an unborn child in the following phraseology: 'No person has the right to terminate the life of an unborn child except as may be authorised by law.'[615]

b) Policy and Administrative Measures

In order to ensure child survival and development, the Ugandan Government has undertaken several policy and administrative measures to improve the quality of and

611 Article 5(1) of the ACRWC provides explicitly that: 'Every child has an inherent right to life. This right shall be protected by law.'

612 Under Article 5(3) of the ACRWC it is provided that: 'Death sentence shall not be pronounced for crimes committed by children.' Under Section 26(2) of the Penal Code, in lieu of the sentence of death, the court 'shall sentence that person to be detained during the President's pleasure, and if so sentenced he shall be liable to be detained in such place and under such conditions as the Minister for the time being responsible for legal affairs may direct, and whilst so detained shall be deemed to be in legal custody.'

613 *See* United Republic of Tanzania, 'Tanzanian 3rd, 4th and 5th Reports on the Implementation of the Convention on the Rights of the Child (CRC) 2005- 2011', submitted to the CROC on 9 January 2012, para. 49.

614 African Child Policy Forum, *Harmonisation of Children's Laws in Eastern and Southern Africa: Country Briefs,* op. cit, p. 186.

615 Article 22(2) of the Constitution of Uganda.

accessibility to health-care services. In terms of policies, the Uganda National Plan of Action for Children reflects the right to life, survival and development. It aims at, *inter alia*, establishing and achieving survival, protection and development targets related to children and women 'that build on existing government policies, structures and sectoral plans.'[616] In addition, Uganda has devised measures to improve survival and development, which include measures 'that have been taken to improve the quality of and accessibility to health-care services; immunization; morbidity; child mortality; and efforts to coordinate and integrate primary health-care programmes in all health centres.'[617]

In this context, health units, for example, 'have been rehabilitated and new ones have been constructed. There is an improvement in the supply of drugs and medical equipment to government health units.'[618] In addition to these measures, the Ugandan Government has set a number of targets in relation to the health and well-being of children, to ensure their survival:

(a) maintenance of high levels of immunization coverage (at least 85 per cent of infants under 1 year) against six immunizable diseases and against tetanus for women of childbearing age;

(b) elimination of neonatal tetanus cases;

(c) elimination of poliomyelitis cases;

(d) reduction of 95 per cent of mortality due to measles;

(e) reduction by 30 per cent of the deaths caused by acute respiratory infections in children under 5 years;

(f) reduction of malaria-caused mortality in children under 5 years from 20 per cent to 10 per cent and morbidity by 30 per cent;

(g) reduction of malaria in pregnant mothers by 60 per cent;

(h) reduction of deaths due to diarrhoea by 50 per cent and reduce the incidence of diarrhoea by 20 per cent in children under 5 years;

(i) reduction of mother-to-child transmissions of HIV by reducing conception among HIV-positive women;

(j) reduction of transmission of HIV through reduction of STDs and changed sexual behaviour; reduction of transmission of HIV in the health-care setting and through sociocultural practices; and

(k) reduction of the socio-economic impact of HIV-infected parents on children through reducing suffering and prolonging the useful life of their parents and through assisting communities and care for orphans.[619]

616 African Child Policy Forum, *Harmonisation of Children's Laws in Eastern and Southern Africa: Country Briefs*, op. cit.

617 *Ibid*, pp. 186 & 187.

618 Republic of Uganda, 'Second Periodic Report of States Parties Due in 1997: Uganda', 5 November 2004 (CRC/C/65/Add.33), para 92.

619 *Ibid*, para 93.

In addition, the Ugandan Government 'has made an effort to coordinate and integrate primary health-care programmes in all health centres. These include the integrated management of childhood illness treatment programmes, safe motherhood promotion through mother-baby packages and the development and use of an essential health package.'[620]

6.2 The Child's Right to have his or her Best Interests Taken into Account

As considered in Chapters Two and Three, Article 4(1) of the ACRWC and Article 3 of the CRC guarantee the child's best interests. Under both treaties, States Parties are obliged to domesticate this principle through an array of measures – constitutional, policy, legislative, judicial and administrative measures. In this section, we examine the extent to which the three common law East African countries have domesticated this principle.

6.2.1 The Domestication of the Child's Best Interests Principle in Kenya

The principle of the best interests of the child has been part of Kenyan family law in respect of guardianship and custody of children. In a number of cases, the Kenyan courts have insisted the need to consider the best interests of the child when considering guardian, adoption and custody issues.[621] Of late, the Kenyan Constitution (2010) and the Children Act (2001) have revolutionized the importance of this principle 'by extending its application to the entire panoply of matters affecting children; whether private (involving parents and families) or public (by government, public authorities and courts).'[622] In particular, Article 53(2) of the Constitution of Kenya states that the child's best interests are of paramount importance in every matter concerning the child. To further elaborate this constitutional guarantee, Section 4(2) of the Kenyan Children Act provides that:

> (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.

The best interests of the child principle is also expounded in Section 4(3) of the Kenyan Children Act, which obliges all judicial and administrative institutions, and all persons acting in the name of these institutions, where they are exercising any powers conferred by this law, to 'treat the interests of the child as the first and paramount consideration.' This consideration is to the extent that this should be consistent with adopting a course of action calculated to:

620 *Ibid*, para 94.

621 See particularly *In Re R.M. (A Baby)* Nairobi Law Courts Adoption Cause No. 76 of 2006 (reported in Children's Legal Action Network and Childline Kenya, *The Law on Children: A Case Digest* Nairobi: Children's Legal Action Network and Childline Kenya, Vol. 2, 2009, pp. 67-70). Applying the principle of the best interests of the child in adoption of an abandoned child from birth, the Nairobi Law Courts in of the cases held that: 'I am also satisfied that it will be the best interests of the child that he be adopted by the applicants. The adoption will give the child an opportunity to grow up in a family environment, which he would otherwise not have had.' See specifically *In Re M.K.M. (An Infant)* Nairobi Law Courts Adoption Cause No. 156 of 2004 (reported in Children's Legal Action Network and Childline Kenya, The Law on Children: A Case Digest Nairobi: Children's Legal Action Network and Childline Kenya, Vol. 2, 2009, pp. 93-95, at p. 95).

622 African Child Policy Forum, *Harmonisation of Children's Laws in Eastern and Southern Africa: Country Briefs,* op. cit, p. 68.

(a) safeguard and promote the rights and welfare of the child;

(b) conserve and promote the welfare of the child;

(c) secure for the child such guidance and correction as is necessary for the welfare of the child and in the public interest.

The CROC has urged the Kenyan government to 'ensure that the principle of the best interests of the child is systematically taken into account in all programmes, policies and decisions that concern children, and especially aiming at addressing vulnerable and disadvantaged children, *inter alia*, by sensitizing and training all involved officials and other professionals.'[623] In its consolidated 3rd, 4th and 5th report to the CROC (the Kenyan consolidated report), the Government of Kenya has reported to have taken the following "follow up actions" in compliance with the foregoing recommendations of the CROC. First, it reported that the principle of the best interest of the child 'has been enshrined in the Constitution of the State Party. Further, it has been defined in the draft Amendments to the Children Act, 2001.'[624] Second, the Government of Kenya

> […] has continued to adhere to the principle of the Best Interest of the Child in all situations. To enhance this, it conducted numerous capacity building sessions for professionals working with and for children at various levels including the Judiciary, law enforcement officers, teachers, Children Officers, school administrators, health personnel, including psychologists, social workers, personnel of childcare institutions, and traditional or community leaders on the principles and application of the best interest of the child in all matters affecting the child.[625]

Therefore, the principle of the best interests of the child is protected constitutionally, legislatively and administratively in Kenya.

6.2.2 The Domestication of the Child's Best Interests Principle in Tanzania

Tanzania has domesticated the principle of the best interests of the child, as enshrined in Article 3 of the CRC and Article 4 of the ACRWC, by adopting and undertaking several measures to address and implement this principle. These measures have also been addressed and invoked in legislative, administrative and judicial decisions. Legislatively, Tanzania has enacted specific provisions recognizing and protecting the best interests of the child in LCA. In particular, Section 4(2) of the LCA[626] requires the best interest of the child to be a primary consideration in all actions concerning a child whether undertaken by public or private social welfare institutions, courts or administrative bodies.

Apart from being entrenched in the child-specific laws as set out above, Tanzania has also embedded the principle of the best interests of the child in other laws that touch on children's welfare. For instance, in Zanzibar the principle is contained in the Spinsters and Single Parent Children Protection Act (2005), which allows pregnant girls to return to school after giving birth. The repealed law relating to impregnated

623 CROC, 'Concluding Observations on Kenya's Second Periodic Report' 19 June 2007, CRC/C/KEN/CO/2, para 27.

624 Republic of Kenya, '3rd, 4th and 5th State Party Report to the UNCRC Committee – Geneva 2005-2011', op. cit, para 101.

625 *Ibid*, para 102.

626 Article 42(2) of the Draft Constitution proposes to protect the child's best interests.

school children formerly made it was an offence for a girl to be pregnant; but this legal position was omitted and replaced by the principle that in order to protect the impregnated girl's best interests, it is not important that she is allowed to return to school after giving birth and after lactation of the child as medically acceptable.

In Tanzania Mainland, Section 125(2) of the Law of Marriage Act (1971)[627] states that the paramount consideration in granting custody of a child should be the *welfare of the child*. The phrase "the welfare of the child" has been defined within the confines of the best interests of the child principle enshrined in Article 3 of the Convention. The leading judicial decision to elaborate on this principle is *Ramesh Rajput v Mrs S. Rajput*,[628] whereby the Court of Appeal of Tanzania held that the most important factor in custody proceedings is the welfare of the child; and that an infant of two years should be with the mother; unless there are very strong reasons to the contrary. This decision has been authoritatively applied by courts in Tanzania, including in *Halima Kahema v Jayantilal G. Karia*,[629] and in *Pulcheria Pundugu v Samuel Huma Pundugu*[630] where the High Court of Tanzania held that: 'In deciding in whose custody an infant should be placed the Court is required (under Section 125(2) of the Law of Marriage Act) to take into account the paramount consideration regarding the welfare of the infants.'

The welfare principle in determining custody of children in a marriage was given weight in *Gertrude B. Mwombera v Elias John Anyandwile*.[631] In this case, the trial magistrate had refused to give custody of the issues of marriage to the appellant (mother) solely on ground that she was economically incapacitated. On this finding, Kimaro, J. (as she then was) was of the view that: 'Regarding the question of custody of children it was wrong for the trial magistrate to put into consideration the economic ability of the parties as a primary factor in determining the issue of custody.' The Court was of the further view that:

> According to Section 125 of the Law of Marriage Act, 1971, *what becomes a paramount consideration is the welfare of the children: under whose custody will the child progress well in terms of care, love and affection, needs, etc.* The mere fact that a spouse has no formal employment is not conclusive [evidence] that she/he is unsuitable to have custody of the children. *The totality of all matters which go with the welfare principle should be taken into consideration before a magistrate makes a determination on who should be given custody of the issues of the marriage*. [Emphasis supplied].

Therefore, the principle of the best interests of the child has been domesticated in Tanzanian family law as well as child law through the welfare of the child notion even before the CRC and ACRWC codified it. As such, it is part of the country's law.

6.2.3 The Domestication of the Child's Best Interests Principle in Uganda

The principle of the best interest of the child is reflected in the Constitution of Uganda (1995) and the Children Act (1996).[632] Article 34(1) of the Ugandan Constitution

627 Cap. 29 R.E. 2002.

628 [1988] TLR 96.

629 [1987] TLR 147.

630 [1985] TLR 7.

631 High Court of Tanzania at Dar es Salaam, Civil Appeal No. 6 of 2001 (Unreported).

632 Republic of Uganda, 'Second Periodic Report of States Parties Due in 1997: Uganda', 5 November 2004 (CRC/C/65/Add.33), para 89.

requires that laws to be enacted in Uganda should further the best interests of the child, which is consistent with Article 3 of the CRC and Article 4 of the ACRWC. Borrowing heavily from the common law "welfare of the child" principle, Section 3 of the Ugandan Children's Act requires that in all actions and decisions taken concerning the child, his or her welfare shall be of paramount consideration. As seen in its application, the common law notion of the "welfare of the child", in effect, 'means the same thing as the best interests of the child.'[633]

To further elaborate the application of the principle of the welfare/best interests of the child, paragraphs 1 and 2 of the First Schedule to the Children Act require that whenever the state, a court or a local authority or any person determines any question or undertakes any action regarding the up-bringing of a child, administration of a child's property and in all matters relating to the child, regard shall be had to the welfare of the child principle. In effect, these provisions complement the provisions of Section 3 of this law.[634]

6.3 The Child's Right not to be Discriminated

Under both the CRC and the ACRWC, States Parties are obliged to domesticate the principle of non-discrimination of children. In this section, we discuss the extent to which the three common law East African countries have adopted constitutional, policy, legislative, judicial and administrative measures to domesticate the principle of non-discrimination.

6.3.1 The Domestication of the Child's Right to Non-Discrimination in Kenya

Consistent with the provisions of the ACRWC and the CRC, Kenya has adopted a number of constitutional, policy, legislative and administrative measures to domesticate and implement the child's right to be protected from discrimination. These measures are examined below.

a) Constitutional and Legislative Measures

The principle of non-discrimination in Kenya is entrenched in both the Constitution of Kenya (2010) and the Children Act.[635] Article 27 of the Kenyan Constitution guarantees every person (including children) the right not to be discriminated against. According to Clause (1) of this Article, every person (including a child) is equal before the law and has the right to equal protection and equal benefit of the law.

Equality includes the full and equal enjoyment of all rights and fundamental freedoms.[636] Under Section 5 of the Children Act, it is provided that: 'No child shall be subjected to discrimination on the ground of origin, sex, religion, creed, custom, language, opinion, conscience, colour, birth, social, political, economic or other status, race, disability, tribe, residence or local connection.'

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633 African Child Policy Forum, *Harmonisation of Children's Laws in Eastern and Southern Africa: Country Briefs*, op. cit, p. 186.

634 *Ibid*.

635 Republic of Kenya, '3rd, 4th and 5th State Party Report to the UNCRC Committee – Geneva 2005-2011', op. cit, para 108.

636 *See* particularly Article 27(2) of the Constitution of Kenya (2010).

In addition, recently enacted laws entrench the principle of non-discrimination. These laws include the Sexual Offences Act and the law against female genital mutilation (FGM), both of which seek to ensure equal treatment of all children under the law.

Furthermore, the discrimination of children born to foreign fathers under the Births and Deaths Registration Act has been reversed in the new Kenya Citizenship and Immigration Act, 2011.[637]

b) Administrative Measures

Despite these constitutional and legislative guarantees, in its previous Concluding Observations the CROC was concerned with the continued violation of the child's right not to be discriminated and urged the Government of Kenya to:

(a) continue revising all its legislation in order to bring it into full compliance with Article 2 of the Convention and to ensure full implementation of all legal provisions;

(b) combat discrimination by ensuring equal access to education, health-care facilities and poverty-alleviation programmes and pay special attention in this regard to the rights of girls;

(c) carry out comprehensive public-education campaigns to prevent and combat all forms of discrimination;

(d) include specific information in the State party's next periodic report on the measures and programmes relevant to the Convention on the Rights of the Child undertaken by the State Party to follow up on the Declaration and Programme of Action adopted at the 2001 World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, also taking into account the Committee's General Comment No. 1[638] on the aims of education.

Addressing the foregoing recommendations by the CROC, the Government of Kenya, in its 3rd, 4th and 5th consolidated reports to the CROC, has indicated a number of "follow up actions" it has made ever since these recommendations were made. In order to respond to the above Concluding Observations, the Government of Kenya indicated that it has taken the following actions:

(a) The Constitution of Kenya, Article 53(1)(e) assigns parental responsibility to both parents whether they are married or not. This provides for protection of children born out of wedlock.

(b) Article 56 specifically deals with minority and marginalised groups.

637 Act No. 12 of 2011, which was assented to on 27 August 2011 and entered into force on 30 August 2011. This law is published by the National Council for Law Reporting on www.kenyalaw.org with the Authority of the Attorney-General. It is also available at http://www.nairobi.diplo.de/contentblob/3356358/Daten/1788002/d_KenyanCitizenship_No12_of_2011.pdf (Accessed on 20 March 2013). On this matter, see particularly, Sections 6-18 of this law.

638 (CRC/GC/2001/1).

(c) Article 14(1) states that a child born of a Kenyan citizen, whether or not the child is born in Kenya, shall acquire Kenyan citizenship as long as either the mother or father is a Kenyan citizen.

(d) Article 56 of the Constitution further provides that any unknown child found in Kenya who is or appears to be 8 years of age is presumed to be a citizen by birth.

(e) The Kenya Citizens and Foreign Nationals Management Service Bill, 2011, further provides for a framework that protects the right to identity for all.

(f) The National Gender and Equality Commission Act of 2011, emphasizes on non-discrimination.

(g) Draft Amendments to the Children Act seeks to harmonize various legislations relevant to child rights and also align them to the Constitution.

(h) The Prohibition of Female Genital Mutilation Act, 2011 protects the rights of the girl child against FGM.[639]

In addition to the provisions of Article 27 of the Constitution and Section 5 of the Children Act (which have outlawed discrimination of children on the listed grounds, Section 5 of the Persons with Disabilities Act (2003) outlaws discrimination of children on any grounds, including disability. The Act also provides that 'no child with disability shall be denied the right to education as provided for in the Children Act 2001, and the UNCRC.'[640] In addition, Kenya also established the HIV and AIDS Tribunal in 2011. In principle:

> The Tribunal is authorized to hear and determine complaints or appeals arising from any breach of the HIV and AIDS Prevention Act 2006 excluding criminal jurisdiction. The Tribunal has powers to address fundamental human rights abuses as a result of an individual's HIV status and come up with remedies to redress the injustices. It also has the power to award damages in respect of any proven financial loss or impairment of dignity, pain or emotional and psychological suffering as a result of discrimination.[641]

In addition, the National Cohesion and Integration Act (2008) provides for the establishment of the National Cohesion and Integration Commission with the mandate of facilitating and promoting equality of opportunity, good relations, harmony and peaceful coexistence between persons (including children) of different ethnic and racial backgrounds in Kenya and to advice the Government thereof.[642] The Kenyan Government has acknowledged that these state legislative measures have been complemented by efforts undertaken by several Civil Society Organizations (CSOs) that, with the support of development partners, 'are undertaking awareness campaigns against all forms of discrimination against children and women.'[643]

639 Republic of Kenya, '3rd, 4th and 5th State Party Report to the UNCRC Committee – Geneva 2005-2011', op. cit, para 95.

640 *Ibid*, para 97.

641 *Ibid*, para 98.

642 *Ibid*, para 99.

643 *Ibid*, para 100.

c) Judicial Measures

In Kenya: *RM v Attorney-General*[644] the court had an opportunity to determine an issue relating to the principle of non-discrimination against children as enshrined in the Children Act. The court borrowed a leaf from the Human Rights Committee,[645] which 'has commented that the enjoyment of rights and freedoms on an equal footing does not mean identical treatment in every instance.'[646] Taking the ICCPR as an example, the court observed that: 'Article 6(5) [of the ICCPR] prohibits the death sentence from being imposed on persons below 18 years of age and from being carried out on pregnant women. The other obvious example is affirmative action which is aimed at diminishing or eliminating conditions likely to perpetuate inequality or discrimination in fact.'[647] According to the court:

> Such a corrective action constitutes or is termed legitimate differentiation under the ICCPR, it is therefore an accepted international principle of law that differentiation based on reasonable and objective criteria does not amount to prohibited discrimination. A state which complies with this [criterion] would not be faulted in practice or in its formulation of a supporting law provided this [criterion] is adhered to. To explain the position further, the universality of the 1948 Declaration of Human Rights is based on a common heritage of humankind which is the oneness of the human family and the essential dignity of the individual. It is from these two universally shared traits from which the notion of equality finds its stem or base.[648]

In this case, the applicant had alleged that Section 23(4) of the Kenyan Children's Act was discriminatory and called upon the High Court of Kenya to determine, *inter alia*, the following questions:

2. Is Section 24(3) of the Children Act either of itself or in its effect discriminatory to the extent that it expressly or constructively prescribes that a father of a child who is neither married to nor has subsequently married the child's mother bears no parental responsibility in relation to that child?
3. Is Section 24(3) of the Children Act inconsistent with Section 82(2) of the Constitution of Kenya concerning a child whose parents were not married to each other at the time of the child's birth to the extent that it permits a father of such child to discharge parental responsibility to the child by virtue of its provision?
4. Has the applicant been treated in a discriminatory manner by his father who, acting by virtue of Section 24(3) of the Children Act, has refused to assume parental responsibility on her behalf?
5. Does Section 24(3) of the Children Act impose a statutory criterion which discriminates against children whose parents were not married to each other at the time of their birth as against all other children; which criterion

644 (2006) AHRLR 256 (KeHC 2006).

645 The Committee oversees the implementation of the International Covenant on Civil and Political Rights (ICCPR).

646 *Kenya: RM v Attorney-General*, op. cit, para. 69.

647 *Ibid*.

648 *Ibid*.

> is inconsistent with Section 82(1) and (2) of the Constitution of Kenya, making the same therefore null and void?

In fact, the child on whose behalf the next friend filed this case in court (referred to by the court in its pseudonym as "RM") was born on 16 September 2000 through a relationship between the mother and another man. It was alleged that the father worked with a local company as a mechanic. The mother deposed that at the time of the birth she was cohabiting both before the date of birth and up to 3 January 2001 with the alleged father who duly paid hospital expenses at the hospital where RM was born. On 3 January 2001 the alleged father disappeared or avoided the mother completely until April 2001.

The mother further deposed that on 16 September 2000 the alleged father came to the matrimonial home and named the child after his mother (RM) and shaved her head after one week as per his tribe's customary law, i.e. the Kisii ethnic group. She went on to depose that the father had failed to give any parental support to both the mother and the child and that both entirely depended on good Samaritans for their upkeep.

She lamented that the law did not place any parental responsibility on the child's father since she was not married; and, had she married him, RM's father would have had parental responsibility towards the plaintiff just like the mother.

She finally deposed that she had been advised that the law, i.e. Section 24(3) of the Children Act was discriminatory as it put RM at a disadvantaged position vis-à-vis other children whose fathers have married or subsequently married their mothers. Such children did not, therefore, have to contend with the question of who would take responsibility on their behalf. And, as such, RM should be accorded equal treatment with those children whose parents were married or had subsequently married by placing parental responsibility on both the father and mother.

Refuting this contention, the High Court of Kenya was of the considered opinion, given the prevalent situation obtaining in Kenya, that:

> To sum up we find and hold that Section 23(4) and by extension 25 do not offend the principle of equality and nondiscrimination either by themselves or in their effect. We further hold that the principle of equality and nondiscrimination does not mean that all distinctions between people are illegal. Distinctions are legitimate and hence lawful provided they satisfy the following: (1) pursue a legitimate aim such as affirmative action to deal with factual inequalities; and (2) are reasonable in the light of their legitimate aim.[649]

This conclusion of the court was founded in the court's finding that since the aim of Section 24(3) of the Children Act 'is to provide for parental responsibility locating it initially in the mother and providing for a shared responsibility taking into account all possible relationships that spring from the birth the section has handled the situation with a reasonable proportionality between the difference of the one set of children (generally born within and those born out of wedlock) since the aim is to provide for parental responsibility in both situations as far as it is practically possible in the later situation.[650] 'Thus, the court found that 'the balance struck by the challenged section cannot be said to be unreasonable or unjust. The difference between the two

649 *Ibid*, para. 80.

650 *Ibid*, para. 75.

sets of situations cannot in our view be said not to have an objective and reasonable justification.'[651]

The application of the principle of non-discrimination in Kenya was also considered by the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) in *Institute for Human Rights and Development in Africa (Banjul) and Open Society Justice Initiative (New York) (behalf of children with Nubian background in Kenya) v The Government of Kenya (Nubian* case*)*.[652] In this communication, the first to be considered by the ACERWC under its communication procedure,[653] the Complainants alleged that children of Nubian descent in Kenya are treated differently from other children in Kenya, for which 'there is no legitimate justification, amounting to unlawful discrimination and a violation of Article 3 of the African Children's Charter.'[654] They further alleged that the fact that children of Nubian descent are expected to go through a lengthy and arduous process of vetting (including requiring them to demonstrate the nationality of their grandparents, as well as the need to seek and gain the approval of Nubian elders and governmental officials, etc.) is discriminatory, and depriving them of any legitimate expectation of nationality, and leaving them effectively stateless.

The ACERWC considered that 'racial and ethnic discrimination are prohibited as binding *jus cogens* norm of international law',[655] observing that the ACWRC is no exception.[656] In this regard, the ACERWC held that:

> The current facts in relation to children of Nubian descent in Kenya indicate a *prima facie* case of discrimination and violation of Article 3 of the Charter. As a result, the burden shifts to the state to justify the difference in treatment indicating how such a treatment falls within the notion of fair discrimination. The failure of the State to be present for a consideration of this Communication makes such an engagement impossible. However, the African Committee weighed whether the treatment of the children of Nubian descent in Kenya can be considered to be a fair discrimination, but found otherwise. For instance, in a very similar case involving children of Haitian descent in Dominican Republic, it was held that the refusal and placing of unfair obstacles by local officials to deny birth certificate and recognition of the nationality of Dominicans of Haitian descent as part of a deliberate policy which effectively made the children stateless constituted racial discrimination.[657] Moreover, after a thorough investigation of the situation of children of Nubian descent in Kenya, the Kenya National Commission on Human Rights has concluded that "the process of vetting… Nubians… is discriminatory and violates the principle of equal treatment. Such a practice has no place in a democratic and pluralistic society".[658]

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651 *Ibid*.

652 Communication No. Com/002/2009 (ACERWC).

653 Article 44(1) of the ACRWC provides that: 'The Committee may receive communication, from any person, group or nongovernmental organization recognized by the Organization of African Unity, by a Member State, or the United Nations relating to any matter covered by this Charter.'

654 *Nubian* case, op. cit, para 55.

655 *Ibid*, para 56.

656 Article 3 provides in full that: '[E]very child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.'

657 *See* generally *Yean and Bosico v Dominican Republic* I-ACtHR Judgment of 8 September 2005.

658 Kenya National Commission on Human Rights, 'An Identity Crisis? Study on the Issuance of National Identity Cards in Kenya' (2007), p. vi.

According to the ACERWC, the current practice applied to children of Nubian descent in Kenya, and in particular its subsequent effects, 'is a violation of the recognition of the children's juridical personality, and is an affront to their dignity and best interests.'[659] For a discriminatory treatment to be justified, the African Commission on Human and Peoples' Rights has rightly warned that 'the reasons for possible limitations must be founded in a legitimate state interest and … limitations of rights must be strictly proportionate (sic) with and absolutely necessary for the advantages which are to be obtained'.[660] Therefore, the ACERWC was not convinced:

> […] especially in relation to a practice that has led children to be stateless for such a long period of time, that the current discriminatory treatment of the Government of Kenya in relation to children of Nubian descent is "strictly proportional with" and equally importantly "absolutely necessary" for the legitimate state interest to be obtained. The Committee is of the view that measures should be taken to facilitate procedures for the acquisition of a nationality for children who would otherwise be stateless, and not the other way round. As a result of all the above, the African Committee finds a violation of Article 3 of the African Children's Charter.[661]

6.3.2 The Domestication of the Child's Right to Non-Discrimination in Tanzania

In its previous Concluding Observations,[662] the CROC urged that Tanzania to continue revising all its legislation in order to bring it in full compliance with Article 2 of the CRC, and to ensure full implementation in practice of all legal provisions. The CROC also recommended that Tanzania should carry out comprehensive public education campaigns to prevent and combat all forms of discrimination. It, therefore, requested that specific information should be included in Tanzania's next periodic report[663] on the measures and programmes relevant to the CRC undertaken by Tanzania to followup on the Declaration and Programme of Action adopted at the 2001 World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, also taking into account the CROC's *General Comment No. 1 on the Aims of Education* (2001).[664]

a) Constitutional and Legislative Measures

In compliance with the CROC's recommendation requiring it to continue revising all its legislation in order to bring it in full compliance with Article 2 of the CRC, Tanzania has completed the said review, which has culminated in the enactment of the LCA in 2009 for Tanzania Mainland and the Children's Act in 2011 for Zanzibar. Both pieces of legislation have complied with the provisions of Article 2 of the CRC and Article 3 of the ACRWC, which prohibit 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

659 *Nubian* case, para 57.

660 *Legal Resources Foundation v Zambia Communication* No. 211/98, para 67 (AComHPR).

661 *Nubian* case, para 57.

662 See CROC, Concluding Observations on Tanzania's Implementation of the CRC CRC/C/TZA/CO/2 dated 21 June 2006.

663 A consolidated 3rd, 4th and 5th report was due and submitted to the CROC on 9 January 2012.

664 *See* particularly CROC, *General Comment No. 1 on the Aims of Education of 2001* CRC/GC/2001/1.

other status.[665] In addition, both Constitutions – i.e. the Constitution of the United Republic of Tanzania (1977) and the Constitution of Zanzibar (1984) – have specific provisions that comply with Article 2 of the CRC and Article 3 of the ACRWC.[666]

This constitutional framework makes it mandatory for all laws enacted in Tanzania to comply with the no-discrimination principle contained in Article 2 of the CRC and Article 3 of the ACRWC. Where any law is contrary to this principle, the High Courts of Tanzania and Zanzibar have power to declare the said law to be unconstitutional for being repugnant to the said constitutional provisions to the extent of such inconsistency.

b) Policy and Administrative Measures

In translating the foregoing constitutional and statutory provisions protecting the principle of non-discrimination as set out in Article 2 of the CRC and Article 3 of the ACRWC into practice, Tanzania has been striving to eradicate discrimination against children based on any of the listed grounds in all spheres of life. For instance, it has ensured that there is no discrimination in school enrolment at all levels of schooling for children. Also, for refugee children, Tanzania has facilitated the establishment and supply of social services such as health and education to children in refugee camps in collaboration with the United Nations Human Commission for Refugees (UNHCR). In this regard, Tanzania has ensured that the provision of social amenities to children is carried out on equal footing to all children, including refugee children living in camps.[667]

Tanzania has also undertaken various measures and programmes relevant to the CRC as well as the ACRWC as a follow-up on the Declaration and Programme of Action adopted at the 2001 World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, also taking into account the CROC's General Comment No. 1 on the Aims of Education (2001).[668] These measures include incorporating in the LCA, the Persons with Disabilities Act (2010)[669] and the Zanzibar Children's Act provisions that prohibit discrimination of children in all aspects concerning them.

6.3.3 The Domestication of the Child's Right to Non-Discrimination in Uganda

The child's right against discrimination is guaranteed in both the Ugandan Constitution and the Children's Act. Article 21 of the Ugandan Constitution provides for equality before the law and protects all persons, including children, against discrimination on grounds of sex, race, colour, ethnic origin, creed, tribe, religion, social or economic standing and/or political opinion. In terms of Article 34(3) 'No child shall be deprived

665 *See* particularly Section 5 of the LCA and Section 6 of the Zanzibar Children's Act (2011).

666 *See* particularly Article 12 of the Constitution of Zanzibar (1984); and Article 13 of the Constitution of the United Republic of Tanzania (1977).

667 United Republic of Tanzania, 'Tanzanian 3rd, 4th and 5th Reports on the Implementation of the Convention on the Rights of the Child (CRC) 2005- 2011', op. cit, para. 39.

668 CROC, General Comment No. 1 on the Aims of Education (2001) CRC/GC/2001/1.

669 Act 9 of 2010. Under Section 4(b) of this law, it is prohibited to discriminate a person (including a child) with disabilities on the basis of their disability; whereby the Minister responsible for persons with disabilities is obliged under Section 5(1)(d) to 'take all appropriate measures to eliminate discrimination on the basis of disability by any persons, private or public.'

by any person of medical treatment, education or any other social or economic benefit by reason of religious or other beliefs.' In furthering this right, Section 5(2) of the Ugandan Children's Act provides that 'any person having custody of a child shall protect the child from discrimination, violence, abuse and neglect.'

6.4 The Right to Participation, Including Respect for the Views of the Child

The right to be heard (Article 12) is a general principle of the CRC and Article 7 of the ACRWC relevant to the implementation and interpretation of all other rights. Article 12 of the CRC, in the main, asserts that all children are capable of and entitled to expressing their views. This applies equally to boys and girls of all ages, rural and urban children, ethnic minorities and children with disabilities. The implementation of the provision of this article at the domestic level requires us to begin to listen to what children say and to take them seriously; that we recognise the value of their own experience, views and concerns; and to question the nature of adult responsibilities towards children.[670]

Recognizing that children have rights does not mean that adults no longer have responsibilities towards children. On the contrary, children cannot and should not be left alone to fight the battles necessary to achieve respect for their rights. What is implied by the Convention, and its philosophy of respect for the dignity of children, is that adults need to learn to work more closely in collaboration with children to help them articulate their lives, to develop strategies for change and exercise their rights.

Participation is a fundamental human right and a core element of a human rights-based approach. Participation represents the right of rights holders - including children - to demand their rights and to hold duty bearers to account. Right holders' participation and duty bearers' accountability are complementary parts of a human rights-based approach. In seeking to enhance children's right to participation, including respect for the views of the child, in a democratic society, it is important to understand clearly what Article 12 of the CRC does and does not say:

- It does not give children the right to autonomy;
- It does not give children the right to control over all decisions irrespective of their implications either for themselves or others;
- It does not give children the right to ride roughshod over the rights of their parents.[671]

However, it does introduce a radical and profound challenge to traditional attitudes, which assume that children should be seen and not heard.

Article 12, therefore, has the following contents:

- All children are capable of expressing a view;
- Children have the right to express their views freely;
- Children have the right to be heard in all matters affecting them;

670 Lansdown, G., *Promoting Children's Participation in Democratic Decision-making* Florence: UNICEF's Innocenti Research Centre, 2001, p. 3.

671 *Ibid*.

- Children have the right to have their views taken seriously; and
- Children have the right to participate in accordance with their age and maturity.[672]

In a nutshell, these contents are elaborative in the following contexts:

i) ***All children are capable of expressing a view***, meaning that there is no lower age limit imposed on the exercise of the right to participate. Thus, the right extends to any child who has a view on a matter of concern to them. Even if very small children (and some children with disabilities) may experience difficulties in articulating their views through speech, they can be encouraged to do so through other means of communication (including art, poetry, play, writing, computers or signing).[673]

ii) ***Children have the right to express their views freely***, which entails that if they are to be able to express their views, it is necessary for adults to create the opportunities for children to do so. That is to say, Article 12 of the CRC imposes an obligation on adults in their capacity as parents, professionals and politicians to ensure that children are enabled and encouraged to contribute their views on all relevant matters. This does not, of course, imply that children should be required to give their views if they are not willing or interested in doing so.[674]

iii) ***Children have the right to be heard in all matters affecting them***, which extends to all actions and decisions that affect children's lives – in the family, in school, in local communities, and at national political level. It applies both to issues that affect individual children, such as decisions about where they live following their parents' divorce, and to children as a constituency, such as legislation determining the minimum age for full-time work. It is important to recognise that many areas of public policy and legislation impact on children's lives – issues relating to transport, housing, macro-economics, environment, as well as education, childcare and public health all have implications for children.[675]

iv) ***Children have the right to have their views taken seriously***, which entails that children should not only be given the right to be listened to; but also it is important to take what they have to say seriously. Article 12 of the CRC insists that children's views are given weight and should inform decisions made about them. Apparently, this does not mean that whatever children say must be complied with – simply that their views receive proper consideration.[676]

v) ***Children have the right to participate in accordance with their age and maturity***, meaning that the weight that must be given to children's views needs to reflect their level of understanding of the issues involved. This does

672 *Ibid.*
673 *Ibid.*
674 *Ibid.*
675 *Ibid.*
676 *Ibid.*

> not mean that young children's views will automatically be given less weight. There are many issues that very small children are capable of understanding and to which they can contribute thoughtful opinions. Competence does not develop uniformly according to rigid developmental stages. The social context, the nature of the decision, the particular life experience of the child and the level of adult support will all affect the capacity of a child to understand the issues affecting them.[677]

(a) The Implication of the Child's Right to Participate in a Democratic Society

The implication of Article 12 of the CRC can be seen in this context: it is a substantive right, which guarantees children's entitlement to be actors in their own lives and to participate in the decisions that affect them. It should be noted, however, that, as with adults, democratic participation is not an end in itself: it is the means through which to achieve justice, influence outcomes and expose abuses of power. That is to say, it is also a procedural right enabling children to challenge abuses or neglect of their rights and take action to promote and protect those rights. It enables children to contribute to respect for their best interests.[678]

(b) The Implications of Failing to Listen to Children and Take their Views Seriously

There is a powerful body of evidence showing how prevailing attitudes towards children, based on the view that adults both know best and will act in their best interests, have failed many children. Many of these failures have resulted from a refusal to listen to the voices of children themselves.[679] How, then, have children been failed?

i) Adults Can Abuse their Power Over Children

Experience has shown that where children are not effectively given the right to participate in making decisions or actions affecting them and their views are not seriously considered, adults have assumed power over children, leading to exploitation and abuse of that power to the detriment of children's well-being.[680]

ii) Adults do not Always Act in Children's Best Interests

Experience recorded in the last century has shown that, adults with responsibility for children across the professional spectrum have been responsible for decisions, policies and actions that have been inappropriate, if not actively harmful to children, while claiming to be acting to promote their welfare.[681]

iii) Parents' Rights are Protected Over those of Children

Public policy often supports the rights and interests of parents ahead of those of children, even when the consequences of so doing are detrimental to the welfare of

677 *Ibid.*
678 *Ibid.*
679 *Ibid.*
680 *Ibid.*
681 *Ibid.*

children; and this is largely due to the fact that parents, as adults and voters, have a more powerful influence on and access to governments than children.[682]

iv) Children's Interests are Often Disregarded in Public Policy

Children's interests are frequently disregarded in the public policy sphere in favour of more powerful interest groups. It is not necessarily the case that children's welfare is deliberately disregarded, but rather that children's voices, and the impact of public policy on their lives, are not visible in decision-making forums and accordingly, never reach the top of the political agenda.[683]

(c) The Effect of Positively Listening to Children and Taking their Views Seriously

Experience recorded in many societies around the world indicates that when children are allowed to participate in making decisions or actions concerning/affecting them and their views are seriously considered, children's rights and welfare are effectively protected. The following are some of the positive results[684] of positive listening to children and taking their views seriously:[685]

(i) It Leads to Better Decisions in the Best Interests of the Child

Children have a body of experience and knowledge that is unique to their situation. They have views and ideas as a result of that experience. Much of government policy impacts directly or indirectly on children's lives, yet it is developed and delivered largely in ignorance of how it will affect the day-to-day lives of children and their present and future well-being.[686]

(ii) It Strengthens a Commitment to, and Understanding of, Democracy

In both well-established and newly-formed democracies, there is a need for children to experience the implications of democratic decision-making. Children need opportunities to learn what their rights and duties are, how their freedom is limited by the rights and freedoms of others and how their actions can affect the rights of others. They need opportunities to participate in democratic decision-making processes within school and within local communities, and learn to abide by subsequent decisions. Such participation helps to shape their attitudes and actions towards responsible citizenship when they become adults.[687]

(iii) It Effectively Protects Children

We only truly learn that we have rights and come to believe in them through the process of acting on them. Having a voice about one's rights is, therefore, essential

682 For example, physical punishment of children persists in many countries throughout the world although the Committee on the Rights of the Child has clearly stated that it represents a violation of Article 19 of the Convention on the Rights of the Child, the right to protection from all forms of violence. Parents defend its use on grounds of the need to impose effective discipline on their children.

683 *Ibid.*

684 *Ibid.*

685 *Ibid.*

686 *Ibid.*

687 *Ibid.*

to their fulfilment. It is well settled that where children are entitled to challenge their situation and given the mechanisms to do so, abuse and violations of rights are far more easily exposed. Children who are encouraged to talk are empowered to challenge abuses of their rights and are not simply reliant on adults to protect them.[688]

(iv) It is a Fundamental Human Right

It is well established in the human rights discourse that all people have a right to express their views when decisions that directly affect their lives are being made – and children are people too.

(d) Principles Governing Participation of Children

Enlisted herein below are a number of fundamental principles that should underpin any activity seeking to promote children's democratic participation:[689]

- children must understand what the project or the process is about, what it is for and their role within it;
- power relations and decision-making structures must be transparent;
- children should be involved from the earliest possible stage of any initiative;
- all children should be treated with equal respect regardless of their age, situation, ethnicity, abilities or other factors;
- ground rules should be established with all the children at the beginning;
- participation should be voluntary and children should be allowed to leave at any stage; and
- children are entitled to respect for their views and experience.

6.4.1 The Domestication of the Child's Right to Participation in Kenya

Consistent with the provisions of Article 12 of the CRC, Kenya has adopted constitutional, policy, legislative and administrative measures to domesticate and implement the child's right to participation, as considered below.

a) Constitutional and Legislative Measures

The Constitution of Kenya (2010) recognises the right of every person (including a child) to participation[690] 'as a key principle and value for the conduct of public affairs at all levels'.[691] In compliance with international child law, Section 4(4) of the Kenya Children's Act explicitly guarantees the child's right to participation, including having his or her views respected as well as taken into account in matters affecting them. The law sets out guidance on the need to consider the child's maturity when considering

688 *Ibid*.

689 *Ibid*.

690 *See* specifically Chapter 4, Article 37 of the Constitution of Kenya (2010).

691 Republic of Kenya, '3rd, 4th and 5th State Party Report to the UNCRC Committee – Geneva 2005-2011', op. cit, para 103.

his or her views, 'a consideration that corresponds to the concept of the evolving capacities of children.'[692]

b) Administrative Measures

In its previous Concluding Observations, the CROC urged the Government of Kenya to effectively:

(a) promote, facilitate and implement, within the family, schools, the community, in institutions as well as in judicial and administrative procedures, the principle of respect for the views of children and their participation in all matters affecting them, in accordance with Article 12 of the CRC, while taking into account the recommendations adopted by the CROC after the day of general discussion on the right of the child to be heard, in 2006; and

(b) make efforts to widely disseminate the National Guidelines on Child Participation and develop strategies to reach the most marginalized groups of children and involve them in public debates, particularly at local level.

In compliance with the foregoing recommendations, the Government of Kenya not only enacted Article 37 into its 2010 Constitution; but also, through the Department of Children's Services (DCS) and various Area Advisory Councils, has facilitated the participation of children in developmental issues at the sub-national and national levels. In this regard the DCS 'has established Children Assemblies in all counties (47) while Children Voices platforms managed by Civil Society Organizations are annually held in 10 regions in the country.'[693] According to the Government of Kenya, respect for the views of children 'has improved in the State Party';[694] in that:

> Children are allowed to give their views during judicial proceedings that concern them, in schools, within families and in the communities. Child Rights Clubs in primary and Student Councils in Secondary schools have also been established in many areas. A Student Leadership Council with representation from all regions meets annually at the national level.[695]

Through the National Council for Children's Services (NCCS), the Government of Kenya has formed 'a Child Participation Committee at the national level to ensure meaningful participation of children at all levels.'[696] In addition, a National Children Steering Committee composed of children has been established 'to ensure children's views are taken into consideration while planning for national children's events.'[697] According to the Kenyan consolidated report, the Government of Kenya, through the NCCS, 'has printed more than 22,000 copies of the National Child Participation Guidelines and disseminated them to stakeholders in the children sector and also to children for their own use. Child friendly school guidelines have been distributed to schools through MOE.'[698]

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692 *Ibid*, p. 68.

693 *Ibid*, para 104.

694 *Ibid*, para 105.

695 *Ibid*.

696 *Ibid*, para 106.

697 *Ibid*.

698 *Ibid*, para 107.

6.4.2 The Domestication of the Child's Right to Participation in Tanzania

In its previous Concluding Observations, the CROC recommended that Tanzania should strengthen its efforts to ensure that children's views are given due consideration in the family, schools, courts, and other relevant administrative and non-administrative settings, in accordance with Article 12 of the CROC. It also recommended that Tanzania should formalize structures of participation for children and young people; and, in particular, that it provides support to the Junior Council, so that the Council can function effectively as the nationally representative body for children. It further recommended that Tanzania should develop strategies to reach the most marginalized groups of children with necessary information, and that it involves them in public debates, by working with all stakeholders particularly at the local level.

a) Constitutional and Legislative Measures

In compliance with the foregoing recommendations, Tanzania has retained its constitutional guarantee of the right to freedom of expression in its two Constitutions: that is, Article 18 of the Constitution of the United Republic of Tanzania and in the Zanzibar Constitution.[699] The foregoing constitutional guarantee of the principle to respect the views of the child has also been translated into statutory obligation by Tanzania. In this context, the Zanzibar Children's Act (2011), in Section 5, requires the Government to ensure that 'views expressed by the child may be given due consideration.' In terms of Section 11 of the LCA, a child has the 'right of opinion and no person shall deprive a child capable of forming views the right to express an opinion, to be listened to and to participate in decisions which affect his well-being.'

b) Administrative Measures

Administratively, Tanzania has established children councils in every municipal, which are represented in the National Children Council. Representation in these councils comes from different groups of children, including children with albinism; children from marginalized sections of society; children with disabilities; children attending and those not attending schools, etc. Tanzania has also ensured that every primary school and secondary school has a children's club.[700]

In addition, the Tanzanian Government has ensured that children's rights committee or clubs are formed and functioning in Tanzania Mainland so as to bring together children at various places in the country to discuss different issues pertaining to their life and deliberation from their meetings to be submitted to school committee for adoption. It has also developed community-based family manuals for training parents to give their children chances to express their views on their rights. Further, the country has set up steering and technical committee purposely to spearhead the functions of children councils and tools have been developed for training parents, service providers and training the children themselves to understand their rights and how to claim them.[701]

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699 United Republic of Tanzania, 'Tanzanian 3rd, 4th and 5th Reports on the Implementation of the Convention on the Rights of the Child (CRC) 2005- 2011', op. cit, para. 51.

700 *Ibid*, para. 52.

701 *Ibid*, para. 53.

Tanzania has created opportunities for the children to use the public media, especially Radio and Television, to air out their views to the public. For example, through the Tanzania Broadcasting Corporation (TBC), in collaboration with Plan International, the Government runs a children's programme known as "*Jukwaa la Watoto*" (Children's Platform). This programme has been engaging children in communities and schools to identify and express their concerns on such issues as child neglect, sexual abuse, child labour, birth registration, early pregnancies, domestic violence, HIV/AIDS, protection of children with disabilities, killing of children with albinism, female genital mutilation/cut (FGM) and other harmful cultural practices. Children also use this platform to call upon duty bearers at homes, communities, district and national levels to play their due roles in fulfilling the rights of all children. The programme is broadcast six times a month on television and radio, and its coverage reaches the whole country.[702]

In the drafting processes of the Law of the Child Act in Tanzania Mainland and the Children's Act in Zanzibar, the Government also ensured that children were adequately consulted and fully participated in giving their views concerning the proposed laws.[703]

6.4.3 The Domestication of the Child's Right to Participation in Uganda

The Constitution of Uganda guarantees the right of every person, including a child, to the right to freedom of expression.[704] Although the Ugandan Children Act does not contain express provisions guaranteeing the child's right to participation, this right can be implied in the provisions of paragraph 4(c) of the First Schedule to the Act, which sets out the guiding principles in the implementation of this law as envisaged in Section 3. This paragraph provides that:

> A child shall have the right—
>
> (a) *Not applicable.*
>
> (b) *Not applicable.*
>
> (c) to exercise, in addition to all the rights stated in this Schedule and this Act, *all the rights* set out in the United Nations Convention on the Rights of the Child and the Organisation of African Unity 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. [Emphasis supplied].

In addition, paragraph 3(a) of the First Schedule also guarantees the child's right for his or her views be considered in the course of any decision being made on him or her or that which is likely to affect him or her. This paragraph provides categorically that:

> 3. In determining any question relating to circumstances set out in paragraph 1(a) and (b), the court or any other person shall have regard in particular to:
>
> (a) the ascertainable *wishes and feelings* of the child concerned considered in the light of his or her age and understanding […]. [Emphasis supplied].

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702 *Ibid*, para. 54.

703 *Ibid*, para. 56. *See* also Revolutionary Government of Zanzibar, *Capturing Children's Views on the Children's Bill 2010*. Zanzibar: Ministry of Social Welfare, Youth, Women and Children/Save the Children, 2011. This report was prepared in the context of the National Child Consultation Programme in Zanzibar).

704 Article 29(1)(a) of the Constitution of Uganda.

However, there are 'no formal structures envisaged by the law to facilitate child participation in the processes of decision-making'[705] in Uganda, as compared to Kenya and Tanzania. Nonetheless, there are a number of situations where children may participate in decisions that affect them; such as, instances in which 'children's views are considered in the various court processes, ranging from adoption to custody proceedings.'[706]

In addition, in order to facilitate children's participation in the policy and legislative formulation processes, civil society organisations (CSOs) have established a parliamentary forum for children. Through this forum, for instance, in November 2009 children were facilitated by the Uganda Child Rights NGO Network (UCRNN) 'to hold a debate with Members of Parliament.'[707]

705 African Child Policy Forum, *Harmonisation of Children's Laws in Eastern and Southern Africa: Country Briefs,* op. cit, p. 186.

706 *Ibid*.

707 *Ibid*.

Chapter Seven

Parental Care, Duties and Responsibilities for the Child

7.0 Introduction

Socially, the family is the basic unit of society and the most popular voluntary institution in modern society.[708] It is the most intimate and important of all social groupings.[709] According to Article 16(3) of the Universal Declaration of Human Rights of 1948 (UDHR), the family 'is the natural and fundamental group in our society'; and, therefore, it 'is entitled to protection by society and the State.'[710] Most people consider family life a private matter, 'and in many ways it is.'[711] So, the family is society's oldest and resilient institution.[712] Thus, '[f]rom the beginning of human life, people have grouped themselves into families to find emotional, physical, and communal support […] Family structures may vary around the world, but the value of 'family' endures.'[713]

It should be noted, however, that the 'utility of the family as the basic unit of society has for centuries been the subject of debate.'[714] This is because, as Tomkin notes, 'there is still no clear universal definition of the family' in that the concept of family 'is always changing and differs from country to country.'[715] Nonetheless, this contention does not erode the paramount importance of the family in assisting children to grow up and become independent and productive adults.[716]

All in all, 'the word *family* is used to describe many relationships: parents and children; people related by blood, marriage, or adoption; or a group of people living together in a single household, sharing living space and housekeeping. Since the word *family* does not have a precise meaning, many laws define the term when they use it.'[717] For example, laws on insurance, social security, inheritance or marriage may define family in other, thematic ways. *Black's Law Dictionary*,[718] nonetheless, defines a family as: (i) 'A group of persons connected by blood, by affinity, or by law, especially within two or three generations. (ii) A group consisting of parents and their children. (iii) A group of persons who live together and have a shared commitment to a domestic relationship.'Viewed in this context, a family is a group of people who love and care for each other, in a relationship that provides emotional, physical, and economic mutual

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708 Olson, D.H. and J. DeFrain, *Marriage and the Family: Diversity and Strengths* 3rd edn. London: Mayfield Publishing Company, 2000, p. 5.

709 Mashamba, C.J., *Introduction to Family Law in Tanzania* 2nd Revised Edition Dar es Salaam: Mkuki na Nyota Publishers, 2013.

710 This right is re-echoed in Article 23(1) of the International Covenant on Civil and Political Rights of 1966 (ICCPR), which contains the same wording as that of Article 16(3) of the UDHR.

711 Arbetman, L.P., *Street Law: a Course in Practical Law* 5th edn. New York: West Publishing Company, 1994, p. 320.

712 *Ibid*, p. 4.

713 *Ibid*.

714 Tomkin, J., *Orphans of Justice – In Search of the Best Interests of the Child When a Parent is Imprisoned: A Legal Analysis* Geneva: Quaker United Nations Office, 2009, p. 15.

715 *Ibid*. See also Mashamba, C.J., *Introduction to Family Law in Tanzania*, op. cit.

716 Mashamba, C.J., 'A Study of Tanzania's Non-Compliance with its Obligation to Domesticate International Juvenile Justice Standards in Comparison with South Africa', op. cit.

717 Arbetman, L.P., et al, *Street Law: a Course in Practical Law,* op. cit.

718 Garner, B.A., (Edition), *Black's Law Dictionary* 8th edn. New York: West Publishing Company, 1999, p.637.

aid to its members.[719] At the centre of family relations are the concepts of giving birth and child upbringing.

It is conventional that an essential, constitutive and definitional characteristic of an adult life is the procreative potential.[720] This is because adult life, as it has been the case across millennia and societies the world over, may inherently lead to procreative relationship between a man and a woman.[721] It should be noted, however, that although the couples may have the procreative potential, this is dependent upon the parties' wish or their capacity to bear children.[722] But where the parties' procreative potential is asserted, it produces certain invariable consequences in relation to children born out of such relationship. Under common law, unless otherwise proved, children born during a marriage are presumed to be children of the husband.[723] Both parents have 'an ineluctable duty to support their children (and children have a reciprocal duty to support their parents).[724] The duty to support children arises whether the children are born of parents who are married or not.'[725]

In recognition of the paramount significance of the family in the upbringing and development of the child, therefore, both international and national laws have reflected the need for children to grow up with, and be cared for, by their parents in a family environment. As the draft Guidelines for the Alternative Care of Children notes:

> […] the family being the fundamental group of society and the natural environment for the growth, well-being and protection of children, efforts should be directed to enabling the child to remain in or return to the care of his/her parents, or when appropriate, other close members. The State should ensure that families have access to forms of support in the care-giving role.[726]

As it shall be seen in this Chapter, it is only in exceptional circumstances that a child may be cared for, and grow up with, persons other than his or her parents.

7.1 Parental Duties and Responsibilities for the Child in International Law

7.1.1 General Principles

In international law, the primary duty to maintain and to take care of the child is imposed on his or her parents. The legal position of parents to take care of their

719 Olson, D.H. and J. DeFrain, *Marriage and the Family: Diversity and Strengths*, op. cit., p. 10.

720 Some authors have pointed out that one of the purposes of marriage is the procreation of children, along with the legalization of sexual intercourse. *See* particularly Chuwa, G.P. and Z.G. Muruke, 'Marriage and Spousal Relationship under Islamic Law' *The Tanzania Lawyer* Vol. 1 No. 3, 2007, pp. 27-42, at p. 35 (note 23).

721 *Minister of Home Affairs and another v Fourie and another; Lesbian and Gay Equality Project and others v Minister of Home Affairs and others* [2005] ZACC 19, 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC), para 85.

722 Mashamba, C.J., *Introduction to Family Law in Tanzania*, op. cit.

723 *Ibid*.

724 In the recent South African case, *Fosi v Road Accident Fund and Fosi* (N.O.) (Case No. 1934/2005, Cape of Good Hope Eastern Circuit Local Division) it was held that: 'The duty of a child to support a needy and deserving parent is well-known in indigenous/customary law. It is observed by such children. There is always an expectation on the part of a parent that his children will honour this duty.'

725 *Minister of Home Affairs and another v Fourie and another; Lesbian and Gay Equality Project and others v Minister of Home Affairs and others*, op. cit, para 67.

726 Guidelines for the Alternative Care of Children, 11th Session, Resolution 11/7Annex to Human Rights Council, para 3.

children 'derives from a presumption that they are the most suitable carers and in the best position to secure the rights of the child.'[727] This assertion can be further justified by the Irish Supreme Court's opinion in *Re J.H., an infant*,[728] where the Irish Chief Justice, referring to the Irish Constitution, noted that it was the right to 'belong to a unit group possessing inalienable and imprescriptible right antecedent and superior to all positive law.' In international law, there are two aspects relating to the role of parents in raising their children: the first aspect entails a functional role, 'which provides that the child is nourished, protected and stimulated.'[729] This is because at this early stage of the child's life the parent 'plays a crucial role in shaping the child's later development.'[730]

The second role of parents in the child's early development has been referred to as a *cultural symbolic role*.[731] In fact, this role is important in securing the child's sense of belonging.[732] Accordingly:

> The role of the child-parent bond in the construction of identity revolves around two processes: the affiliation process by which the child identifies with and integrates kinship and community structures; and early attachment experiences. The latter determines whether a child feels sufficiently loved and bolsters unconscious feelings of the right to exist.[733]

Therefore, basing on this articulation, the essential role of parents in the upbringing and development of the child is given legal recognition in a number of international human rights instruments. This legal recognition revolves around the need to protect the autonomy and privacy of the family unit;[734] and, in particular, the position of parents over their children.

Viewed in the foregoing enunciation, the significance of the child's right to the care and company of his or her parents is expressed in its universal recognition in a number of international human rights treaties.[735] Specifically, this right is recognised and guaranteed under Article 19 of the ACRWC,[736] Article 18 of the CRC[737] and Article 19 of the American Convention on Human Rights, which implies the right of the child to be part of a family.[738]

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727 Tomkin, J., op. cit, pa. 15 and Archard, D., *Children Rights and Childhood* London: Routledge, 1993, pp. 102-106.

728 [1985] IR 375, para 390.

729 Tomkin, *Ibid*.

730 Ayre, L., et al (Editions), *Children of Imprisoned Parents: European Perspectives on Good Practice* Paris: EUROCHIPS, 2006, p. 27.

731 Tomkin, op. cit.

732 *Ibid*.

733 Ayre, L, et al, op. cit, p. 28.

734 *See* in particular Article 23 of the ICCPR, which provides that the family is the natural and fundamental unit for society and is thus entitled to protection by society and the State.

735 Tomkin, op. cit, p. 16.

736 Article 19(1) of the ACRWC provides expressly that: 'Every child shall be entitled to the enjoyment of parental care and protection and shall, whenever possible, have the right to reside with his or her parents. No child shall be separated from his parents against his will, except when a judicial authority determines in accordance with the appropriate law, that such separation is in the best interest of the child.'

737 Article 18(1) of the CRC provides that: 'States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.'

738 *See* also Article 16 of the Additional Optional Protocol to the American Convention on Human Rights.

However, there is a terminological difference between the two children's rights instruments: the CRC and the ACRWC. While the CRC imposes obligations on parents in the context of "child's custodians," the ACRWC extends the parental responsibilities to "other people in charge of the child". In fact, this is in appreciation of the concept of the extended family in the African context, which misses in the CRC. Parallel to parental responsibilities, the ACRWC imposes responsibilities on the child, which include the duty to respect parents and the duty towards the society, community and the nation. In this context, it can be argued that the concept of duties answers to the idea of the child's participation in his family, community, and society inherent in Africa.[739]

Interestingly, the CRC 'also tries to find a balance in the sensitive triangle of children-parents-state.'[740] For instance, Article 5 (together with Article 18 in particular) provides a framework for the relationship between the child, his or her parents and family, and the State.[741] According to Hodgkin and Newell, Article 5 provides the CRC with a flexible definition of "family" and introduces to the Convention two vital concepts: parental "responsibilities" and the "evolving capacities" of the child.[742] The article provides that:

> 5. States Parties shall *respect the responsibilities, rights and duties of parents* or, where applicable, *the members of the extended family or community as provided for by local custom,* legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with *the evolving capacities of the child*, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention. [Emphasis supplied.]

The article, in the opinion of Hodgkin and Newell, also 'signals clearly that the Convention regards the child as the active subject of rights, emphasizing the exercise "by the child" of his or her rights.'[743]

In the broad sense, 'this article expounds that maintenance, care, custody and protection of the child is the primary responsibility and duty for parents, guardians and/or relatives.'[744] The UN Committee on the Rights of the Child (the CROC) has expanded the interpretation of the article in its General Comments. The role of parents in relation to the capacities and rights of babies and younger children is explained in the Committee's General Comment No. 7 on "Implementing Child Rights in Early Childhood" thus:

> The responsibility vested in parents and other primary caregivers is linked to the requirement that they act in children's best interests. Article 5 states that parents' role is to offer appropriate direction and guidance in 'the exercise by the child of the rights in the … Convention'. This applies equally to younger as to older children. Babies and infants are entirely dependent on others, but they are not passive recipients of care, direction and guidance. They are active social agents, who seek protection, nurturance and understanding from parents or other caregivers, which they require for their survival, growth and well-being. Newborn babies are able to recognize their parents (or other caregivers) very

739 *See* particularly Sloth-Nielsen, J. and B.D. Mezmur, 'A Dutiful Child: The Implications of Article 31 of the African Children's Charter' *Journal of African Law* Issue 2, 2008, pp. 159-189.

740 Nowak, op. cit, p. 93.

741 Mashamba. *Introduction to Family Law in Tanzania*, op. cit, p. 86.

742 Hodgkin, R. and P. Newell, *Implementation Handbook for the Convention on the Rights of the Child* 3rd edn. Geneva: United Nations Children's Fund, 2007, p. 75.

743 *Ibid*.

744 Mashamba, C.J., *Introduction to Family Law in Tanzania*, op. cit, p. 87.

> soon after birth, and they engage actively in non-verbal communication. Under normal circumstances, young children form strong mutual attachments with their parents or primary caregivers. These relationships offer children physical and emotional security, as well as consistent care and attention. Through these relationships children construct a personal identity and acquire culturally valued skills, knowledge and behaviours. In these ways, parents (and other caregivers) are normally the major conduit through which young children are able to realize their rights.[745]

Under Article 18 of the CRC, both parents (father and mother) have common responsibilities for the upbringing and development of their children. The article provides, *in extenso*, that:

> 18(1) States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.
>
> 2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.
>
> 3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.

From the foregoing analysis it can be summed up that the CRC 'corresponds with the universal human rights in many areas and in addition, also includes a number of rights specific to children.'[746] In addition, the CRC[747] and the ACRWC[748] require States Parties to develop mechanisms that will be used to advise and educate parents about their responsibilities for children.

Besides, Article 6(i) of the African Women's Protocol requires States Parties to enact legislation which ensures that 'a woman and a man shall jointly contribute to safeguarding the interests of the family, protecting and educating their children.' Under Section 129(1) of the Tanzanian Law of Marriage Act it is a mandatory duty of a man 'to maintain his infant children, whether they are in his custody or the custody of any other person, either by providing them with such accommodation, clothing, food and education as may be reasonable having regard to his means and station in life or by paying the cost thereof.' This duty can only be assumed by a woman where the children's father 'is dead or his whereabouts are unknown or if and so far as he is unable to maintain them.'[749]

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745 *See* Committee on the Rights of the Child, General Comment No. 7, 2005: 'Implementing Child Rights in Early Childhood.' CRC/C/GC/7/Rev.1, para. 16.

746 Nowak, p. cit, p. 93.

747 Article 18 of the CRC.

748 Article 11(3) of the ACRWC.

749 Section 129(2) of the Tanzanian Law of Marriage Act, Cap. 29 R.E. 2002.

7.1.2 Parental Responsibilities for Children Deprived of their Liberty under International Law

As a general rule, under both the CRC and the ACRWC, the child should not be deprived of his or her family environment.[750] For instance, the ACRWC[751] stipulates that a child is entitled to the enjoyment of parental care and protection and shall, whenever possible, have the right to reside with his or her parents. It further insists, in a mandatory manner, that no child shall be separated from his parents against his will, except when a judicial authority determines in accordance with the appropriate law that such separation is in the best interests of the child.[752]

But where circumstances so compel, a child may be placed in an alternative care, which should be akin to a family lifestyle and environment in general. This means that deprivation of family environment should be applied as a matter of last resort and in the best interests of the child. This is justifiable in light of the fact that 'children who lack the security of a family are more vulnerable to the violation of all other rights that they are entitled to, as children and rights-bearing individuals in society.'[753] Such violations of children's rights particularly impact on the growth and development from childhood through adolescence to adulthood, which are very important stages for laying the foundation of an emotionally balanced and secure adult.

As such, a child should be adequately protected and guided when navigating through these important stages in their lives. So, where a child's moral and emotional growth and upbringing in a family environment are at risk, it is acceptable that he or she should be placed in alternative care. Such children in need of alternative care include orphans, street children and abandoned children, whether or not they are placed in institutional care.[754]

Thus, under international law, where it is mandatory that a child should be deprived of a family environment and thus placed in an institutionalised care, due regard should be paid to the desirability of continuity in the child's upbringing and to the child's ethnic, religious, cultural and linguistic background.[755] It is also the spirit of international child law that where the child is to be deprived of his or her family environment, States Parties should accord special protection and assistance, preferably alternative family care, to the child concerned.[756] The best alternative family care suggested include among others, foster placement, or placement in suitable institutions for the care of children.[757]

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750 *See* particularly Article 20 of the CRC and Article 19 of the ACRWC. See also para 1 of the Preamble to the 1993 Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption.

751 *See* Article 19 (1) of the ACRWC.

752 For a detailed account on this aspect, *see* particularly Nkonya, C.M. and H. Mtembwa, 'Children's Institutionalized Care under the Law of the Child Act (2009)' *The Justice Review* Vol. 8 No. 2, 2009.

753 Assim, U.A., 'In the Best Interests of Children Deprived of a Family Environment: A Focus on Islamic Kafalah as an Alternative Care Option.' LL.M. Dissertation, University of Pretoria, 2009, p.1

754 *Ibid*, p. 2. Currently, the number of children deprived of their family environment (thus in need of alternative care) is increasing worldwide. *See* particularly Shapiro, L.M., 'Inferring a Right to Permanent Family Care from the United Nations Convention on the Rights of the Child, the Hague Convention on Intercountry Adoption, and Selected Scientific Literature' *Washington and Lee Journal of Civil Rights and Social Justice* Vol. 15, 2008, p. 194.

755 Article 20(3) of the CRC and Article 25(3) of the ACRWC.

756 Article 25(2)(a) of the ACRWC.

757 Nkonya and Mtembwa, op. cit.

International child law also obliges States Parties to undertake measures (legislative, policy or administrative) that can necessitate regular contact between the separated child and his or her parents;[758] and the tracing and re-unification of children deprived of their family environment with their parents or relatives where separation is caused by internal and/or external displacement arising from armed conflicts or natural disasters.[759] In the context of Article 9(4) of the CRC, where the State is responsible for separating the child from his or her parent(s), the State is obliged to furnish the child with all relevant information concerning the whereabouts of the parent(s).

It is also a rule of international law that where a child is temporarily or permanently deprived of his or her family environment, or where it is in his or her best interests that he or she cannot be allowed to remain in that environment, such child must be entitled to special protection and assistance provided by the State.[760] In this regard, States Parties are obliged, in accordance with their national laws, to ensure alternative care for such a child.[761] In principle, such alternative care 'could include, *inter alia*, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.'[762]

Underlying the foregoing protections offered to children deprived of parental care or of their family environment is the best interests of such children. Expounding this principle in the context of the child's right to the care and company of parents, the European Court on Human Rights often relies on Article 8 of the ECHR, which protects the child's right to private and family life. For example, in *Johansen v Norway*,[763] the European Court on Human Rights, assessing whether the removal of a child into a care was a violation of Article 8, found that: 'having regard to the improvements in the applicant's situation and irreversible effect which the deprivation of the applicant's parental rights and access had on her enjoyment of life with her daughter, the measures could not be said to be justified.' In this matter, the European Court on Human Rights

> […] took into consideration the best interests of the child when balancing the interests of the child remaining in public care with the rights of the parent to be united with her children, and found that removing the child from parental care should only be a temporary measure.[764]

In addition, the Court held that any risk to the child's health and development 'must be central to any decision when limiting rights guaranteed under Article 8.'[765]

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758 Article 9(3) provides that: 'States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.' In a similar tone, Article 19(2) of the ACRWC provides expressly that: 'Every child who is separated from one or both parents shall have the right to maintain personal relations and direct contact with both parents on a regular basis.'

759 Article 25(2)(b) of the ACRWC.

760 Article 20(1) of the CRC.

761 *Ibid*, Article 20(2).

762 *Ibid*, Article 20(3).

763 [1996] ECHR 31.

764 Tomkin, op. cit, p. 17.

765 *Ibid*, referring to *Johansen v Norway*, op. cit, para 72.

7.2 The Concept of *Ubuntu* as it Impacts on Parental Obligations in the African Context

In most of Sub-Saharan African customary law and practices relating to matrimonial relations that also encompass parental responsibilities for the child; the most significant aspect is the African communal value, commonly referred to as *Ubuntu*. *Ubuntu*, as a significant factor in African community solidarity in respect of survival, justice and matrimonial issues, was better judiciously defined in *S v Makwanyane*[766] by the South African Constitutional Court as a:

> […] culture which places some emphasis on communality and on the interdependence of the members of a community. It recognizes a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.[767]

Ubuntu, as an important African communal ethic, was also given judicial consideration by the Court of Appeal of Tanzania in *DPP v Daudi Pete*.[768] In this case, the Court considered the African communal ethic to be 'the co-existence of the individual and society, and also the reality of co-existence of rights and duties of the individual on the one hand, and the collective of communitarian rights and duties of society [which in effect] means that the rights and duties of the individual are limited by the rights and duties of society, and vice versa.'

In the view of Mokgoro, *Ubuntu* is a key social value which emphasizes 'group solidarity, conformity, compassion, respect, human dignity, humanistic orientation and collective unity.'[769] Connecting *Ubuntu* and the concept of extended family in Africa, Mokgoro points out that: 'a society based on *Ubuntu* places strong emphasis on family obligations. Although the concept of *Ubuntu* has proved difficult to define in the Western language,[770] in […] Africa it is viewed as the basic constitutional value of human dignity; it is an idea based on deep respect for the human dignity of others.[771]

Concretizing the essence of *Ubuntu* in the African justice system, Sachs, J, held in *Dikoko v Mokhatla* that: '*Ubuntu – botho* is more than a phrase to be invoked from time to time to add a gracious and affirmative gloss to a legal finding already arrived

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766 1995 (3) SA 391 (CC). For a detailed analysis of the import and dimensions of *Ubuntu, see* particularly Rwezaura, B., 'Competing 'Images' of Childhood in the Social and Legal Systems of Contemporary Sub-Saharan Africa' *International Journal of Law, Policy and the Family* Vol 12, 1998, pp. 253-278; and Sloth-Nielsen, J. and J. Gallinetti, 'Just Say Sorry?' *Ubuntu*, Africanisation and the Child Justice System in the Child Justice Act 75 of 2008' P.E.R. Vol. 14 No. 4, 2011.

767 *S v Makwanyane*, *Ibid*, para. 224.

768 [1993] TLR 22 (CA).

769 Mokgoro, Y.J., 'Ubuntu and the Law in South Africa' *Buffalo Human Rights Law Review* Vol. 4, 1998. See also Himonga, C., 'African Customary Law and Children's Rights: Intersections and Domains in a New Era', in Sloth-Nielsen, J. (Edition), *Children's Rights in Africa: A legal Perspective* Hampshire: Ashgate Publishing Ltd., 2008, pp. 73-90, p. 81.

770 *See*, for instance, Keevy, I., '*Ubuntu* versus the Core Value of the South African Constitution' *Journal for Juridical Science* Vol. 32, 2009; and Sloth-Nielsen, J. and J. Gallinetti, 'Just Say Sorry?' Ubuntu, Africanisation and the Child Justice System in the Child Justice Act 75 of 2008', op. cit, p. 69.

771 *See* particularly Mokgoro, J., in *Dikoko v Mokhatla* 2006 6 SA 235 (CC), para 68.

at. It is intrinsic to and constitutive of our constitutional culture'.[772] In *Port Elizabeth Municipality v Various Occupiers*,[773] Justice Sachs of the South African Constitutional Court, J, held that the spirit of *Ubuntu*, as part of the deep cultural heritage of the majority of the population in Africa, 'suffuses the whole constitutional order.'

According to Justice Sachs, *Ubuntu* 'combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalized and operational declaration in our evolving new society of the need for human interdependence, respect and concern.'[774] He suggests, therefore, that courts should be 'called upon to balance competing interests in a principled way and promote the constitutional vision of a caring society based on good neighbourliness and shared concern.'

This African communal value has played a pivotal role in the regulation of matrimonial relations, particularly child upbringing and parental responsibility for the child, in the context of customary law in most African societies; in that, it has served as a mining from which those involved in the matrimonial relations can quarry their rights and obligations.[775] In this context, therefore, through *Ubuntu,* married couples could define their rights, role and obligations towards their counterparts, their relatives and members of the wider extended family. As such, there is a strong connection between the concept of *Ubuntu* and the concept of extended family in the African customary law context; mainly because, in this context, 'a society based on *Ubuntu* places strong emphasis on family obligations. Family members are obliged to help one another.'[776] In this perspective, members of the family in the African context – couples, their children, relatives, and members of the society close to them – are assigned roles, rights and obligations towards the preservation of the matrimonial relations. Briefly, these aspects are discussed below.

With regard to couples (i.e. husband and wife), customary law through the *Ubuntu* communal value requires a husband to be the head of the family and as the main provider of the basic necessaries of the family and its members – provision of shelter, food and security. Interestingly, this obligation has been embedded in the penal as well as the marriage laws in many countries. For instance, in respect of maintenance of children, Section 129(1) of the Tanzanian Law of Marriage Act obliges the father 'to maintain his […] children, whether they are in his custody or the custody of any other person, either by providing them with such accommodation, clothing, food and education as may be reasonable having regard to his means and station in life or by paying the cost thereof.'[777]

However, this obligation cannot be discharged by the father only on two grounds: where there is an agreement or order of the court for the father not to do so;[778] or where the 'father is dead or his whereabouts are unknown or if and so far as he is

772 *Ibid*, para 113.

773 2005 (1) SA 217 (CC). This case was dealing with the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, No. 19 of 1998.

774 *Ibid*, para 37.

775 Mashamba, C.J., *Introduction for Family Law,* op. cit.

776 Mokgoro, op. cit, p. 15. *See* also Himonga, op. cit, p. 81.

777 This duty is also well canvassed in Sections 41, 42 and 43 of the Law of the Child Act (2009).

778 Section 129(1) of the Law of Marriage Act.

unable to maintain them.'[779] Section 207 of the Penal Code provides that it is the duty of the *head* – be it a father or mother – of a family to provide the necessaries of life for a child; and such person 'shall be deemed to have caused any consequences which adversely affect the life or health of the child by reason of any omission to perform that duty, whether the child is helpless or not.'

In respect of children, *Ubuntu* requires them to respect their parents, siblings, relatives, members of the extended family as well as the wider society in which they grow.[780] In recognition of the central role that *Ubuntu* plays in the regulation of matrimonial relations in the African society, the African Charter on the Rights and Welfare of the Child (ACRWC) has codified this value in Article 31. This provision has been adopted in many laws related to children's rights that were enacted in many sub-Saharan African countries after the adoption of the ACRWC.[781] For instance, Section 15 of the Tanzanian Law of the Child Act, almost verbatim,[782] reproduces Article 31 on the duties and responsibilities of the child. This section provides that a child shall have a duty and responsibility to:

(a) work for the cohesion of the family;

(b) respect his parents, guardians, superiors and elders at all times and assist them in case of need;

(c) serve his community and nation by placing his physical and intellectual abilities at its service in accordance with his age and ability;

(d) preserve and strengthen social and national cohesion; and

779 *Ibid*, Section 129(2).

780 Unlike in African traditional or customary context, in the West children are not always expected to respect their parents, siblings, relatives, members of the society (particularly the elderly) and the society in which they grow. This is a result of the existence of a wider room for freedom of children towards their parents and the lack of an extended, communally based matrimonial relations that is inherent in Africa. As a result of this aspect, in the West it is always not surprising to hear children and young people saying: 'the elderly have to respect me, first. I can't be expected to show respect all the time.' This is narrated by Freddy Macha in his column entitled: 'A London Bus Journey and Reminder of Contrasting Worlds' published in *The Citizen* newspaper (Dar es Salaam), Friday, 5 April 2013. According to Macha, this kind of perception in children towards their parents, relatives and members of the society in which they live 'is an example of one of ongoing critical social themes in wealthy societies.' According to Macha: 'During 2004, I heard former British Minister, Ms Claire Short, complimenting the way Africans respect the *wazee*. She lamented on how rich societies have lost that very significant character of community and human relations. 'We can learn a lot from Africa,' the veteran politician advised.'

781 *See* particularly Section 21 of the Kenyan Children Act (2004).

782 Article 31 of the ACRWC provides that:

'Every child shall have responsibilities towards his family and society, the State and other legally recognized communities and the international community. The child, subject to his age and ability, and such limitations as may be contained in the present Charter, shall have the duty;

(a) to work for the cohesion of the family, to respect his parents, superiors and elders at all times and to assist them in case of need;

(b) to serve his national community by placing his physical and intellectual abilities at its service;

(c) to preserve and strengthen social and national solidarity;

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

(e) to preserve and strengthen the independence and the integrity of his country;

(f) to contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African Unity.'

(e) preserve and strengthen the positive cultural values of his community and the nation in general in relation to other members of the community or the nation.

It can, therefore, be emphatically pointed out that 'the incorporation of the communal ethic into the children's rights legislation ensures that the child sees the family and community of which he or she is a member as significant part of his or her life.'[783] In principle, by discharging such duties and responsibilities to the family and community, members of the family and the community are also required to reciprocate by respecting the child's rights as a member of the same family or community.

As for the rest of the members of the community, *Ubuntu* requires them to respect members of the family with a view to making the family the strongest unit of society. They are required to ensure that the family unit does not disintegrate in whatever manner, in which case they play a central role in restoring peace and stability where the family experiences matrimonial turbulence. They are also required to ensure that children of every family in the community are not abused, as there is a sturdy norm in the African traditional society to the effect that "a child belongs to everyone" in the community.[784]

As Himonga points out, however, this might now be probably prevalent only in rural areas, 'where traditional child-rearing practices and concepts still have considerable influence.'[785] In most modern African urban settings, this tradition is losing ground as members of such communities are increasingly embracing modern ways of life, mainly influenced by Western lifestyles. Nonetheless, *Ubuntu* is very significant in the conduct, shaping and subsistence of matrimonial relations in the African society.

7.3 Parental Duties and Responsibilities for the Child in the East African Context

7.3.1 Parental Duties and Responsibilities for the Child under Ugandan Law

a) The Legal Framework

As in many modern Constitutions, the concept of parental duties and responsibilities for the child is constitutionalised in the Constitution of Uganda. In this regard, the Constitution recognises that: 'The family is the natural and basic unit of society and is entitled to protection by society and the State';[786] and, as such, parents have a primary right and duty to care for and bring up their children.[787] It also expounds, in Article 31(5), that children may not be separated from their parents or persons entitled to raise them up against the will of their families or those persons, except in accordance with

783 Himonga, op. cit, p. 82.

784 Mashamba, C.J., *Introduction for Family Law,* op. cit.

785 *Ibid*. See also Himonga, C., 'The Right of the Child to Participate in Decision Making: A Perspective from Zambia,' in Ncube, W. (Edition), *Law, Culture, Tradition and Children's Rights in Eastern and Southern Africa* Aldershot and Brookfield: Ashgate, 1998, pp. 116 & 117.

786 Article 19 of the Ugandan Constitution.

787 *Ibid*, Article 31(4).

the law. Under Article 34 of the Constitution, children have the right to know and be cared for by their parents, or those entitled by law to raise them.[788]

This parental responsibility for the child enshrined in the Ugandan Constitution is given further elaboration in Section 4(1) of the Children Act, which guarantees the child's right 'to live with his or her parents or guardians.' In the Ugandan Children Act, the concept of parental duties and responsibilities for the child is embedded in the principle of the welfare of the child, which embodies the child's best interests underlying the responsibilities of parents towards their children.[789] In particular, the responsibilities of parents and their right to take care of their children are set out in Section 6(1) of the Children's Act, which provides that: 'Every parent shall have parental responsibility for his or her child.' Where the natural parents of a child are deceased, parental responsibility 'may be passed on to relatives of either parent, or by way of a care order, to the warden of an approved home, or to a foster parent.'[790] This is irrespective of whether or not parents are married, staying together, separated or divorced.

The duty to maintain a child is explicitly canvassed in Section 5(1) of the Ugandan Children Act, which obliges a parent, guardian or any person having custody of a child to maintain that child. In particular, that duty gives a child the right to education and guidance;[791] immunisation;[792] adequate diet;[793] clothing;[794] shelter;[795] and medical attention.[796] The Children Act also obliges any person having custody of a child to protect such child from discrimination, violence, abuse and neglect.[797] In this context, the Children Act protects the interests of the child in the award of maintenance orders by courts.[798]

Therefore, from the foregoing exposition, the general rule in Ugandan child law is that a child has the right to be cared for by, and grow up with, his or her parents. However, in very special circumstances and where it is in the best interests of such child, a child may be cared for by, and grow up with, other persons than his or her parents. When this happens, as an exception, nevertheless, the child should be placed in a family environment.[799]

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788 See Article 34(1), (2), (4) and (6) of the Constitution of Uganda (1995). See also Foundation for Human Rights Initiatives, *Juvenile Justice in Uganda: Report for the Period of January – July 2009* Kampala Foundation for Human Rights Initiatives, 2009, p. 3.

789 Section 4(2) of the Ugandan Children Act provides that: 'Subject to sub-section (1), where a competent authority determines in accordance with the laws and procedures applicable that it is in the best interests of the child to separate him or her from his or her parents or parent, the best substitute care available shall be provided for the child.' See also African Child Policy Forum, *Harmonisation of Children's Laws in Eastern and Southern Africa: Country Briefs* op. cit, p. 187; and Republic of Uganda, 'Second Periodic Report of States Parties Due in 1997: Uganda', 5 November 2004 (CRC/C/65/Add.33), para 112.

790 Section 6(2) of the Ugandan Children Act.

791 *Ibid*, Section 5(1)(a).

792 *Ibid*, Section 5(1)(b).

793 *Ibid*, Section 5(1)(c).

794 *Ibid*, Section 5(1)(d).

795 *Ibid*, Section 5(1)(e).

796 *Ibid*, Section 5(1)(f).

797 *Ibid*, Section 5(2).

798 *Ibid*, Section 76(7)-(9).

799 African Child Policy Forum, op. cit, p. 188.

b) Separation of a Child from Parents

As noted above, both the ACRWC and the CRC requires that, as a general rule, children should be brought up by, and live with, their parents. However, as an exception to this general rule, where it is necessary for a child to be separated from his or her parents, whether permanently or temporarily, such child 'shall be entitled to special protection and assistance.'[800] In terms of Article 9(1) of the CRC, States Parties are obliged to ensure that a child 'shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.' In principle, such determination 'may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.'[801]

In its domestication of this principle, Article 31(5) of the Constitution of Uganda provides that: 'Children may not be separated from their families or the persons entitled to bring them up against the will of their families or of those persons, except in accordance with the law.' Under Section 4(1) of the Children Act, the general rule is that a child 'is entitled to live with his or her parents or guardians.' However, there is an exception in sub-section (2) of this section to the effect that:

> (2) Subject to sub-section (1), where a competent authority determines in accordance with the laws and procedures applicable that it is in the best interests of the child to separate him or her from his or her parents or parent, the best substitute care available shall be provided for the child.

In ensuring that this legal provision is implemented effectively, it is the duty of the Probation and Social Welfare Officer to make sure that 'a child whose best interests are at stake is provided with appropriate care.'[802] The Probation and Social Welfare Officer's duty to enforce this provision lies in a supervision or care order issued by a family and children court under Section 19 of the Children Act. An application for a supervision or care order under this section may be made by Probation and Social Welfare Officer or an authorised person. In such an application, the court may either place the child under the supervision of a Probation and Social Welfare Officer while leaving the child in the custody of his or her parents or relatives;[803] or place the child in the care of the warden of an approved home or with an approved foster parent in accordance with the Foster Care Placement Rules in the Second Schedule to the Children Act.[804]

The aim of a supervision or care order is to remove a child from a situation where he or she is suffering or is likely to suffer significant harm;[805] and to assist the child and those with whom he or she was living or wishes to live to examine the circumstances that have led to the making of the order and to take steps to resolve or ameliorate the

800 Article 25(1) of the ACRWC.

801 Article 9(1) of the CRC.

802 Republic of Uganda, 'Second Periodic Report of States Parties Due in 1997: Uganda', 5 November 2004 (CRC/C/65/Add.33), para 117.

803 Section 19(a) of the Ugandan Children Act.

804 *Ibid*, Section 19(b).

805 *Ibid*, Section 28(a).

problem so as to ensure the child's return to the community.[806] This means that the court may only make a supervision or care order, if it is satisfied that:

(a) the child concerned is suffering or is likely to suffer significant harm; and

(b) that the harm, or probability of harm, is attributable to:

(i) the care given to the child, or likely to be given to the child if the order were not made, not being what it would be reasonable to expect a parent to give to a child; or

(ii) the child's being beyond parental control.[807]

Whereas the duty to enforce a supervision order is vested in the Probation and Social Welfare Officer who applies for the order;[808] the duties of a supervisor while a supervision order is in force are laid down in Section 23 of the Ugandan Children Act, including:

(a) to be friendly to, advise and assist the supervised child;

(b) to advise the parents;

(c) to make plans for the child's future in consultation with the child and his or her parents or guardian;

(d) to apply to the court to discharge or vary the order if necessary;

(e) to take such other reasonable steps as may be necessary to reduce the harm to the child.

It should be noted that during the period of the child's separation from the parents, the warden of the approved home or the foster parent has parental responsibility for the child.[809] The warden of the approved home or the foster parent with whom the child is placed 'shall ensure that the child's development while in the approved home or with a foster family, particularly his or her health and education, is attended to.'[810] It is also the responsibility of the warden of the approved home 'to communicate with the parents or guardians of the child, to inform them of the child's progress and to arrange through the probation and social welfare officer for a trial return home by the child as soon as it is appropriate.'[811]

The child's contact with the parents while in the approved home or with the foster parents 'is encouraged, unless it is not in the best interests of the child.'[812] The warden (where the child is placed in an approved home) or the Probation and Social Welfare Officer (where the child is placed in a foster home) 'has the responsibility of ensuring that communication is maintained with the parents of the child.'[813]

806 *Ibid*, Section 28(b).

807 *Ibid*, Section 21.

808 *Ibid*, Section 25.

809 Section 31(1) of the Ugandan Children Act; and Republic of Uganda, 'Second Periodic Report of States Parties Due in 1997: Uganda', op. cit, para 118.

810 *Ibid*, Section 31(3).

811 *Ibid*, Section 31(4).

812 *Ibid*, Section 31(2); and *Ibid*, para 119.

813 Republic of Uganda, 'Second Periodic Report of States Parties Due in 1997: Uganda', *Ibid*.

The Ugandan Children Act gives the Probation and Social Welfare Officer the duty to work with the parents, guardians or relatives to whom the child is expected to return after the termination of the care order.[814] In this respect, the Probation and Social Welfare Officer is required to provide child and family counseling before, during and after the child's return and to gain the assistance of those in the community who can help to resolve the problems that caused the care order to be made.[815]

c) Children Deprived of their Family Environment

Article 20(1) of the CRC requires that a child who is temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, is entitled to special protection and assistance provided by the State.' Thus, it vests an obligation on States Parties, in accordance with their national laws, to ensure alternative care for such a child;[816] which could include, *inter alia*, foster placement, *kafalah* of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard 'shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.'[817]

In respect of children deprived of their family environment, the Ugandan Children Act sets out a legal framework on adoption[818] and inter-country adoption.[819] It should be noted that, although there are provisions relating to inter-country adoption in the Ugandan Children's Act, Uganda has not yet ratified the Hague Convention on Protection of Children and Cooperation in Respect of Inter-country Adoption.[820] This is despite the continued reminder by the CROC in its concluding observations in respect of Uganda.[821]

According to the Government of Uganda, social norms as regards the position of the child within the family relate to protection, care and providing for their well-being. But with increased poverty, urbanization and modernization:

> [C]hildren are increasingly being considered as burdens. They are being neglected and there is an increase in child abandonment cases. The Children Statute provides the legal framework regarding adoption, and inter-country adoption is allowed but with stringent conditions. Placement of children in institutions is considered as a last resort as the family unit is the best environment for a child.[822]

The Ugandan Government acknowledges that: 'Violence within the family is common, especially between parents and against women and children. Society recognizes violence against women and children within the family as a problem but accepts that it is a prerogative of men, especially to keep discipline and order in the

814 Section 32(1) of the Ugandan Children Act; and *Ibid*, para 120.

815 *Ibid*, Section 32(2).

816 Article 20(2) of the CRC.

817 *Ibid*, Article 20(3).

818 *See* particularly Sections 44 and 45 of the Ugandan Children Act.

819 *Ibid*, Section 46.

820 Not adopted in November 2009.

821 See particularly recent CROC Concluding Observation.www.rapcan.org.za/.../CP%20Submission%20ACERWC%203010%20En(Accessed on 28 July 2013).

822 Republic of Uganda, 'Second Periodic Report of States Parties Due in 1997: Uganda', op. cit, para 127.

home.'[823] According to the Government: 'It is difficult to tell whether reported cases of child abuse, neglect and mistreatment reflect actual levels because of lack of data and limited research.'[824] Therefore, the Government, through the law, sensitization of the general public and counseling, 'has taken steps to prevent abuse, rehabilitate victims and punish perpetrators.'[825] However, such efforts are 'limited by resource constraints, lack of trained manpower, widespread ignorance and poverty among the people.'[826]

d) Recovery and Maintenance for the Child

Article 27 of the CRC recognises that in order to ensure the realisation of the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development,[827] States Parties are obliged to take "all appropriate measures" 'to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad.'[828] In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties 'shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.'[829]

In Uganda, Sections 76-88 of the Children Act provide for the maintenance of a child where one or both parents neglects to provide for maintenance of a child 'irrespective of whether the parents are married, staying together, separated or divorced.'[830] The law provides that any person, who has the custody of a child or the child through a next friend, may make an application for a maintenance order to the Family and Children Court having jurisdiction in the place where the applicant resides, against the mother or father of the child, as the case may be.[831] An application for a maintenance order may be made in several situations. It may be made during a subsisting marriage;[832] during proceedings for divorce, separation or nullity of marriage;[833] during separation;[834] during proceedings for a declaration of parentage;[835] or after a declaration of parentage[836] has been made. It is also the law to the effect that where a declaration of parentage has been made, 'an order for recovery of arrears of expenses incurred on the maintenance of a child may be made even after the death of the child.'[837]

823 *Ibid*, para 128.
824 *Ibid*.
825 *Ibid*.
826 *Ibid*.
827 Article 27(1) of the CRC.
828 *Ibid*, Article 27(4).
829 *Ibid*.
830 Republic of Uganda, 'Second Periodic Report of States Parties Due in 1997: Uganda', op. cit, para 123.
831 Section 76(1) of the Ugandan Children Act.
832 *Ibid*, Section 76(3)(a).
833 *Ibid*, Section 76(3)(b).
834 *Ibid*, Section 76(3)(c).
835 *Ibid*, Section 76(3)(d).
836 *Ibid*, Section 76(3)(e).
837 *Ibid*, Section 78(4).

It is the law that the maintenance to be ordered by the court 'shall include feeding, clothing, education and the general welfare of the child.'[838] The mother or father may be required to pay a monthly sum of money as may be determined by the court, having regard to the circumstances of the case and the financial means of the parent for the maintenance of the child.[839] The costs for placing the order are also imposed on the parent.[840] The court may also opt for a lump sum payment, which is paid to court and expended to meet the maintenance of the child.[841] An order for maintenance may be made against the estate of a deceased person who has been declared the parent of the child.[842]

If the parent against whom the order is made neglects or refuses to pay the sum due to him or her under the order, the court may attach his or her earnings or property to meet the maintenance costs. Under the law, there are mainly two ways of recovering maintenance against a neglecting party.[843] The court may direct that an attachment of earnings be made; or it may direct that the sum due, together with any costs incurred:

> […] be recovered by distress and sale or redistribution of the property of the father or mother unless he or she gives sufficient security by way of recognisance or otherwise to the satisfaction of the court for his or her appearance before the court on a day appointed for the return of the warrant of distress, but not more than seven days from the taking of the security.[844]

The amount of money provided for in the maintenance order may be varied upon application made under Section 78(1) of the Children Act by either the applicant or the parent against whom the order was made. In this kind of application, the court may, after inquiring into the circumstances, 'make an order either increasing or decreasing the amount of money previously ordered to be paid under the order.'[845] It is the law also that an order for maintenance against a father or mother must 'cease to have effect on custody of the child being granted to that father or mother or other person in his or her place by the court.'[846]

838 *Ibid*, Section 76(8).
839 *Ibid*, Section 76(7)(a).
840 *Ibid*, Section 76(7)(c).
841 *Ibid*, Section 76(9).
842 *Ibid*, Section 78(3).
843 *Ibid*, Section 77(a).
844 *Ibid*, Section 77(b).
845 *Ibid*, Section 78(1).
846 *Ibid*, Section 78(2).

The money payable under the maintenance order is paid to the applicant unless a custodian has been appointed, in which case the money is paid to the custodian.[847] The court may also order that 'the money shall be paid into court and then paid to the applicant or custodian in a manner and subject to any condition as the court may direct.'[848]

There are several ways of cessation of an order for maintenance under the Uganda Children Act. The maintenance order ceases to have effect if custody of the child is granted to the parent that the order was made against.[849] The maintenance order also shall cease to have any force or validity on the child attaining eighteen years.[850]

The Children Statute protects the interests of the child in the award of maintenance orders.[851] Under Section 81, the Children Act provides that: 'A person in whose custody a child is commits an offence if he or she misapplies any money paid for the maintenance of the child, and the grant of custody may be varied in the best interests of the child.'

7.3.2 Parental Duties and Responsibilities for the Child under Kenyan Law

a) Equal Parental Duties and Responsibilities for the Child

The concept of "parental responsibility" is provided for in Article 54(1) of the Kenyan Constitution (2010) and in Part III (Sections 23-28) of the Kenyan Children Act. Section 23(1) of the Kenyan Children's Act defines parental responsibility to mean 'all the duties, rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child's property in a manner consistent with the evolving capacities of the child.' As the court held in *RM v Attorney-General*,[852]

847 *Ibid*, Section 79(1). The custodian is appointed under Section 80 of the Children Act, which provides in extenso that:

'(1) Whenever a maintenance order is made against the father or mother, a court may, at the time of making the order or from time to time thereafter, on being satisfied that the applicant—

(a) is not a fit and proper person to have custody of the child; or

(b) is dead, or has become of unsound mind or is in prison, appoint a person who is willing to have custody of the child to be the custodian of the child.

(2) The appointment of a custodian may be made on the application of a probation and social welfare officer or of the person having custody of the child or of the person against whom the maintenance order is made.

(3) The appointment of a custodian may be revoked and another person appointed to have custody of the child.

(4) A custodian shall have power to apply for the recovery of all payments in arrears becoming due under a maintenance order as any other applicant would have been entitled to do.

(5) Where any order of appointment or of revocation of a custodian is made, the court may also order the child to be delivered to the person appointed to have custody of the child.

(6) If a child in respect of whom a maintenance order subsists is wrongfully removed from the person in whose custody he or she is, the court may, on the application of the custodian, make an order that the custody of the child be recommitted to the applicant.

(7) Any person who contravenes an order made under sub-section (6) commits an offence and shall be dealt with in accordance with this Act.'

848 *Ibid*, Section 79(2).

849 *Ibid*, Section 78(2).

850 *Ibid*, Section 82.

851 Republic of Uganda, 'Second Periodic Report of States Parties Due in 1997: Uganda', op. cit, para 126.

852 (2006) AHRLR 256 (KeHC 2006).

Section 23(2) of the Children's Act 'sets out the actual responsibilities' of parents towards their children.[853]

Article 54(1) of the Kenyan Constitution affirms the principle that the primary duty to care and maintain a child is vested in the child's parents, guardians or relatives who are in charge of a child. For the purpose of parental responsibility for the child, a parent 'includes both parents when immediately available or one of them when the other is not available.'[854] In particular, Article 54(1) of the Kenyan Constitution underscores that the child has the right to parental care and protection,'which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not.'

Where a child is born within marriage or during cohabitation of parents, the father is presumed to have accepted *de facto* parental responsibility of the child[855] in terms of Section 25(2) of the Children's Act, which provides that:

> Where a child's father and mother were not married to each other at the time of his birth but have subsequent to such birth cohabited for a period or periods which amount to not less than twelve months, or where father has acknowledged paternity of the child or has maintained the child, he shall have acquired parental responsibility for the child, notwithstanding that a parental responsibility agreement has not been made by the mother and father of the child.

It is to be noted that, in a number of cases, Kenyan courts have held that, the father's assumption of parental responsibility in this context should be in the child's best interests.[856] Before the Children's Act was enacted, the courts in Kenya (like in other former British colonies) took into consideration of the principle of the child's welfare in giving the father parental responsibility in this context.[857]

b) Mother's Parental Responsibility as a Matter of "first instance"

Sections 24 and 25 of the Children's Act place particular emphasis on the equality of parents to care for and protect a child while in marital relations. For children born out of wedlock, the Children's Act places on the mother parental responsibility as a matter of "first instance".[858] This aspect was elaborated by the court in *RM v Attorney-General* in the following regards:

> Reason demands that the law apportions parental responsibility in the first instance because parental responsibility can in certain situations vest in only one parent because of the overriding interest of the child and this is what it has done. […] In other words, the law places parental responsibility on unmarried mother because she is the only one immediately available at birth where there is no marriage and the needs of the child have to be paramount or overriding at any given time.[859]

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853 *Ibid*, para. 25.

854 *Ibid*, para. 50.

855 African Child Policy Forum, op. cit, p. 70.

856 *See* particularly *John Kimani Muthiora v Charity Wanjiru Maina* Meru High Court of Kenya, Civil Appeal No. 131 of 2006 (reported in Children's Legal Action Network and Childline Kenya, The Law on Children: A Case Digest Vol. 2, 2009, pp. 57-60).

857 *See* particularly *Mehrnissa v Parvez* [1976-1985] 1 EA 289; and *Githunguri v Githunguri* [1982-1988] 1 KLR 9.

858 Section 24(3)(a) of the Kenyan Children's Act.

859 *Ibid*, para. 27.

In such situation, the father can only assume parental responsibility where he applies to a court to "acquire" such responsibility. In Section 25(1), the Children's Act provides particularly that:

> 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[860] provide for the father to have parental responsibility for the child.

As the court held in *RM v Attorney-General,* the 'mother or any other person with the *locus standi* can thereafter cause the parental responsibilities to be shared thereafter and the child would be at par in terms of parental responsibility with the child born within wedlock.'[861] As in the previous situation, the court order in respect of granting the father parental responsibility of the child should be made in the child's best interests.[862]

It should be noted that in *RM v Attorney-General* the provisions of Section 24(3) of the Kenyan Children Act were unsuccessfully challenged as unconstitutional. The court sustained the same on the ground explicit in the following reasoning:

> As crafted the Children Act is a milestone in entrenching and securing the rights of the child and Section 24(3) is in our view a big improvement of the uncoordinated laws which dealt with parental responsibility before its enactment. Scrapping it from our law would go against the objects of the Act and the state responsibility to endeavour to create laws, aimed at securing the best interests of the child.[863]

According to the court, Section 24(3) 'recognises the child's right to parental support at all stages provided paternity is established and even where it is not an agreement of parental responsibility has been allowed. We find no unreasonableness in the way the legislation has provided for the situations which arise, in this personal law relationship.'[864] The court concluded, therefore, that the differentiation in Sections 24(3) and 25 'is not arbitrary and cannot be said to lack a rational basis having regard the objects of the Act and in particular locating parental responsibility.'[865] In *extenso,* the court was of the view that:

> It is clear to the court that what Sections 24 and 25 are seeking to achieve is to have the parental responsibility shared in the case of the married couples or where there is a consensual parental agreement or the responsibility split between individuals if there is no marriage and also to locate parental responsibility permanently where an unmarried father, has had a 12 months' history of giving maintenance to the child. In cases outside these situations the law initially locates the parental responsibility on the mother of the child because firstly there cannot be a gap in parental responsibility in the first instance and the best interests of the child is for the identified parent to take up the responsibility. The law assumes that the process of identifying the father outside marriage is likely to take time e.g. paternity or legitimacy suits are likely to take time where instituted, yet the needs of the child cannot be held in abeyance even for a moment. Taking the facts of the case before the court as an illustration the next friend of the child has claimed that the

860 This kind of an agreement is known as 'a parental responsibility agreement'. For an elaboration of this kind of agreement, see particularly African Child Policy Forum, *Harmonisation of Children's Laws in Eastern and Southern Africa: Country Briefs* op. cit, pp. 69-71.

861 Op. cit, para. 27.

862 *Ibid*.

863 *Ibid*, para. 52.

864 *Ibid*, para. 61.

865 *Ibid*, para. 62.

> child's head was 'shaven' by the father pursuant to the Kisii customary tradition. Yet she has not explained why she has not pursued this claim in a court of law. A constitutional court is not the right forum for such a claim. Customary African marriages are recognised by our law. Thus in the event of a successful claim under the customary law Section 24(3) could still be invoked to ensure that parental responsibility is shared between the two. The section is not tied to the statutory marriages.[866]

The court went on to hold that while the ideal situation 'may be holy matrimony or the other legally recognized marriage status, in terms of parental responsibility the law as crafted has gone beyond this in order to locate and provide parental responsibility so as to achieve it, this being a cornerstone of the, overriding interest of the child.'[867] The court opined further that:

> If a state or the courts were to blindly apply the rule of the thumb and hold that there cannot be legitimate distinction in the situation before us, then what is the case of the single mothers who would have nothing to do with the father by choice? Should the law wipe them from the face of the earth or should it not try and do social engineering by providing for each situation using the best criteria available to secure the rights and obligations of all in the interest of justice, reason and equity.[868]

According to the court, the Children Act, including the challenged section(s), 'captures the issue of parental responsibility in a manner never done before in the history of the rights of the child in this country and it would be a great tragedy for the Court to accept the invitation to strike them out or to hold that the sub-section is unconstitutional. If the court were to do so the gap in meeting the overriding interest of the child would be immediately retrogressive and unforgivable.'[869]

c) Parental Responsibility for Children without Parents

Like in all modern jurisdictions, the Kenyan Children Act sets out situations in which a child who cannot be cared for by his or her parents can benefit from such service from other persons/institutions than the parents. There are three sets of provisions relating to maintenance and care of children who do not have parental care. The first and second sets of such provisions relate to foster care and adoption. Whereas Part IX (Sections 147-153) of the Children Act provides for conditions upon which children can be placed into the custody and care of foster parents or institutions, Part XII (Sections 154-183) of this law regulates the adoption of children in Kenya.[870]

The third set of provisions relating to alternative care for children without parental care concerns the provisions of Section 119 of the Kenyan Children Act, which relates to children defined as being "in need of care and protection". This category of children includes orphaned and vulnerable children and child victims of crime, including trafficking and negative cultural practices like FGM.

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866 *Ibid*, para. 72.

867 *Ibid*, para. 77.

868 *Ibid*.

869 *Ibid*, para. 82.

870 In particular, Section 158 of the Kenyan Children Act sets out detailed provisions relating to the conditions to be met in regard to both national and inter-country adoptions. It should be noted, however, that courts are vested with powers to make such adoption orders only in the best interests of the child concerned.

d) Lack of Reconciliation between Legal Principles and Practice

It is to be noted that, although there are explicit provisions protecting the child's right to parental care and protection in Kenya, as of 2009 up to 12% (1.8 million) of Kenya's children were orphans.[871] This has been partly attributed to the absence of state funded, adequate and state-wide child support programmes and partly due to lack of public involvement in parenting programmes.[872] As a result of this anomaly, the children's rights guaranteed in the Constitution and the Children Act are seen to 'remain paper rights and pipe dreams for the hundreds of thousands of doomed poor children in Kenya who are decimated daily by hunger, malnutrition, curable diseases, and material deprivation due to the grinding poverty situation in the country.'[873]

7.3.3 Parental Duties and Responsibilities for the Child under Tanzanian Law

Parental duties and responsibilities for the child under the LCA are divided into three broad categories. The first category is where a parent, guardian or relative is obliged to provide care and maintenance to a child. The second is where members of the community have to take over the parental duties and responsibilities where parents or guardians or relatives are incapable of doing so. The third category is where the state, through local government authorities, is obliged to take over such duties and responsibilities. These categories are examined below.

a) The Primary Duty to Maintain a Child

In recognition of the essence and supremacy of parental duty and responsibilities for the child, Section 8 of the LCA primarily obliges parents, guardians or relatives to maintain a child, which includes:

(i) Provision of various services to the child;

(ii) Prohibition to deprive the child of his or her basic services;

(iii) Prohibition to deprive the child of medical services on ground of his or her religious belief;

(iv) Prohibition to deprive a child his or her right to leisure and recreation; and

(v) Prohibition of depriving the child of her/his rights on ground of disability.

It should be noted, however, that before the enactment of the LCA the duty to maintain a child was primarily the responsibility of the father. The mother could do so only where the father was economically or physically incapacitated.

Under international children's rights law, both parents are vested with the primary duty and responsibility for the child's upbringing and development. For instance, Article 5, together with Article 18 in particular, of the CRC provides a framework for the relationship between the child, his or her parents and family, and the State.

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871 See Bryant, J.H., 'Kenya's Cash Transfer Program: Protecting the Health and Human Rights of Orphans and Vulnerable Children' *Health and Human Rights – An International Journal* Vol. 11 No. 2, 2009; and African Child Policy Forum, *Harmonisation of Children's Laws in Eastern and Southern Africa: Country Briefs*, op. cit, p. 70.

872 *Ibid*.

873 Wabwile, M.N., 'Rights Brought Home?: Human Rights in Kenya's Children Act 2001', in Bainhaim, A. and B. Rwezaura (Editions), *The International Survey of Family Law* Bristol: Jordan Publishing, 2005, p. 413.

Consistent with international children's rights principles, the Law of the Child Act (2009) imposes primary duties and responsibilities to parents. Accordingly, Section 9(1) of the LCA obliges parents or guardians to ensure that the child's rights to life, dignity, respect, leisure, liberty, health, education and shelter are protected. Sub-section (3) of this section imposes duty on parents, guardians or relatives of a child to:

(i) protect the child from neglect, discrimination, violence, abuse, exposure to physical and moral hazards and oppression;

(ii) provide guidance, care, assistance and maintenance for the child and assurance of the child's survival and development; and

(iii) ensure that, in the temporary absence of a parent, the child shall be cared for by a competent person, except where the parent has surrendered his rights and responsibilities in accordance with a written law or any traditional or customary arrangement.[874]

In a more progressive way, sub-section (4) of Section 9 of the LCA extends the parental responsibilities to a relative or custodian where biological parents of a child are deceased by way of court order or any traditional arrangement. The most innovative way to achieve this end introduced by the LCA is the issue of an "open adoption order"[875] issued by the Resident Magistrate Court or the District Court in terms of Section 54(1)(b).

b) Children Deprived of a Family Environment

Article 20 of the CRC and Article 19 of the ACRWC require States Parties thereto to protect children who are deprived of their family environment. In Tanzania, this has been done through the establishment of special protection and assistance to a child temporarily or permanently deprived of his or her family environment or who, in his or her best interests, cannot be allowed to remain in that environment.[876] This has been done through the enactment of specific provisions to facilitate this aspect. For instance, according to Section 37(3) of the Law of the Child Act, the court may, at any time, revoke the grant of custody to one person and grant the custody to another, approved residential home or an institution, as it may deem necessary.[877]

In compliance with paragraph (3) of Article 20 of the CRC, Tanzania has particularly set out in the two child laws such alternative or substitute care as foster placement;[878] *kafalah* in the context of Islamic law applicable in Zanzibar,[879] adoption[880]

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874 For a detailed account on the duties and responsibilities for the child in Tanzania, see particularly Machibya, E., 'Duties and Responsibilities for the Child under the Law of the Child Act (2009): The Opened Arms for Children?' *The Justice Review.* Vol. 8 No. 2, 2009.

875 Under Section 54(3) of the LCA, the term 'open adoption' as used in the LCA, means adoption of the child by a relative.

876 Tanzania Consolidated 3-5 Report to CRC, para. 102.

877 According to Section 9(3) of the Zanzibar Children's Act, where a Children's Court 'determines that it is in the best interests of a child to separate him from his parents, the best substitute care available shall be provided for the child.'

878 Part IV (Sections 27-33) of the Law of the Child Act; and Part 7 (Sections 72-74) of the Zanzibar Children's Act.

879 Section 75 of the Zanzibar Children's Act.

880 Sections 76-96 of the Zanzibar Children's Act; and Part VI (Sections 52-76) of the Law of the Child Act.

and placement in suitable institutions[881] for the care of children who have been deprived of a family environment.[882]

c) Parental Responsibilities and Duties of Institutional Caregivers

In compliance with the foregoing international child law requirement, Section 7(1) of the LCA guarantees a child's right to live together with his or her parents or guardians. Sub-section (2) of Section 7 provides categorically that:

> (2) A person shall not deny a child the right to live with his parents, guardian or family and to grow up in a caring and peaceful environment unless it is decided by the court that living with his parents or family shall:
>
> (a) lead to a significant harm to the child;
>
> (b) subject the child to serious abuse; or
>
> (c) not be in the best interests of the child.

In terms of sub-section (3) of Section 7, where a competent authority or a court determines in accordance with the law and procedures applicable that 'it is in the best interests of the child to separate him from his parent, the best substitute care available shall be provided for the child.'

When a child is placed under substitute care in terms of Section 7 of the LCA, Section 27 of the LCA imposes parental responsibilities on the patron of an approved residential home or manager of an institution or the foster parents while the child is with him/her or with the institution. Such parental duties and responsibilities include:

(i) ensuring the child's contact with parents, relatives or friends while under the caregiver, *unless it is not in the best interest of the child to do so*;

(ii) ensuring the child's development while under the caregiver, particularly his or her health and education, is attended to; and

(iii) communicating with the parents, guardians or relatives of the child to inform them about the child's progress and to arrange (through a Social Welfare Officer) for a trial return home by the child as soon as it is appropriate.

However, as a developing and poor country, Tanzania faces a number of challenges in protecting children deprived of their family environment. Nkonya and Mtembwa identify a number of these challenges, including lack of appropriate or suitable alternative institutions, lack of resources (both financial and human) to support effective functioning of the available alternative institutions, lack of trained personnel to provide sufficient parental care to children in institutions, and low level of re-unification of children with their families because 'most of parents do not make follow-ups on their children at the centre as the result they are unaware of the children's development nor do they offer any support to the centre.'[883]

d) Community Responsibilities for the Child

The LCA has innovatively introduced provisions that oblige members of the community to report to a Social Welfare Officer (SWO) or a local government authority any

881 Sections 133-146 of the Law of the Child Act; and Part 12 (Sections 123-134) of the Zanzibar Children's Act.

882 Tanzania Consolidated 3-5 Report to CRC, op. cit, para. 103.

883 Nkonya and Mtembwa, op. cit.

violation of the child's rights.[884] Accordingly, failure to report on incidents of violation of the child's rights amounts to an offence and on conviction, a person is liable to a fine of TShs. 50,000 or to imprisonment for a term of three months or to both.[885]

e) State Responsibility for the Child

As we have noted above, international law imposes obligations on States Parties for the protection and promotion of the rights of the child within their respective jurisdictions, including assuming parental responsibilities where parents, guardians or relatives are not capable of doing so. In implementing this international law requirement, Section 94 of the LCA has introduced *indirect* state responsibilities for the child. *Indirect* because the responsibilities of the state are to be discharged by local government authorities (LGAs), which are affiliated to the central government.

Accordingly, Section 94(1) imposes a duty on the LGA to safeguard and promote the welfare of the child within its area of jurisdiction. This duty is specifically discharged by a SWO.[886] Through the SWO, the LGA's duties for the child include:

(i) to provide parental counselling to the child's parents, guardians or relatives and children for promoting *reconciliation* between them;[887]

(ii) to keep a register of most vulnerable children (MVC) within its area of jurisdiction and give material assistance to them whenever possible in order to enable those children to grow up with dignity among other children and to develop their potential and self-reliance;[888]

(iii) to provide assistance and accommodation for any child who appears to require such assistance as a result of having been lost or abandoned or is seeking refuge;[889]

(iv) in collaboration with the police, to make every effort to trace the child's parents, guardians, or relatives of any lost or abandoned child; and, to return the child to the place where he ordinarily resides;[890] and

(v) in collaboration with a police officer, to investigate all cases of breach or violation of the right of the child.[891]

f) Separation of Children from their Parents

As noted above, Article 9 of the CRC and Article 19(1) of the ACRWC require States Parties thereto to ensure that a child is not separated from his or parents against their will, except where competent authorities subject to judicial review so determine, in accordance with applicable law and procedure, that such separation is necessary for the best interests of the child. In case there is a situation that may cause separation of

884 Section 95(1) of the LCA.
885 *Ibid*, Section 95(2).
886 *Ibid*, Section 94(2).
887 *Ibid*, Section 94(3).
888 *Ibid*, Section 94(4).
889 *Ibid*, Section 94(5).
890 *Ibid*, Section 94(6).
891 *Ibid*, Section 94(7).

children from their parents, the best interests of the child will be considered. This will be done by competent authorities subject to judicial review that will determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.

Both the LCA and the Zanzibar Children's Act provide that, where the parents of a child are separated or divorced, a child shall have a right to maintenance and education of the quality he or she enjoyed immediately before his parents were separated or divorced; live with the parent who, in the opinion of the court, is most capable of securing the child's best interests; and access to the other parent, in which case both parents have mutual responsibility to secure such access, unless the court specifies to the contrary.[892]

According to Section 9(3) of the Zanzibar Children's Act, where a Children's Court determines that it is in the best interests of a child to separate him from his parents, the best substitute care available shall be provided for the child. As such, it is the law in Zanzibar that a child who is separated from his parents shall have the right to maintain personal relations and direct contact with both parents on a regular basis, except when this is not in the best interests of the child.[893] There is a rebuttable presumption under the country's legal system that a child under seven years has to stay with the mother until s/he attains the age of seven years,[894] although the Court must have regard to the undesirability of disturbing the life of the child by changes of custody.[895] Under the LCA, one of the paramount considerations for granting the order of custody of the child when parents are separated is '*the best interest of the child* and the importance of the child being with his mother.'[896]

In addition to this paramount consideration, the court must also consider the following factors:

(a) the rights of the child under Section 26 of the LCA;

(b) the age and sex of the child;

(c) that it is preferable for a child to be with his or her parents except if his or her rights are persistently being abused by his parents;

(d) the views of the child have been independently given;

(e) that it is desirable to keep siblings together;

(f) the need for continuity in the care and control of the child; and

(g) any other matter that the court may consider relevant.[897]

On its part, the Law of Marriage Act states that the paramount consideration in granting custody of a child should be the *welfare of the child*.[898] Besides, the court shall have regard to:

892 Section 9 of the Zanzibar Children's Act and Section 26 of the LCA.

893 Section 9(4) of the Zanzibar Children's Act.

894 Section 125(2) of the Act and Section 26 of the LCA. See also *Lugembe John v Milembe Nyanda* High Court of Tanzania at Tabora, Matrimonial Civil Appeal No. 2 of 1998 (Unreported).

895 Section 26(2) of the LCA.

896 *Ibid*, Section 39(1).

897 *Ibid*, Section 39(2).

898 *See* particularly *Ramesh Rajput v Mrs. S. Rajput* [1988] TLR 96.

(a) the wishes of the parents of the child;

(b) the wishes of the child, where he or she is of an age to express an independent opinion; and

(c) the customs of the community to which the parties belong.[899]

In compliance with the provisions of paragraph (2) of Article 9 of the CRC, both the LCA and the Zanzibar Children's Act give an opportunity to all interested parties to participate in proceedings relating to separation of a child from his or her parents. The interested parties are also allowed to make their views known and are considered by the court in making the order for separation.[900]

g) Family Reunification

Article 10 of the CRC provides for reunification of children living in a different country from that of their parents. In Tanzania this requirement is domesticated through policy and legislation; i.e. through the National Refugee Policy (2003), which covers various aspects of the management of refugee matters in Tanzania; and the Refugees Act (1998).[901] This law protects the interest of the child through various provisions. In particular, Section 35 of the Refugees Act sets out the right of family reunion and the procedure to be followed to achieve this end. The procedure for reunion is provided in sub-section (1) of this Section as follows:

> (1) A recognised refugee resident in Tanzania who wishes to join or to be joined by any member of his family outside or within Tanzania respectively shall make application for a family re-union to the Minister through the UNHCR or the Director who shall submit the application to the Committee which shall recommend to the Minister whether to allow the family re-union or not, provided that such family re-union shall not take place before permission is granted under this section. Failure to abide by this provision shall be an offence under this Act.

Under sub-section (2) of Section 35 of the Refugee Act there is an appeal mechanism for a person affected or aggrieved by the decision of the Minister responsible for home affairs refusing or granting family re-union, who may file a petition for review to the Minister.

In addition, sub-section (3) of Section 35 of the Refugee Act requires that where there is disunity in the family of a refugee as a result of divorce, separation, death, etc., any member of that family 'may remain in Tanzania and shall have to apply within a maximum period of 2 years from the time of disunity of the family for the acquisition of the refugee status on his own right or for a legalization of the residence in Tanzania under the Immigration Act,[902] failure of which shall be an offence under this Act.'

h) Recovery of Maintenance for the Child

Article 27(4) of the CRC requires States Parties 'to take appropriate measures to secure the recovery of maintenance for the child from the parents or other persons

899 *See* section 125(2) of the Law of Marriage Act.

900 *See* particularly Sections 28, 29, 34, 37 of the Law of the Child Act and Sections 23, 24 and 25 of the Zanzibar Children's Act.

901 Cap. 37 R.E. 2002.

902 Cap. 54 R.E. 2002.

having financial responsibility for the child, both within the State Party and from abroad.' Tanzania has complied with this provision by enacting specific provisions on this subject in the Law of the Child Act and the Zanzibar Children's Act. Section 42(2) of the LCA and Section 64(2) of the Zanzibar Children's Act provide, *mutatis mutandis*, that an application for maintenance 'may be made against any person who is eligible to maintain the child or contribute towards the welfare and maintenance of the child.'

Part Three

The Realisation of the Child's Civil, Political and Socio-Economic Rights in East Africa

Chapter Eight

The Child's Enjoyment of Civil and Political Rights

8.0 Introduction

It is well established that all human rights, including child rights, are indivisible and interdependent. Viewed in this context, it is arguable that although the CRC and the ACRWC are the primary and specific sources for children's rights in international law, children's rights are also generally protected in other international human rights treaties.[903] This means that, in terms of civil and political rights for children, the basic sources are the CRC and ACRWC in the context of the International Covenant on Civil and Political Rights (ICCPR).[904]

In this regard, Article 4 of the CRC obliges States Parties to undertake all appropriate legislative, administrative, and other measures for the implementation of the rights, including civil and political rights, recognized in this treaty. In a more emphatic note, Article 1(1) of the ACRWC obliges Member States of the Organization of African Unity (OAU) (now the African Union, AU) that are parties to the treaty to 'recognize the rights, freedoms and duties enshrined in this Charter and shall undertake necessary steps, in accordance with their Constitutional processes and with the provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter.' In the same vein, the Human Rights Committee's General Comment No. 17 on Article 24 of the ICCPR notes that children should benefit from all civil rights recognised in this treaty by virtue of their being individuals.

Therefore, this Chapter discusses the realisation by children of civil and political rights in the contexts of the CRC, ACRWC, ICCPR and other relevant international human rights treaties in the three common law East African countries considered in this book.

8.1 The Child's Right to Name and Nationality

The child has the right to name, nationality and to know his or her biological parents and extended family; as well as the right to free and compulsory birth registration and issue of a certificate after birth or immediately thereafter.[905] As the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) held in *Institute for Human Rights and Development in Africa (Banjul) and Open Society Justice Initiative (New York) (behalf of children with Nubian background in Kenya) v The Government of Kenya*:[906]

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903 Tomkin, J., *Orphans of Justice – In Search of the Best Interests of the Child When a Parent is Imprisoned: A Legal Analysis* Geneva: Quaker United Nations Office, 2009, p. 12.

904 G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force on 23 March 1976.

905 UNICEF defines birth registration as 'the official recording of the birth of a child by a State's administrative process. It is the permanent and official record of a child's existence and is fundamental to the realization of children's rights and practical needs.' *See* UNICEF, 'Birth Registration' *Child Protection Information Sheet* Geneva: UNICEF, 2006, p. 1.

906 Communication No. Com/002/2009 (ACERWC).

> It is rightly said that birth registration is the State's first official acknowledgment of a child's existence, and a child who is not registered at birth is in danger of being shut out of society – denied the right to an official identity, a recognized name and a nationality.[907]

The justification of these rights is to be found in Article 6(4) of the ACRWC, which obliges States Parties to undertake measures 'to ensure that their Constitutional legislation recognize 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.'[908]

At the global level, many human rights treaties recognise the child's right to acquire a nationality, albeit with varying formulations.[909] As Doek rightly points out, international human rights law has shifted from the position that 'the child shall be entitled from his birth [...] to a nationality',[910] to one mandating that the child 'shall acquire a nationality'.[911] The same wording and position 'is transparent under Article 6 of the African Children's Charter.' [912]The reason for such a shift is because it is felt that 'a State could not accept an unqualified obligation to accord its nationality to every child born on its territory regardless of the circumstances.'[913] The ACERWC has observed that:

> [U]under general international law, States set the rules for acquisition, change and loss of nationality as part of their sovereign power. However, although states maintain the sovereign right to regulate nationality, in the African Committee's view, state discretion must be and is indeed limited by international human rights standards, in this particular case the African Children's Charter, as well as customary international law and general principles of law that protect individuals against arbitrary state actions.[914]

In particular, states 'are limited in their discretion to grant nationality by their obligations to guarantee equal protection and to prevent, avoid, and reduce statelessness.'[915] Implicit in Article 6(4) of the ACRWC 'is the obligation to implement the provision proactively in cooperation with other States, particularly when the child may be entitled to the nationality of another State.'[916] In this regard, the nature of the State Party obligation under Article 6(4) of the ACRWC is to "undertake to ensure". As such, the obligation

907 *Ibid*, para 38, referring to UNICEF, 'Birth Registration: Right From the Start' Innocenti Digest No 9, March 2002, p. 1.

908 Similarly, Article 7(2) of the CRC obliges States Parties to 'ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.'

909 These instruments include the Universal Declaration of Human Rights (UDHR); International Covenant on Civil and Political Rights (ICCPR); International Convention on the Elimination of All Forms of Racial Discrimination (CERD); Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); Convention on the Rights of the Child (CRC); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW); and the Convention on the Rights of Persons with Disabilities (CRPD).

910 Principle 3 of the UN Declaration on the Rights of the Child of 1959.

911 Doek, J.E., 'The CRC and the Right to Acquire and to Preserve a Nationality', *Refugee Survey Quarterly* Vol. 25 No. 3, 2006, referring to Article 7(1) of CRC, Article 24(3) of the ICCPR.

912 *Nubian* case, op. cit, para 47.

913 Doek, op. cit.

914 *Nubian* case, op. cit, para 48.

915 *Ibid*. In this regard, the ACERWC was of the view 'that African States, including Kenya, need to be encouraged and supported to ratify and implement fully the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness.'

916 *Ibid*, para 51.

that States Parties under Article 6(4) of the Charter 'is not an obligation of conduct but an obligation of result. States Parties need to make sure that all necessary measures are taken to prevent the child from having no nationality.'[917]

In an effort to implement this right, member states of the African Union (AU) have committed themselves within the African Fit for Children (AFFC) Framework[918] to ensure effective implementation of the universal birth registration as a child protection measure.[919] This is based on the principle that the child's right to protection can only be exercised if the rights bearer can be identified as the true beneficiary. Birth registration, therefore, is important to ascertain the child's status for purposes of constitutional and legal protection – that is, to enable the child to enjoy his or her rights and benefits under the Constitution and the law. Birth certificate is also important in the sense that it could be a prerequisite for access to social services; and, as such, 'establishing a birth registration system […] may over time improve children's access to health care and education.'[920] It is also notably correct that, it is easy 'to protect children from exploitative activities like sexual abuse and child labour if their age is easily ascertainable.'[921]

In terms of ascertainment of the child's minimum age of criminal responsibility (MACR) in the justice system, birth registration is of paramount significance, the absence of which may deny a person the benefit of being treated as a child.[922] In this regard, in many justice systems, where there are no effectively functioning birth registration systems (like in the three common law East African countries considered in this book), experience has just shown that age estimates for the purpose of criminal responsibility based on the body morphology and intelligence of the accused child have proved inadequate and inaccurate. Many children have found themselves processed through the criminal justice system even where they were under the MACR.

8.1.1 The Child's Right to Name and Nationality in Uganda

Like the Tanzanian Constitution, the Constitution of Uganda does not explicitly guarantee the child's right to name; but it guarantees the right to nationality. The right to nationality in the Ugandan Constitution is implicit in the provisions relating to citizenship, which accord automatic citizenship to persons whose parent(s) or grandparent(s) is/are Ugandan.[923] Prior to the 1995 Constitution, only male citizens could confer citizenship to their children born within or outside Uganda. With the current Constitution, the right of Ugandan citizenship is given to a child born within and outside Uganda through either parent. In principle:

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917 *Ibid*, para 52.

918 The African Common Position –*Africa Fit for Children* – was adopted in 2001 and given greater impetus in 2007 with the Call for Accelerated Action. It constitutes 'a novel and determined effort by African leaders to build renewed momentum towards the realisation of the rights of children in Africa.' *See* African Child Policy Forum, *Harmonisation of Children's Laws in Eastern and Southern Africa: Country Briefs* Addis Ababa: African Child Policy Forum, 2012, p. iv.

919 See para 7(a) of the Call for Accelerated Action.

920 Article 40, 'A Children's Law Reform Process in South Sudan', available at http://www.communitylawcentre.org.za/children/2005art40/vo17_no1_sudan.php/sudan (Accessed on 14 March 2013).

921 African Child Policy Forum, *Harmonisation of Children's Laws in Eastern and Southern Africa: Country Briefs*, op. cit, p. 187.

922 *Ibid*.

923 Article 10 of the Constitution of Uganda.

> This means that a child born to a woman who is a citizen of Uganda is automatically a Ugandan citizen by birth. Citizenship is extended to such a child through the mother, even if she is married to a non-Ugandan and even if such a child is born outside Uganda. The child, if she or he wishes, has the right to Ugandan citizenship.[924]

In addition, Article 11 of the Constitution provides that 'a child of not more than 5 years of age found in Uganda, whose parents are not known,' shall be presumed to be a citizen of Uganda by birth.' It also provides for adoption of children born to non-Ugandan citizens. In Article 11(2), the Constitution provides that: 'A child under the age of eighteen years neither of whose parents is a citizen of Uganda, who is adopted by a citizen of Uganda shall, on application, be registered as a citizen of Uganda.'

It also provides for the adoption of children born to non-Ugandan citizens. It says that a child under the age of 18 years neither of whose parents is a citizen of Uganda and who is adopted by a citizen of Uganda shall on application be recognized as a citizen of Uganda. Under Article 34(1), the Ugandan Constitution guarantees the child's right to know and to be cared for by their parents; and also guarantees the parent's right and duty to care for and bring up their children.[925]

Nonetheless, both the Constitution and the Children's Act of Kenya guarantee the child's right to name and nationality. Unlike the Tanzanian and Kenyan child laws, the Ugandan Children's Act makes no provision for the child's right to name.[926] However, the Ugandan Constitution enshrines an obligation on the State to register every birth, marriage and death.[927] To give the foregoing constitutional provisions relating to compulsory registration of birth more legal power, the Birth and Death Registration Act (1970)[928] also provides for the registration of births and deaths within six months. It should be noted that the child's right to a name is akin to the child's right to be registered as guaranteed in Article 6 of the ACRWC and Article 7 of the CRC. It is to be noted that failure to register a child's birth 'may impair his or her capacity to enjoy some of the rights and protection accorded by law.'[929]

Although birth registration is an obligation of the state in Uganda, it is still practiced at the low ebb, and particularly in urban areas. As the Government notes:

> During the years of political turmoil and mismanagement, mechanisms for registration of births and deaths were run down. The practice of and requirement for registration is lax. However, today efforts are being made to revitalize the process of registration of births and deaths. A project for the same is being piloted in two selected districts of the country.[930]

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924 Republic of Uganda, 'Consideration of Reports Submitted by States Parties under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women: Uganda', Third Periodic Report of State Parties, 3 July 2000 (CEDAW/C/UGA/3), p. 33.

925 *Ibid*, Article 31(4).

926 African Child Policy Forum, *Harmonisation of Children's Laws in Eastern and Southern Africa: Country Briefs*, op. cit, p. 186.

927 *See* particularly Article 18 of the Constitution of Uganda (1995), which expressly states that: 'The State shall register every birth, marriage and death occurring in Uganda.'

928 Amended by Decree No. 3 of 1974.

929 African Child Policy Forum, *Harmonisation of Children's Laws in Eastern and Southern Africa: Country Briefs*, op. cit.

930 Republic of Uganda, 'Second Periodic Report of States Parties Due in 1997: Uganda', 5 November 2004 (CRC/C/65/Add.33), para 96.

It is estimated that in 2006 only 4% of children in Uganda were registered.[931] In its Concluding Observations to Uganda's initial report in 1997, the CROC expressed its concern with the absence of effective registration of children in the rural areas.[932]

8.1.2 The Child's Right to Name and Nationality in Kenya

(a) The Constitutional and Statutory Framework

As stated in Chapter Four of this book, the Constitution of Kenya (2010) is one of the most progressive Constitutions in terms of constitutionalising all categories of human rights – ranging from civil, political, socio-economic, and environmental to children's rights and women's rights. It also obliges the State to "observe, respect, promote and fulfill" the rights and freedoms enshrined in the Bill of Rights. It also obliges the State to enact and implement legislation to fulfill its international obligations in respect of human rights and fundamental freedoms.[933] This obligation is reinforced by the constitutional guarantee to everyone, including children, of the right to pursue an action in courts in the event of denial of any of the constitutionally guaranteed rights.[934]

In respect of the child's right to name and nationality, Article 53(1) of the Constitution of Kenya provides that: 'Every child has the right - to a name and nationality from birth.' This right is also expounded in the National Children Policy (2008), which stipulates that every child, including a child with disability and/or special needs, has a right to identity and registration at birth.[935] Further elaboration of this right is provided in Section 11 of the Children Act, which categorically provides that:

> 11 Name and nationality.
>
> Every child shall have a right to a name and nationality and where a child is deprived of his identity the Government shall provide appropriate assistance and protection, with a view to establishing his identity.

In addition, Article 14(4) of the 2010 Kenyan Constitution provides that a child under eight years of age whose parents are not known is presumed to be a citizen by birth.[936]

The Births and Deaths Registration Act[937] also reinforces the child's right to name and nationality in that it makes it mandatory for the registrar of births to register a child within six months after birth, 'except upon receiving the written authority of the Principal Registrar issued in accordance with the rules, and upon payment of the prescribed fee.'[938]

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931 *See* Ugandan Ministry of Gender, Labour and Social Development at <http://www.mglsd.go.ug/ovc/downloads/Policies_12.pdf> (Accessed on 14 March 2013).

932 CROC Concluding Observations of Uganda www.communitylawcentre.org.za/.../ childrens.../Ending% 20Corporal% (Accessed on 28 July 2013).

933 Article 21 of the Constitution of Kenya (2010).

934 *Ibid*.

935 Republic of Kenya, '3rd, 4th and 5th State Party Report to the UNCRC Committee – Geneva 2005-2011', op. cit, para 136.

936 This issue was considered in the Nubian case, op. cit.

937 Cap. 149 Rev. 2012.

938 *Ibid*, Section 8.

(b) Reconciling Legal Principles and Practice in Relation to Birth Registration in Kenya

Like in the other two East African countries examined in this book, birth registration in Kenya is yet to attain the required level of success envisaged under Article 7 of the CRC and Article 6 of the ACRWC. The Kenyan Government has acknowledged that the requirement for free birth registration to be undertaken within 6 months after birth 'has not always been adhered to due to ignorance on the part of parents, and especially for women who deliver outside the health facilities.'[939]

In its previous consideration of the Kenyan periodic report, the CROC was concerned with this state of affairs and made the following Concluding Observations: That is, Kenya should implement an efficient birth-registration system that fully covers its territory and all the children in Kenya, including through:

(a) ensuring free-of-charge birth registration at all stages of the registration process;

(b) taking appropriate measures to register those who have not been registered at birth;

(c) introducing mobile birth-registration units in order to reach the remote areas;

reviewing existing discriminatory legislation on birth registration, including legislation that prohibits the registration of children born to foreign fathers; and

(d) formalizing links between various service-delivery structures and promoting awareness and appreciation of the importance of birth registration through mass campaigns that provide information on the procedure of birth registration, including the rights and entitlements derived from the registration, through, *inter alia*, television, radio and printed materials.

Through the Department of Civil Registration, the Government of Kenya has undertaken the following actions to implement the foregoing CROC recommendations: first, it has increased the number of civil registration offices from 69 in 2005 to 112 by the end of 2011; second, it ensures that every sub-location is a reporting centre throughout the country; and, third, the Births and Deaths Registration Act is under review to align it with the Constitution.[940]

Despite the challenges identified above, 'it should be noted that there has been [an] increase in actual registration of birth of children rising from 541,664 to 749,693 between 2005 and 2010.'[941] This has been due to 'intensive campaigns undertaken by the State Party and the policy to make it mandatory for all children to acquire a birth certificate before sitting for national examinations at the end of primary school and secondary school cycles.'[942] Through the Department of Civil Registration, the Government of Kenya 'has been implementing a number of programmes and activities

939 Republic of Kenya, '3rd, 4th and 5th State Party Report to the UNCRC Committee – Geneva 2005-2011', op. cit, para 128.

940 *See* the Births and Deaths Registration Bill, 2011.

941 Republic of Kenya, '3rd, 4th and 5th State Party Report to the UNCRC Committee – Geneva 2005-2011', op. cit, para 128.

942 *Ibid*.

with the aim of raising the level of public awareness on the need and importance of registering births and deaths.'[943]

The Department with assistance from UNICEF, Kenya National Bureau of Statistics (KNBS STATCAP project), and UNHCR, APHIA II, among others 'has designed and implemented social mobilization and training strategies to increase the level of awareness of the importance of birth registration. The strategies target community, opinion leaders, and provincial administration and birth registration agents.'[944] In order to improve registration coverage rates, the Department of Civil Registration 'has undertaken sensitization activities in arid and semi-arid districts and informal urban settlements that have low registration rates as a way of ensuring that every child's birth is registered.'[945] In addition, the Department of Children's Services 'has a Cash-Transfer programme to Orphans and Vulnerable Children and one of the conditionality is child birth registration.'[946]

In addition, the Government of Kenya has adopted its rules that 'provide for conditions by which a person can become a Kenyan citizen.[947] Pursuant to Chapter IV of the former Constitution of Kenya and the Kenya Citizenship Act, Cap. 170 of the Laws of Kenya, the four ways through which a person may acquire Kenyan citizenship are birth, descent, registration, and naturalisation.

In practice, however, there is sheer discrimination in the registration process against certain classes of children in Kenya. This is true in respect of birth registration of 'certain categories of children who have no access to registration including children born of foreign fathers and children from certain minority communities such as the Nubian and Somali communities.'[948] This issue was considered by the ACERWC in 2010 in its first adjudicative decision under its communication procedure in the *Nubian* case. In this communication the Complainants alleged that the Nubians in Kenya descended from the Nuba mountains found in what is current–day central Sudan and were forcibly conscripted into the colonial British army in the early 1900s when Sudan was under British rule. Upon demobilisation, allegedly, although they requested to be returned to Sudan, the colonial government at the time refused and forced them to remain in Kenya.

The Complainants also alleged that the British colonial authorities allocated land for the Nubians, including in the settlement known as *Kibera*, but did not grant them British citizenship.[949] At Kenya's independence in 1963, the Complainants argued, the citizenship status of the Nubians was not directly addressed, and for a long period of time they were consistently treated by the government of Kenya as "aliens" since they, according to the Government, did not have any ancestral homeland within Kenya, and as a result could not be granted Kenyan nationality. The Complainants alleged that the

943 *Ibid*, para 129.

944 *Ibid*.

945 *Ibid*, para 137.

946 *Ibid*, para 138.

947 *Nubian* case, op. cit, para. 49.

948 African Child Policy Forum, Harmonisation of Children's Laws in Eastern and Southern Africa: Country Briefs, op. cit, p. 69.

949 Although technically speaking "nationality" and "citizenship" do not mean the same thing, the African Committee uses the two notions interchangeably in this decision as they are used in such a manner in the Communication itself.

refusal by the Kenyan Government to recognise the Nubians' claim to land is closely linked with the Government's denial of Nubians to Kenyan citizenship.

A major difficulty in making the right to nationality effective for Nubian children is the fact that many Nubian descents in Kenya who are parents have difficulty in registering the birth of their children. For instance, the fact that many of these parents lack valid identity documents further complicates their efforts to register their children's births. It was further alleged that birth registration certificate in Kenya explicitly indicates that it is not proof of citizenship, thereby leaving registered children in an ambiguous situation contrary to Article 6 of the African Children's Charter.

In connection to this, the Communication further alleged that while children of Nubian descent in Kenya have no proof of their nationality, they have legitimate expectation that they will be recognised as nationals when they reach the age of 18. However, for children of Nubian descent in Kenya, since many persons of Nubian descent are not granted the ID cards that are essential to prove nationality, or only get them after a long delay, this uncertainty means that the future prospects of children of Nubian descent are severely limited and often leaves them stateless. The Complainants further alleged that a vetting process that is applicable to children of Nubian decent is extremely arduous, unreasonable, and *de facto* discriminatory.

The Communication alleged that children of Nubian descent living in Kenya, descendants from Sudanese Nubian members of the British colonial armed forces, have suffered, and continue to suffer, a violation of their rights. In particular, the Communication alleged the systematic and discriminatory denial to these children of their right to acquire Kenyan nationality that is essential to the enjoyment of their protected human rights. Apart from the right against discrimination (Article 3 of the Charter) and the right to acquire a nationality (Article 6(3) of the Charter), the Communication alleged that the denial of nationality to these children also caused a subsequent violation of their rights to equal access to education (Article 11(3) of the Charter); access to health and health services (Article 14(2)(b) of the Charter); a violation of the prohibition against degrading treatment (Article 16 of the Charter); and an infringement of Article 20(2)(a) and (b) of the Charter requiring States Parties, in accordance with their means and national conditions, to take all appropriate measures to assist parents and other persons responsible for the child.

In this *exparte* decision,[950] the ACERWC found the Government of Kenya in violation of its obligations in:

A- Article 3 of the Charter on non-discrimination, as children with Nubian background in Kenya are systematically discriminated against by the state on the basis of multiple expressly prohibited grounds;

B- Article 6(3) of the Charter, as children with Nubian background in Kenya are deprived of their right to acquire a nationality (with the effect that these children are at risk of statelessness);

950 After successive requests made by the ACERWC addressed to the Government of Kenya to share its views both on admissibility and the merits of the Communication failed, the Committee met on 22 March 2011 during its 17th Ordinary Session and considered the merits of the Communication. The Committee was of the view that the best interests of the children involved in the Communication demanded that a decision needed to be made without any further postponement and delay. See the ACERWC's Summary Decision dated 24 March 2011.

C- And as a result of the violation as outlined in A and B above, Article 11(3) of the Charter as the right to equal access to education is denied to children with Nubian background in Kenya;

D- And Article 14(2)(b) of the Charter, as children with Nubian background in Kenya are denied equal access to necessary medical assistance and health care to all children with emphasis on the development of primary health care.[951]

In this Communication the Complainants alleged that the treatment of children of Nubian descent violates their right to be registered at the time of their birth, because some parents have difficulty having their children registered especially since many public hospital officials refuse to issue birth certificates to children of Nubian descent. Such a limitation is confirmed by the Kenya National Commission on Human Rights (KNHCR) that identified and recorded practices indicating discrimination against certain population groups, including persons of Nubian descent, in the grant of birth registration and identity documents.[952] In this context, the ACERWC noted that:

> 40. Both the African Committee (2009) and the CRC Committee (2007) have already recommended through their concluding observations to the Government of Kenya that there is some gap in the State Party's birth registration practice, partly reflected in the number and categories (such as children born out of wedlock, children of minority groups, and children of refugee, asylum-seeking or migrant families) of births that go unregistered. Unregistered children are not issued birth certificates and thus rendered stateless, as they cannot prove their nationality, where they were born, or to whom. The African Committee is of the view that the obligation of the State Party under the African Children's Charter in relation to making sure that all children are registered immediately after birth is not only limited to passing laws (and policies),[953] but also extends to addressing all *de facto* limitations and obstacles to birth registration.[954]

The Complainants had further alleged that even when birth certificates are issued to children of Nubian descent, they do not confer a nationality upon them. They alleged that children of Nubian descent are often left to wait until they turn 18 years to apply to acquire a nationality, which is granted on the basis of discretion of the concerned authority. To this allegation, the ACERWC was of the view that: 'there is a strong and direct link between birth registration and nationality. This link is further reinforced by the fact that both rights are provided for in the same Article under the African Children's Charter (as well as the UN Convention on the Rights of the Child).'[955] Therefore, the ACERWC noted that:

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951 *Ibid*.

952 *See* generally, Kenya National Commission on Human Rights, 'An Identity Crisis? Study on the Issuance of National Identity Cards in Kenya', 2007.

953 The ACERWC noted that: 'It remains to be seen in practice the extent to which the guarantee in the 2010 Constitution, particularly in Article 12(1)(b) which states that '[e]very citizen is entitled to a Kenyan passport and to any document of registration and identification issued by the State to citizens' will improve this situation.'

954 This can sometimes be achieved through a universal, well-managed registration that is based on the principle of non-discrimination and accessible to all (using e.g. mobile registration units for children living in remote areas) and free of charge. See Doek, J.E., 'The CRC and the Right to Acquire and to Preserve a Nationality' *Refugee Survey Quarterly* Vol. 25 No. 3, 2006, p. 26.

955 *Nubian* case, op. cit, para. 42.

> Article 6(3) does not explicitly read, unlike the right to a name in Article 6(1), that "every child has the right *from his birth* to acquire a nationality". It only says that "every child has the right to acquire a nationality". Nonetheless, a purposive reading and interpretation of the relevant provision strongly suggests that, as much as possible, children should have a nationality beginning from birth. This interpretation is also in tandem with Article 4 of the African Children's Charter that requires that "in all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration". Moreover, this interpretation is further supported by the UN Human Rights Committee that indicated: "States are required to adopt every appropriate measure, both internally and in cooperation with other States, *to ensure that every child has a nationality when he is born*" (African Committee's emphasis)[956]. Moreover, by definition, a child is a person below the age of 18 (Article 2 of the African Children's Charter), and the practice of making children wait until they turn 18 years of age to apply to acquire a nationality cannot be seen as an effort on the part of the State Party to comply with its children's rights obligations. Therefore, the seemingly routine practice (which is applied more of as rule than in highly exceptional instances) of the State Party that leaves children of Nubian descent without acquiring a nationality for a very long period of 18 years is neither in line with the spirit and purpose of Article 6, nor promotes children's best interests, and therefore constitutes a violation of the African Children's Charter.[957]

The Complainants also alleged that 'birth registration certificate in Kenya explicitly indicates that it is not proof of nationality thereby leaving even registered children stateless.'[958] They further alleged that 'while children in Kenya have no proof of their nationality, they have legitimate expectation that they will be recognised as nationals when they reach the age of 18. However, for children of Nubian descent in Kenya, since many persons of Nubian descent are not granted the ID cards that are essential to prove nationality, or only get them after a long delay, this uncertainty means that the future prospects of children of Nubian descent are severely limited, and often leaves them stateless.' Therefore, the central issue to the ACERWC was statelessness, to which the ACERWC observed that:

> One of the main purposes of Article 6, in particular Article 6(4) of the African Children's Charter, is to prevent and/or reduce statelessness. A "stateless person", according to the 1954 UN Convention relating to the Status of Stateless Persons, means "a person who is not considered as a national by any State under the operation of its law". There is evidence that this universal definition of a "stateless person" is accepted as part of customary international law. Therefore, a "stateless child" is a child who is not considered as a national by any State under the operation of its laws.[959]

The ACERWC acknowledged that: 'While complex issues of parentage, race, ethnicity, place of birth, and politics all play a role in determining an individual's nationality, the root causes of statelessness [in Kenya] are complex and multifaceted including state succession, decolonization, conflicting laws between States, domestic changes to nationality laws, and discrimination.'[960] Whatever the root cause(s), the ACERWC 'cannot overemphasize the overall negative impact of statelessness on children. While it is always no fault of their own, stateless children often inherit an uncertain future.

956 Human Rights Committee, General Comment No. 17, 'Article 24: Rights of the Child', (1989), para. 8.

957 *Nubian* case, op. cit, para. 42.

958 *Ibid*, para 43.

959 *Ibid*, para 44.

960 *Ibid*, para 45. See also Kosinski, S., 'State of Uncertainty: Citizenship, Statelessness, and Discrimination in the Dominican Republic', *Boston College International and Comparative Law Review,* Vol. 32, 2009, p. 377.

For instance, they might fail to benefit from protections and constitutional rights granted by the State.'[961] These include 'difficulty to travel freely, difficulty in accessing justice procedures when necessary, as well as the challenge of finding oneself in a legal limbo vulnerable to expulsion from their home country.'[962] According to the ACERWC, statelessness 'is particularly devastating to children in the realisation of their socio-economic rights such as access to health care, and access to education. In sum, being stateless as a child is generally antithesis to the best interests of children.'[963]

It should be noted that pursuant to Chapter IV of the former Constitution of Kenya and the Kenya Citizenship Act,[964] there are four ways through which a person may acquire Kenyan citizenship: i.e. by birth, descent, registration, and naturalisation. The ACERWC found 'sufficient evidence that indeed some persons (including children) of Nubian descent in Kenya have acquired Kenyan nationality through one of these four ways.'[965] Therefore:

> [N]either the Communication alleges nor the African Committee believes that children of Nubian descent in Kenya have been left stateless. However, the crux and truth of the matter is that, even with the application of these (fairly restrictive)four ways through which a person can become a Kenyan national, a significant number of children of Nubian descent in Kenya have been left stateless.[966]

According to the ACERWC, the duty in Article 6(4) of the ACRWC to ensure that a child 'acquire[s] 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' is 'squarely applicable to the present Communication as an obligation of the Government of Kenya.'[967] This, by no means, is:

> […] an attempt by the African Committee to be prescriptive about the choice States make in providing for laws pertaining to the acquisition of nationality. Therefore, while the African Committee is not suggesting that States Parties to the Charter should introduce the *jus soli* approach, in line with the best interests of the child principle, it is explaining the intent of Article 6(4) of the African Children's Charter that if a child is born on the territory of a State Party and is not granted nationality by another State, the State in whose territory the child is born, in this particular case Kenya, should allow the child to acquire its nationality.[968]

In the end, the ACERWC commended the new Kenyan Constitutional dispensation introduced in 2010, 'which ushers a number of advancements in promoting and protecting children's rights, including their right to acquire a nationality.'[969] In fact:

> While the African Committee lauds the effort of the State Party in providing for this provision in its Constitution, it would like to draw the attention of the State Party that this provision is still not a sufficient guarantee against statelessness, let alone address the crux of

961 *Nubian* case, op. cit, para. 46.

962 *Ibid*.

963 *Ibid*.

964 Cap. 170 of the Laws of Kenya.

965 *Nubian* case, op. cit, para. 49.

966 *Ibid*.

967 *Ibid*, para 50.

968 *Ibid*.

969 *Ibid*, para 53. In particular, Article 14(4) of the 2010 Kenyan Constitution entrenches that a child less than eight years of age whose parents are not known is presumed to be a citizen by birth.

> the present Communication- namely, children born in Kenya of stateless parent(s) or who would otherwise be stateless, to acquire a nationality by birth.[970]

From the foregoing elaboration, the ACERWC found the Government of Kenya in violation of Articles 6(2), 6(3) and 6(4) of the ACRWC relating to the child's right to a name and nationality. The ACERWC regarded the violations discussed in the preceding paragraphs 'as emblematic of the difficulties occasioned by the non-recognition of Kenyan nationality of children of Nubian descent in the instant case. It thus concluded that:

> The Committee does not wish to fault governments that are labouring under difficult circumstance to improve the lives of their people. The Government of Kenya has ratified the African Children's Charter earlier than many countries on the continent (25 July 2000), and more importantly, has made a number of significant progresses in implementing the provisions of the Charter. However, it is worthy of note that the violation complained of has persisted unchecked for more than half a century, thereby prejudicing not just the children in respect of whom the complaint has been brought under this African Children's Charter, but indeed generations preceding them. The implications of the multi-generational impact of the denial of right of nationality are manifest and of far wider effect than may at first blush appear in the case. Systemic under-development of an entire community has been alleged to be the result. Therefore, in addressing the consequences of the non-recognition of the nationality of children of Nubian descent, actions which address the long-term effects of the past practice must be formulated. As is clearly stated in the African Children's Charter (see Article 11(2)(h); Article 14(2)(h); Article 20(2)), such measures must be formulated with the participation of the impacted community.[971]

In order to address the foregoing anomalies relating to the child's enjoyment of his or her right to name and nationality, the Kenyan Government has enacted the Kenya Citizenship and Immigration Act.[972] According to Section 22(1)(g) of this law, every citizen is entitled to the rights, privileges and benefits and is subject to the limitations provided for or permitted by the Constitution or any other written law including: the entitlement to any document of registration or identification issued by the State to citizens. These documents include a birth certificate; a certificate of registration; a passport; a national identification card; and a voter's card, where applicable.

8.1.3 The Child's Right to Name and Nationality in Tanzania

In Tanzania the child's right to name and nationality is enshrined in Section 6(1), (2) and (3) of the Law of the Child Act (LCA).[973] Under Section 6(1) of the LCA, a child has the right to a name, nationality and to know his or her biological parents and extended family. The law prohibits a person to 'deprive a child of the right to a name, nationality and to know his biological parents and members of extended family subject to the provisions of any other written laws.'[974] In order to ensure that a child effectively enjoys this right, each parent or guardian is obliged to ensure that his or her child's birth is registered with the Registrar-General.[975]

970 *Ibid*.

971 *Ibid*, para 68.

972 No. 12 of 2011.

973 This right derives its source from Article 6(2) of the ACRWC; and Article 7 of the CRC.

974 Section 6(2) of the LCA.

975 *Ibid*, Section 6(3).See also Births and Deaths Registration Act, Cap. 108 R.E. 2013.

In its previous Concluding Observations, the CROC recommended, in the light of Article 7 of the CRC, that Tanzania should implement an efficient birth registration system that covers its territory fully, including through:

(a) ensuring birth registration free of charge;

(b) introducing mobile birth registration units in order to reach the remote areas;

(c) taking appropriate measures to register those who have not been registered at birth; and

(d) formalizing links between various service delivery structures and promoting awareness and appreciation of the importance of birth registration through mass campaigns that provide information on the procedure of birth registration, including the rights and entitlements derived from the registration, through, *inter alia*, television, radio and printed materials.[976]

In compliance with the foregoing CROC recommendations, Tanzania has undertaken a number of legislative, judicial and administrative measures to ensure that it complies with Article 7 of the CRC, and by extension Article 6(2) of the ACRWC. In this context, Tanzania has continued to implement the Births and Deaths Registration Act,[977] which provides, in Section 11, that: 'it shall be the duty of the father and mother, and, in default of the father and mother, of the occupier of the house in which to his knowledge such child is born, and of each person present at the birth, and of the person having charge of such child, to register the birth within three months of the birth.'

With the enactment of the LCA in 2009, Tanzania has widened the scope of the application of this provision to include the child's right to a name, nationality and to know his biological parents and extended family.[978] It has also extended this principle to include prohibition on a person to deprive a child of the right to a name, nationality and to know his biological parents and members of extended family subject to the provisions of any other written laws.[979] The LCA has also reaffirmed the principle that:

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976 United Republic of Tanzania, 'Tanzania 3rd, 4th and 5th Reports on the Implementation of the Convention on the Rights of the Child (CRC) 2005-2011', submitted to the CROC by the Ministry of Community Development, Gender and Children (Tanzania Mainland) and the Ministry of Social Welfare, Youth, Women and Children Development (Zanzibar), 9 January 2012 (henceforth, 'Tanzania's Consolidated 3-5 Reports'), para. 57.

977 Cap. 108 R.E. 2002. In Zanzibar the Birth and Death Registration Act (2006), *inter alia*, requires a child to be registered within 42 days after birth. The Zanzibar Children's Act (2011) also has provisions which require a child to be registered immediately after birth and compel health authority or any other relevant agency for birth registration to assist in child registration. This is, in particular, provided in Section 8(1) of the Children's Act, which states that: 'Subject to the provisions of the Birth and Death Registration Act, No. 10 of 2006 every child shall be registered upon birth.' Sub-section (2) of this section provides that: 'The health authorities and any other relevant person or agency shall co-operate with the Registrar of Birth in measures to secure the registration of all births.'

978 Section 6(1) of the Law of the Child Act (2009). In Zanzibar, the State has established birth registration offices at districts levels to implement the foregoing statutory provisions. In this regard, Shehia offices have been provided with birth registration forms to help in the birth registration process for children who are normally born out of health facilities. For those children born in hospitals they receive notification cards for registration from the health facilities in which they are born, which are then submitted to the Registrar of Birth and Death for issuance of birth certificates.

979 *Ibid*, Section 6(2); and Section 7 of the Zanzibar Children's Act (2011).

'Each parent or guardian shall be responsible for the registration of the birth of his child to the Registrar-General.'[980]

In translating the foregoing statutory provisions into action, Tanzania has designated the Registration, Insolvency and Trusteeship Agency (RITA) to deal with registration and issuance of birth certificates in Tanzania Mainland. Through RITA, Tanzania has made birth registration free of charge in health facilities where children are born. However, the provision of free birth certificates is still a challenge to Tanzania due to high-rocketing costs of production of the certificates and the distribution costs, particularly in rural areas. Nonetheless, RITA has been grappling with this challenge through a number of initiatives, all of which aiming at providing free birth certification to children.[981]

One of the strategic outcomes of the U5BRI[982] is reviewing the policy and framework governing civil registration in Tanzania including issues of births and deaths, the purpose of which is to allow for free certification for first issuance for all under-five year olds for the period of the Initiative. Through this Initiative certificates are proposed to be hand-written and issued instantly at the time of registration unlike the current situation whereby a notification is issued and then one has to go to the district office for a certificate.

Tanzania has also designed catch-up campaigns model to serve also as mobile registration in Tanzania Mainland, which should go in tandem with addressing some of the institutional and systemic challenges that inhibit progress and coverage of birth registration.[983] The Local Government Officers at the ward level do not have mandate to register children though this would have been easier for them if they were mandated. Therefore, RITA has developed a high level strategic framework which has laid the foundation for completely reforming the birth registration system with a view to establishing a new birth registration system; and, parallel to this, provide a reliable and efficient system that is capable of turning off the tap by enabling registrations to take place as close to those concerned as possible in time and at places where they occur. This is the Under Five National Birth Registration Strategy (U5NBRS), also referred to as Under Five Birth Registration Initiative (U5BRI).[984]

Apart from the U5BRI, RITA has also come up with another strategy to address the issue of those who have not been registered and increase registration access; and, therefore, the implementation of what is called "6-18 Birth Registration Initiative". This initiative aims at catching school-aged children to ensure that they are registered while at school at different stages where they can be caught, be it at enrolment stage or when they are already attending primary and/or secondary education; but hopefully before reaching higher learning stage. With this, again, RITA is working very closely with Local Government Authorities (LGA's) under whose administration all public schools are placed. In this arrangement RITA is assisted by heads of schools, teachers

980 *Ibid*, Section 6(3).

981 Tanzania's Consolidated 3-5 Reports, op. cit, para. 61.

982 U5BRI means: Under 5 Birth Registration Initiative.

983 Tanzania's Consolidated 3-5 Reports, op. cit, para. 62.

984 *See* United Republic of Tanzania, 'The Costed Operational Plan for the Implementation of the U5NBRS.' Dar es Salaam: Ministry of Constitutional Affairs and Justice/RITA, July 2011.

and education officers who are designated as assistant registrars in trying to bridge the human resources gap that currently faces RITA.[985]

Furthermore, Tanzania has carried out awareness-raising campaigns and mobile registration service in 40 districts in Tanzania Mainland; whereby the campaigns have been successful as 361,667 people were registered. Currently, the DHS data of 2010 show it is only 14% of the under-five who have been registered and 6.2% out of that have birth certificates. Therefore, RITA is vigorously working on its U5BRI which aim at raising the percentage of registered under five children to reach 80% during the first five years of the initiative.[986]

RITA has taken into consideration the issue of most vulnerable children (MVC) and given its due attention by registering and providing them with birth certificates as part of its plan to help them. As part of improving the registration system, RITA is scanning all its registers; and, so far, about 10 million copies have been scanned. It has also undertaken computerization of the registration system in 5 pilot districts in Tanzania Mainland where the certificates are being issued through computers.[987]

The scaling up of birth registration to the rest of the districts in Tanzania Mainland, however, has been a challenge to Tanzania; until the review of the Birth Registration system is finalised. In order to mitigate this challenge, nonetheless, Tanzania has regularly been formalizing links between various service delivery structures and promoting awareness and appreciation of the importance of birth registration through mass campaigns that provide information on the procedure of birth registration, including the rights and entitlements derived from the registration, through, *inter alia*, television, radio and printed materials. So far, RITA has established a National Sub-committee for Vital Registration to strengthen and institutionalize a functioning Vital Registration System in Tanzania through which birth registration services can be easily accessed and sustained.[988]

8.2 The Child's Right to Freedom of Expression and Opinion

The realisation of the freedoms of expression and opinion by all human beings, including children, are generally and specifically guaranteed in a number of international human rights treaties, including Article 19 of the ICCPR, Article 13 of the African Charter on Human and Peoples' Rights (ACHPR) and Article 10 of the European Convention on Human Rights (ECHR). In respect of children, the specific source from which participation rights of the child (including freedoms of expression and opinion) derive are Article 12 of the CRC[989] and Article 7 of the ACRWC.[990] These provisions require that a child, who is capable of forming and communicating his or her views, to express

985 Tanzania's Consolidated 3-5 Reports, op. cit, para. 63.

986 *Ibid*, para. 64.

987 *Ibid*, para. 65.

988 *Ibid*, para. 66.

989 Article 12(1) of the CRC explicitly provides that: 'States 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.'

990 Article 7 of the ACRWC categorically provides that: 'Every child who is capable of communicating his or her own views shall be assured the rights to express his opinions freely in all matters and to disseminate his opinions subject to such restrictions as are prescribed by laws.'

those views freely in all matters affecting him or her.[991] This right entails dissemination of the child's opinions.

There are only two sets of limitations of the realisation of this right by children in the two treaties. Whereas the CRC requires that the views of the child should be given due weight 'in accordance with the age and maturity of the child'; the ACRWC requires that the expression and dissemination of the child's views on matters affecting him or her shall be 'subject to such restrictions as are prescribed by laws.' In addition, States Parties are obliged to ensure that the child enjoys this right. Consistent with this obligation, all of the three common law East African countries considered in this book have both constitutionally and legislatively guaranteed the child's freedoms of expression and opinion as considered below.

8.2.1 The Child's Right to Freedom of Expression and Opinion in Uganda

a) The Constitutional Guarantee of the Child's Right to Freedom of Expression and Opinion

The right to freedom of expression and opinion to every person, including a child, is provided for in Article 29(1)(a) of the Ugandan Constitution, which guarantees the right to every person, including a child, to freedom of speech and expression, which 'shall include freedom of the press and other media.' In addition, Article 41 of the Constitution of Uganda guarantees the right of every person, including a child, to access to information in the following regards:

> 41(1) Every citizen has a right of access to information in the possession of the State or any other organ or agency of the State except where the release of the information is likely to prejudice the security or sovereignty of the State or interfere with the right to the privacy of any other person.
>
> (2) Parliament shall make laws prescribing the classes of information referred to in clause (1) of this article and the procedure for obtaining access to that information.

As in all common law East African countries canvassed in this book, the reference to the phrase "every person" includes the child.

b) Practical Realisation of the Child's Right to Freedom of Expression and Opinion

As in many countries in Sub-Saharan Africa, the liberalization of the media in Uganda has continued to provide 'an opportunity for children to express their views beyond the confines of the family. The media have provided children with an opportunity to express their views on various issues of interest to them. Almost all the print and electronic media have provision for children to express their views. Leading newspapers have weekly columns specially reserved for children.'[992] In fact:

> Radio and television stations also have programmes for children; these are presented by the children. The government newspaper, the *New Vision*, runs a monthly pullout entitled

991 Article 12(2) of the CRC, in particular, extends the child's right to freedom of expression in judicial proceedings. It explicitly provides that '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.'

992 Republic of Uganda, 'Second Periodic Report of States Parties Due in 1997: Uganda', 5 November 2004 (CRC/C/65/Add.33), para 101.

> "Young Talk" in which children discuss issues that are of interest and relevance to them. "Young Talk" is widely distributed all over the country.[993]

However, the Government of Uganda has acknowledged that 'the variety, quality and appropriateness of media programmes available to children is still poor. There are no effective mechanisms in place to protect children from harmful influence through the media.'[994]

Nonetheless, children in Uganda 'are free to join associations and participate in peaceful assemblies. Many schools in Uganda today have established debating clubs and child rights clubs, which provide children with an opportunity to access information and to discuss issues of interest to them.'[995] Unfortunately, such opportunities 'are limited to children in schools, especially within urban areas.'[996]

8.2.2 The Child's Right to Freedom of Expression and Opinion in Kenya

Under the Kenyan Constitution (2010), the right to freedom of expression is explicitly provided for in Article 33, which states that every person has the right to freedom of expression which includes:

(a) Freedom to seek, receive or impart information or ideas;

(b) Freedom of artistic creativity; and

(c) Academic freedom and freedom of scientific research.

In addition, the Constitution of Kenya guarantees every person, including a child, the right to access to information, including freedom of the media.[997] Section 4(4) of the Kenyan Children Act (2001) provides that a child shall be accorded an opportunity to express his opinion in judicial and administrative processes whose opinion shall be taken into consideration as appropriate taking into account his age and degree of maturity.[998] Section 4(4) of the Kenyan Children Act explicitly provides that:

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

Further, Section 17 of the Act entitles a child to leisure and participation in cultural and artistic activities.

Administratively, the Guidelines for Child Participation in Kenya, published in 2007, establish, regulate and enforce procedures and standards for children's involvement amongst all practitioners. The Guidelines provide for child participation at home, school, community and national levels.[999] In addition, the Ministry of Education 'undertakes co-curricular activities such as the national drama and music festivals at all levels of education cycle starting from ECDE to tertiary level. During school time,

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993 *Ibid*.

994 *Ibid*.

995 *Ibid*, para 102.

996 *Ibid*.

997 Article 35 of the Kenyan Constitution (2010).

998 Cap. 59.

999 Republic of Kenya, '3rd, 4th and 5th State Party Report to the UNCRC Committee – Geneva 2005-2011', op. cit, para 140.

more than one hour per week is set aside for each class to participate in sports and other extra curricula activities.'[1000]

8.2.3 The Child's Right to Freedom of Expression and Opinion in Tanzania

In compliance with Article 13 of the CRC and Article 7 of the ACRWC, both of which guarantee the child's right to freedom of expression, Tanzania has retained express constitutional and statutory guarantees of this right. Article 18 of the Constitution of the United Republic of Tanzania was amended in 2005 and removed the claw-back clause that used to subject the right to freedom of expression to any law enacted by Parliament.[1001] Now the right to freedom of expression is absolute, and it requires that "every person" (including a child) has:

(a) the freedom of expressing one's opinion and views;

(b) the right to seek, to receive and impart information irrespective of national frontiers;

(c) the freedom to communicate with others without being interfered in such communication; and

(d) the right to be informed, at any time, of various events important to his or her life and other members of the community and about any other events important to the society around him or her.

Under Tanzanian law, the term "person" means any word or expression descriptive of a person and includes a public body, company, or association or body of persons, corporate or unincorporated;[1002] and includes an adult, child or man and woman. So, the expression "every person" in Article 18 of the Constitution of Tanzania extends to children as well.

Statutorily, Tanzania has enacted in Section 11 of the LCA the child's 'right of opinion and no person shall deprive a child capable of forming views the right to express an opinion, to be listened to and to participate in decisions which affect his well-being.'[1003]

As to the administrative measures to ensure that the child's right of expression is guaranteed, Tanzania has established in both the Mainland and Zanzibar ministries responsible for communication and transport, which have respective committees. These committees are responsible for issuing licences to private bodies that desire to provide communication services to the public including running of internet café. The committees have the duty to inspect and cancel licence to any private institution if such institution is found to have abused the licence, which include corrupting public morals through allowing access to restricted sites; particularly so, in respect of allowing children to access pornographic sites.[1004]

1000 *Ibid*, para 141.

1001 Tanzania's Consolidated 3-5 Report, op. cit, para. 67.

1002 Section 4 of the Interpretation of Laws Act, Cap. 1 R.E. 2002. Under Section 2(1), this law applies to Mainland Tanzania as well as to Tanzania Zanzibar in relation to all laws which apply throughout the United Republic of Tanzania.

1003 A similar legal effect is also provided for in Section 8 of the Zanzibar Children's Act (2011).

1004 Tanzania Consolidated 3-5 Report, op. cit, para. 69.

In addition, Tanzania carries out media programmes throughout the country whereby media outlets – such as television, radios and newspapers (both public and private) – air special programs that aim at imparting children with relevant information for their wellbeing. There are also children councils and clubs used by children to express their views. In addition, in detention facilities where children who have been deprived of their liberty are placed there are television sets and newspapers provided to children.[1005]

8.3 The Right to Freedom of Thought, Conscience and Religion

Article 9(1) of the ACRWC and Article 14(1) of the CRC guarantee the child's right to freedom of thought, conscience and religion. In particular, Article 14(1) of the CRC obliges States Parties to 'respect the right of the child to freedom of thought, conscience and religion.' The ACRWC vests on parents (and where applicable, legal guardians) a duty 'to provide guidance and direction in the exercise of these rights having regard to the evolving capacities, and best interests of the child.'[1006] Both the ACRWC and the CRC oblige, in similar phraseology, States Parties to respect the duty of parents (and where applicable, legal guardians) to provide guidance and direction to the child in the exercise or enjoyment of these rights.

It should be noted that the freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by national laws and policies;[1007] provided that such limitations 'are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.'[1008] In the context of international child rights law, the child's enjoyment of the right to freedom of thought, conscience and religion should be in the manner consistent with his or her evolving capacities.[1009]

As part of the fulfilment of their obligation under international law, all the three common law East African countries have both constitutionally and legislatively guaranteed the child's right to freedom of thought, conscience and religion, as expounded below.

8.3.1 The Child's Right to Freedom of Thought, Conscience and Religion in Uganda

Consistent with Article 9 of the ACRWC and Article 14 of the CRC, the Constitution of Uganda (1995) guarantees the right of every person, including a child, to freedom of thought, conscience and religion. In particular, Article 29(1)(b) provides that every person (including a child) has the right to 'freedom of thought, conscience and belief which shall include academic freedom in institutions of learning.' Under Article 29(1)(c) of the Constitution every person (including a child) has the:

> […] freedom to practise any religion and manifest such practice which shall include the right to belong to and participate in the practices of any religious body or organisation in a manner consistent with this Constitution

1005 *Ibid*, para. 70.

1006 Article 9(2) of the ACRWC.

1007 *Ibid*, Article 9(3); and Article 14(3) of the CRC.

1008 Article 14(3) of the CRC.

1009 Article 14(2) of the CRC.

In practice, the freedom of worship in Uganda is guaranteed to every person, including children, who 'normally practise the religion of their parents.'[1010]

8.3.2 The Child's Right to Freedom of Thought, Conscience and Religion in Kenya

Consistent with Article 9 of the ACRWC and Article 14 of the CRC, the Kenyan Constitution guarantees every person's right to freedom of thought, conscience and religion. In particular, Article 32(1) of the Constitution provides that every person (including a child) 'has the right to freedom of conscience, religion, thought, belief and opinion.' This entails every person's right, either individually or in community with others, in public or in private, 'to manifest any religion or belief through worship, practice, teaching or observance, including observance of a day of worship.'[1011]

In order to broaden the scope of this right, the Kenyan Constitution provides that: 'A person may not be denied access to any institution, employment or facility, or the enjoyment of any right, because of the person's belief or religion.'[1012] It also provides that a person 'shall not be compelled to act, or engage in any act, that is contrary to the person's belief or religion.'[1013] Section 8(1) of the Children Act provides that every child has a right to religious education subject to appropriate parental guidance. This notwithstanding, children 'are often denied the right to participate in religion of their choice due to lack of appropriate parental guidance.'[1014]

8.3.3 The Child's Right to Freedom of Thought, Conscience and Religion in Tanzania

Tanzania is a secular state[1015] whereby its citizens are free to choose religion of their own choice without state intervention or coercion.[1016] Therefore, children residing in Tanzania do normally belong to their parents' or guardians' religion; although they may change their childhood religion on their own volition upon attaining adulthood.[1017] In order to enable its citizens to enjoy their religious beliefs, the State has a constitutional duty to guarantee the right of every citizen to profess religion of their choice.[1018] This

1010 Republic of Uganda, 'Consideration of Reports Submitted by States Parties under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women: Uganda', Third Periodic Report of State Parties, 3 July 2000 (CEDAW/C/UGA/3), para 104.

1011 Article 32(2) of the Constitution of Kenya (2010).

1012 *Ibid*, Article 32(3).

1013 *Ibid*, Article 32(4).

1014 Republic of Kenya, '3rd, 4th and 5th State Party Report to the UNCRC Committee – Geneva 2005-2011'.

1015 *See* Article 3(1) of the Constitution of Tanzania and *Zakaria Kamwela and 126 others v The Minister of Education and Vocational Training & AG* Court of Appeal of Tanzania at Dar es Salaam, Civil Appeal No. 3 of 2012 (Unreported).

1016 This practice has also been emphasised by previous national leaders in Tanzania. For instance, in Nyerere, J.K., Nyufa Dar es Salaam: Mwalimu Nyerere Foundation, 1995, pp. 27-28, the first President of Tanzania, Mwalimu Julius Nyerere pointed out that: '*Nchi yetu haina dini. Watu wetu wana dini, wengine wanazo dini wengine hawana.*' (This statement has been translated by the Court of Appeal of Tanzania in Zakaria Kamwela as: 'Our country has no religion. Our people have religion, some have a religion and others do not have one'). This statement was reinforced by the second President of Tanzania Mzee Ali Hassani Mwinyi in Mwinyi, A.H., *Uhuru wa Kuabudu* Songea: Peramiho Printing Press, 1979, pp. 10-12.

1017 Tanzania Consolidated 3 -5 Report, op. cit, para. 71.

1018 Article 19 of the Constitution of the United Republic of Tanzania (1977) and Article 19(1) of the Constitution of Zanzibar (1984). This provision was buttressed by the Court of Appeal of Tanzania in *Dibagula v The Republic* (2003) AHRLR 274 (CAT) and *Zakaria Kamwela and 126 others v The Minister of Education and Vocational Training & AG*, op. cit.

guarantee entails prohibition of insulting other people's religion as provided for in Section 129 of the Penal Code,[1019] which provides that:

> Any person who, with the deliberate intention of wounding the religious feelings of any person, utters any word, or makes any sound in the hearing of that person, or makes any gesture in the sight of that person, or places any object in the sight of that person, is guilty of a misdemeanour, and is liable to imprisonment for one year.

This statutory provision was given due judicial consideration in the famous case of *Hamis Rajabu Dibagula v R*.[1020] In this case, the appellant was convicted by the District Court of Morogoro for uttering words with the intent to wound religious feelings of others. The District Court sentenced him to 18 months' imprisonment. While exercising revisional jurisdiction, the High Court set aside that sentence and substituted therefor such shorter sentence as was to result in the immediate release of the appellant from custody. A further appeal to the Court of Appeal raised questions of considerable public importance concerning the limits of the right to freedom of religion, guaranteed under Article 19 of the Constitution of Tanzania (1977). The Court of Appeal held that the Constitution of Tanzania and other relevant laws oblige the people of this country to live together with mutual respect and tolerance of other's religious beliefs, which is one of the principal obligations of good citizenship.

Based on this constitutional foundation, Tanzania has ensured that there is no religious segregation or discrimination to children in its territory. As such, children in the country enjoy the right to freedom of thought, conscience and religion of their parents or guardians, provided that such right does not injure the right of others to enjoy the same right.[1021]

8.4 The Right to Freedoms of Association and Assembly

The freedoms of association and assembly are two sides of the same coin. They are among the fundamental civil and political rights which are protected under the United Nations Declaration of Human Rights of 1948 (UDHR);[1022] the International Covenant on Civil and Political Rights of 1966 (ICCPR);[1023] the American Convention on Human Rights of 1964;[1024] the European Convention on Human Rights of 1950; and the African Charter on Human and People's Rights of 1981.

Specific to children, Article 8 of the ACRWC provides that: 'Every child shall have the right to free association and freedom of peaceful assembly in conformity with the law.' In a similar tone, Article 15(1) of the CRC obliges States Parties to 'recognize the rights of the child to freedom of association and to freedom of peaceful assembly.' The CRC goes further to prohibit restrictions that 'may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public

1019 Cap. 16 R.E. 2002.

1020 (Criminal Appeal No. 53 of 2001) [2003] TZCA 1 (14 March 2003). This case has been reported elsewhere as *Dibagula v The Republic* (2003) AHRLR 274 (CAT).

1021 Tanzania's Consolidated 3-5 Report, op. cit, para. 72.

1022 Article 20 of the UDHR.

1023 Article 21 of the ICCPR.

1024 Articles 15 and 16 of the *American Convention*.

order (order public), the protection of public health or morals or the protection of the rights and freedoms of others.'[1025]

In modern democracy, it has always been necessary to guarantee and protect the freedoms of association and assembly, in that they are one of the avenues for attainment of social development and nurturing of democratic advancement in a given society.[1026] It has always been contended that 'it is only in coming together in an organized form that people in a society can progress and improve their lives.'[1027] At the same time, it is only while organized that people 'can effectively struggle against oppression, repression and other undemocratic tendencies around them.'[1028] So, the freedom of assembly always 'goes hand in hand with the right to associate and organize freely – to discuss and communicate on issues of common interest amongst members of a given social group.'[1029] It is, therefore, pertinent to note here that humankind's development 'can be conducted only in association with others, and when there are forums for communication of ideas, proposals and policies. For these reasons, the rights to freedom of peaceful assembly and association are of [greatest] importance.'[1030]

It is in recognition of the foregoing importance of the freedoms of association and assembly that almost every modern Constitution has specific provisions that protect this right, which 'is one of the profound pillars of modern democracy, the maximum protection of which is the elemental underpinning of modern democracy in the contemporary world.'[1031] In the respect of the child's right to freedoms of association and assembly, all the three common law East African countries have constitutionalised and enacted in laws these freedoms, as considered below.

8.4.1 The Child's Right to Freedoms of Association and Assembly in Uganda

In domesticating the right to freedoms of association and assembly as guaranteed in Article 8 of the ACRWC and Article 15 of the CRC, Article 29 of the Constitution of Uganda (1995) categorically guarantees to every person the right to freedom of association and assembly. It explicitly provides that every person, including a child, has the right of 'freedom to assemble and to demonstrate together with others peacefully and unarmed and to petition.'[1032] It also provides that every child has the right to freedom of association which includes, *inter alia*, the freedom to form and join associations such as civic organisations.[1033]

In practice, the Ugandan Government 'encourages co-curricular activities in schools, which enables children to develop their capacity and enhance their character

1025 Article 15(2) of the CRC.

1026 Mashamba, C.J., *Judicial Protection of Civil and Political Rights in Tanzania: Cases, Materials and Commentary* Dar es Salaam: nola/IPPL Publishers, 2010.

1027 Peter, C.M., *Human Rights in Tanzania: Selected Cases and Materials* Köln: Koppe Rudiger, 1995, p. 652.

1028 *Ibid*.

1029 Mashamba, C.J., *Judicial Protection of Civil and Political Rights in Tanzania: Cases, Materials and Commentary,* op. cit.

1030 High Commissioner for Human Rights, *Human Rights and Law Enforcement: A Manual on Human Rights Training for the Police* (Professional Training Series No. 5) Geneva: Centre for Human Rights (United Nations), 1997, at p. 43

1031 Mashamba, C.J., *Judicial Protection of Civil and Political Rights in Tanzania: Cases, Materials and Commentary,* op. cit.

1032 Article 29(1)(d) of the Constitution of Uganda (1995).

1033 *Ibid*, Article 29(1)(e).

formation. Many schools have a number of clubs and associations to which membership for children is open.'[1034]

8.4.2 The Child's Right to Freedoms of Association and Assembly in Kenya

Consistent with Article 8 of the ACRWC and Article 15 of the CRC, Article 36(1) of the Kenyan Constitution explicitly guarantees the right of every person, including a child, to the freedom of association, which includes the right to form, join or participate in the activities of an association of any kind. It prohibits compelling a person to join an association of any kind.[1035] In terms of Article 37 of the Kenyan Constitution, every person, including a child, 'has the right, peaceably and unarmed, to assemble, to demonstrate, to picket, and to present petitions to public authorities.'

In practice, Kenya 'has rolled out the Children Assemblies in every County and the representatives were democratically elected by their peers.'[1036] These assemblies provide platforms for the realisation of the child's freedoms of association and assembly in Kenya.

8.4.3 The Child's Right to Freedoms of Association and Assembly in Tanzania

Tanzania recognizes the fact that children in its jurisdiction have the right to freedoms of association and peaceful assembly.[1037] In order to effectively guarantee this freedom, Tanzania has constitutionalised this right, which forms part of the enforceable parts of both the Zanzibar Constitution and the Constitution of the United Republic of Tanzania.[1038] Through these constitutional provisions, "every person",[1039] including a child, has the freedom to associate with others and to peacefully assemble together with others with a view to publicly expressing their opinion or views. The only restriction in the two Constitutions is in relation to formation of political parties, whereby persons who decide to form a political party, should not have a cause that seeks to advance religious, ethnic or tribal or certain regional interests; or which seeks to disintegrate the United Republic of Tanzania; or that seeks to operate on only one part of the Union; or which does not allow periodic elections of its leadership.

In order to give these constitutional provisions a practical application, Tanzania has also entrenched the child's freedom of association and peaceful assembly in that it has allowed the formation of junior and youth councils and children's and youth committees and clubs in schools and various social life circles, whereby children do associate and assemble to discuss matters concerning their well-being.[1040]

1034 Republic of Uganda, 'Second Periodic Report of States Parties Due in 1997: Uganda', op. cit,, para 105.

1035 Article 36(2) of the Kenyan Constitution. In sub Article (3) of Article 36, the Kenyan Constitution provides that:

'(3) Any legislation that requires registration of an association of any kind shall provide that—

(a) registration may not be withheld or withdrawn unreasonably; and

(b) there shall be a right to have a fair hearing before a registration is cancelled.'

1036 Republic of Kenya, '3rd, 4th and 5th State Party Report to the UNCRC Committee – Geneva 2005-2011', op. cit, para 143.

1037 Tanzania's Consolidated 3-5 Report, op. cit, para. 73.

1038 Article 20 of the Constitution of the United Republic of Tanzania (1977).

1039 *See* Section 4 of the Interpretation of Laws Act, Cap. 1 R.E. 2002.

1040 Tanzania Consolidated 3 -5 Report, op. cit, para. 74.

8.5 The Child's Right to Privacy

The child's right to privacy derives from the right of the family to privacy free from interference by the State, which is provided for, *inter alia*, under Articles 17, 23 and 24 of the International Covenant on Civil and Political Rights (ICCPR).[1041] The right of the family to privacy 'recognises the importance of the family as an institution'[1042] where children are mostly maintained, cared for and brought up. It is in this recognition that both the ACRWC and the CRC protect the child's right to privacy. In particular, Article 10 of the ACRWC expressly provides that:

> **Article 10: Protection of Privacy**
>
> No child shall be subject to arbitrary or unlawful interference with his privacy, family home or correspondence, or to the attacks upon his honour or reputation, provided that parents or legal guardians shall have the right to exercise reasonable supervision over the conduct of their children. The child has the right to the protection of the law against such interference or attacks.

In a similar tone, Article 16(1) of the CRC categorically provides that: 'No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.' In addition, paragraph (2) of this article guarantees the child's 'right to the protection of the law against such interference or attacks.' Recognising the importance of this right, all the three common law East African countries considered in this book have provided both constitutional and statutory guarantees to this right as elucidated below.

8.5.1 Protection of the Child's Right to Privacy in Uganda

Consistent with the foregoing position in international law, the Ugandan Constitution guarantees and protects the right to privacy of the person, home and other property. In protecting the right to privacy of the person, Article 27(1) of the Ugandan Constitution provides that no person shall be subjected to unlawful search of the person,[1043] home or other property of that person; and unlawful entry by others of the premises of that person's property.[1044] The Constitution also prohibits subjecting a person, including a child, to interference with the privacy of that person's home, correspondence, communication or other property.[1045]

The child's right to privacy in judicial proceedings is guaranteed under Article 27(3)-(12) of the Constitution and Section 102(1) of the Ugandan Children Act, which states explicitly that:

> The child's right to privacy shall be respected throughout the court proceedings in order to avoid harm being caused to him or her by undue publicity; and no person shall, in respect of a child charged before a family and children court, publish any information that may lead to the identification of the child except with the permission of court.

1041 G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force on 23 March 1976.

1042 Tomkin, J., *Orphans of Justice – In Search of the Best Interests of the Child When a Parent is Imprisoned: A Legal Analysis* Geneva: Quaker United Nations Office, 2009, p. 16.

1043 Article 27(1)(a) of the Ugandan Constitution.

1044 *Ibid*, Article 27(1)(b).

1045 *Ibid*, Article 27(2).

Under sub-section (2) of Section 102, the Children Act makes an offence for any person to publish the name or address of the child;[1046] the name or address of any school which the child has been attending;[1047] or any photograph or other matter likely to lead to the identification of the child,[1048] contrary to sub-section (1) of this section. In contravention of this requirement, a person 'commits an offence and is liable on conviction to a fine not exceeding five hundred thousand shillings or to imprisonment not exceeding six months or to both.'[1049] In principle, this provision 'emphasizes the need to respect the child's privacy to avoid potential harm that may be caused to the child by undue publicity.'[1050]

8.5.2 Protection of the Child's Right to Privacy in Kenya

In Kenya, the child's right to privacy is guaranteed both under the Constitution of Kenya (2010) and the Children Act. Article 31 of the Kenyan Constitution guarantees the right of everyone (including the child)'s privacy to be protected by the State. In principle, under this article the Constitution clearly stipulates that every person (including the child) has the right to privacy which includes the right not to have: their home or property searched; their possessions seized; information relating to their family or private affairs unnecessarily required or revealed; or the privacy of their communications infringed.

This constitutional guarantee of the right to privacy is elaborated further in several laws touching on the person. In particular, under the Kenyan Children Act, there are a number of provisions that are aimed at protecting the child's privacy. Section 19, for example, elaborates that: 'Every child shall have the right to privacy subject to parental guidance.'

Under Section 76(5) of the Kenyan Children Act, in any proceedings concerning a child, whether instituted under this law or under any written law, the child's name, identity, home or last place of residence or school, shall not, nor shall the particulars of the child's parents or relatives, or any photograph, or depiction or caricature of the child, be published or revealed. This prohibition is in relation to any publication, or report, which shall include any law report.[1051]

In addition, Section 74 of the Kenyan Children Act requires the Children's Court, when determining a matter involving a child, to sit in a different building or room or at different times from those in which sitting of courts other than the Children's Courts are held. It also prohibits members of the public to participate in proceedings before the Children's Courts in which a child is involved, except those listed in the section, which include:

(a) members and officers of the court;

(b) parties to the case before the court, their advocates and witnesses and other persons directly concerned in the case;

1046 Section 102(2)(a) of the Ugandan Children Act.

1047 *Ibid*, Section 102(2)(b).

1048 *Ibid*, Section 102(2)(c).

1049 *Ibid*, Section 102(2).

1050 Republic of Uganda, 'Second Periodic Report of States Parties Due in 1997: Uganda', op. cit, para 106.

1051 African Child Policy Forum, *Harmonisation of Children's Laws in Eastern and Southern Africa: Country Briefs*, op. cit, p. 69.

(c) parents or guardians of any child brought before the court;

(d) *bona fide* registered representatives of newspapers or news agencies;

(e) such other persons as the court may specially authorise to be present.

In addition, Section 13(2) of the HIV and AIDS Prevention and Control Act (2006) provides that no person shall compel another to undergo an HIV test as a precondition to, or for continued enjoyment of admission into any educational institution. This aims at protecting privacy of the person against his or her will. The HIV and AIDS Tribunal has also been operationalized to hear and determine fundamental human rights abuses as a result of an individual's HIV status and come with remedies to redress the injustices thereof.[1052]

8.5.3 Protection of the Child's Right to Privacy in Tanzania

Tanzania recognizes the need for protecting the child's privacy and image as stipulated in Article 16 of the CRC and Article 10 of the ACRWC. In compliance with this pre-requisite, both the Constitution of Zanzibar and the Constitution of the United Republic of Tanzania contain provisions that expressly protect the right to privacy and prohibit unlawful or arbitrary interference with a person's privacy, unless in furtherance of express legal requirement or in compliance with a lawful court order.[1053]

The constitutional provisions require Tanzania to enact laws to provide effective procedure for interference with a persons privacy, which should aim at safeguarding the privacy of an individual. In compliance with this constitutional requisite, the newly passed laws relating to children contain provisions that prohibit exposing the identity of the children who either are victims of abuse or who have come into conflict with the law; in that Tanzania recognizes that any disposal of those children may lead to trauma which can affect their wellbeing in the future hence may not be confident and low self-esteem.[1054]

In particular, Sections 33 and 48 of the Zanzibar Children's Act (2011) and Section 33 of the Law of the Child Act (2009) all prohibit publication of any information relating to children who have been accused or victims of any act. In a similar wording, sub-sections (2) of Sections 33 of the two laws make it an offence to publish the prohibited information. It categorically provides that:

> Any person who publishes any information or photograph contrary to this section commits an offence and upon conviction shall be liable to a fine of not less than two million shillings and not more than fifteen million shillings or to imprisonment for a term not exceeding three years or to both.[1055]

1052 The Tribunal was established in 2009 and sworn in June 2011. Despite the fact that the Tribunal is based in Nairobi, there are plans to open offices in all the 47 counties to receive complaints. See Republic of Kenya, '3rd, 4th and 5th State Party Report to the UNCRC Committee – Geneva 2005-2011', op. cit, para 145.

1053 *See* particularly Constitution of Zanzibar and Article 16 of the Constitution of the United Republic of Tanzania.

1054 Tanzania's Consolidated 3-5 Report, op. cit, para. 76.

1055 Sub-section (2) of Section 33 of the Zanzibar Children's Act provides that:

> 'Any person who publishes information or a photograph contrary to this section commits an offence and upon conviction shall be liable to a fine of not less than five hundred thousand shillings and not exceeding three million shillings or to imprisonment for a term of not less six months and not exceeding two years or to both such a fine and imprisonment.'

In compliance with the requirement of Article 17(e) of the CRC, Section 110(2) of the Zanzibar Children's Act (2011), *inter alia*, has protected the children from accessing pornographic information and materials that are injurious or harmful to the child's well-being. This law makes it an offence (a) to possess, for any purpose, or to access through the internet or any other communications technology, child pornography; or (b) to produce, distribute, disseminate, including through the internet, import, export, offer, advertise or sell child pornography. In terms of sub-section (5) of Section 110 of the Zanzibar Children's Act, any person who contravenes the provisions of this section 'commits an offence and shall on conviction be liable to a fine of not less than five million and not exceeding fifteen million shillings or to imprisonment for a term of not less than five years and not exceeding ten years or to both such a fine and imprisonment.'

Chapter Nine

The Child's Enjoyment of Socio-Economic Rights: The Rights to Health and Adequate Standards of Living

9.0 Introduction

As discussed in Chapter Two, both the ACRWC and the CRC contain civil, political, economic, social and cultural rights for children. As noted in Chapter Seven, both Article 1 of the ACRWC and Article 4 of the CRC oblige States Parties to take appropriate measures to implement by domesticating these rights in their respective Constitutions, legislative and policy frameworks as well as in their socio-economic developmental programmes. In particular to socio-economic rights, Article 4 of the CRC is even more expansive. It provides that:

> […] With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

According to Article 1(3) of the ACRWC, any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in this treaty, 'shall to the extent of such inconsistency be discouraged.'

As considered in Chapter Four, whereas the 1995 Constitution of Uganda[1056] and the Constitution of Kenya (2010)[1057] contain specific provisions protecting the rights of the child,[1058] the Constitution of Tanzania does not specifically contain children's rights. Children's rights are also embodied in the Bills of Rights in these Constitutions. In this vein, the Kenyan Constitution introduces 'a progressive Bill of Rights (Chapter 4) that is by and large guided by international human rights standards'[1059] as it enshrines both socio-economic rights[1060] and civil and political rights,[1061] as judicially justiciable, in a single text.

In addition to this, all the Bills of Rights also enshrine other rights, including equality and freedom from discrimination, the rights of persons with disabilities, rights of older members of society, rights of minorities and rights of children.

In particular, the 2010 Kenyan Constitution is the most progressive of all the three common law East African countries to constitutionalize a comprehensive listing of children's socio-economic rights in Article 53. This article guarantees to every child the rights to a name and nationality from birth;[1062] to free and compulsory

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1056 Article 34 of the Constitution of Uganda.

1057 The Kenyan Constitution entered into force on 27 August 2010.

1058 *Ibid*, Article 53.

1059 African Child Policy Forum, op. cit, p. 65.

1060 The socio-economic rights enshrined in the Kenyan Constitution include the rights to health, education, food, social security, water and sanitation, and housing.

1061 These rights include the rights to life, liberty and security of the persons, and privacy; and freedoms of conscience, religion, belief and opinion, of association and assembly.

1062 Article 53(a) of the Constitution of Kenya (2010).

basic education;[1063] and to basic nutrition, shelter and health care.[1064] It also provides constitutional guarantee to every child to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour.[1065]

The Ugandan Constitution, however, contains a limited number of the child's socio-economic rights, which are the child's right to basic education that 'shall be the responsibility of the State and the parents of the child.'[1066] Another socio-economic right is the child's right to health, whereby Article 34(3) prohibits a person to deprive a child of his or her 'medical treatment, education or any other social or economic benefit by reason of religious or other beliefs.'

Therefore, this Chapter examines at length the child's realisation of two categories of socio-economic rights – i.e. the right to health and the right to adequate standard of living – in Kenya, Uganda and Tanzania.

9.1 The Child's Right to Health

The child's right to health is enshrined in a number of international human rights instruments, including the Universal Declaration of Human Rights (UDHR),[1067] the International Covenant on Economic, Social and Cultural Rights (ICESCR),[1068] the American Convention on Human Rights (ACHR),[1069] the African Charter on Human and Peoples' Rights (ACHPR),[1070] and the European Convention on Human Rights (ECHR).[1071] Nevertheless, the child's right to health is specifically enshrined in the CRC and the ACRWC.

The right of the child to the enjoyment of the highest attainable standard of health and to facilities of the treatment of illness and rehabilitation of health is pivotal to the future of every country. Thus, States Parties to both the ACRWC and the CRC have the duty to protect this right by particularly striving to ensure that no child is deprived of his or her right of access to such health care services. In recognition of this pivotal role of the need to protect the child's right to health, both Article 14 of the ACRWC and Articles 24 and 26 of the CRC guarantee this right. Whereas Article 14(1) of the ACRWC requires that the child should have the right to enjoy the "best attainable" state of physical, mental and spiritual health, Article 24(1) of the CRC requires that the child is entitled to the enjoyment of the "highest attainable" standard of health and to facilities for the treatment of illness and rehabilitation of health.

Under both the ACRWC and the CRC, States Parties are obliged to 'undertake to pursue the full implementation of this right'[1072] and 'strive to ensure that no child is

1063 *Ibid*, Article 53(1)(b).
1064 *Ibid*, Article 53(1)(c).
1065 *Ibid*, Article 53(1)(d).
1066 Article 34(2) of the Constitution of Uganda.
1067 *See* particularly Article 25 of the UDHR.
1068 *See* particularly Article 12 of the ICESCR.
1069 *See* particularly Article 20 of the ACHR.
1070 *See* particularly Article 16 of the ACHPR.
1071 *See* particularly Article 8 of the ECHR.
1072 Article 14(2) of the ACRWC.

deprived of his or her right of access to such health care services.'[1073] States Parties are, therefore, obliged to undertake measures:

(a) to reduce or diminish infant and child mortality rates;[1074]

(b) to ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;[1075]

(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;[1076]

(d) to combat disease and malnutrition within the framework of primary health care through the application of appropriate technology;[1077]

(e) to ensure appropriate health care for expectant and nursing mothers;[1078]

(f) to develop preventive health care and family life education and provision of service;[1079]

(g) to integrate basic health service programmes in national development plans;[1080]

(h) to ensure that all sectors of the society, in particular, parents, children, community leaders and community workers are informed and supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of domestic and other accidents;[1081]

(i) to ensure the meaningful participation of non-governmental organizations, local communities and the beneficiary population in the planning and management of a basic service programme for children;[1082]

(j) to support through technical and financial means, the mobilization of local community resources in the development of primary health care for children.[1083]

Under the Africa Fit for Children (AFFC) Framework, States have the duty to achieve a number of targets to ensure that the child's right to health is attained and reduce

1073 Article 24(1) of the CRC.

1074 Article 14(2)(a) of the ACRWC and Article 24(2)(a) of the CRC.

1075 Article 14(2)(b) of the ACRWC and Article 24(2)(b) of the CRC.

1076 Article 14(2)(c) of the ACRWC and Article 24(2)(c) of the CRC.

1077 Article 14(2)(d) of the ACRWC.

1078 Article 14(2)(e). Article 24(2)(d) of the CRC uses the following phraseology in this regard: 'To ensure appropriate pre-natal and post-natal health care for mothers'.

1079 Article 14(2)(f) of the ACRWC and Article 24(2)(f) of the CRC.

1080 Article 14(2)(g) of the ACRWC.

1081 *Ibid*, Article 14(2)(h).

1082 *Ibid*, Article 14(2)(i).

1083 *Ibid*, Article 14(2)(j).

mortality rates and accelerate child survival. The major targets to which African Governments have committed under the AFFC include:

(a) strengthening health systems in order to provide good and quality and accessible health, maternal and child health services, including hospitals, that are child friendly;

(b) scaling up essential interventions to reduce maternal morbidity and mortality as well as to reduce neonatal mortality; and

(c) scaling up a minimum package of proven childhood interventions based on successful strategies and support family and community based actions that enhance children's health, nutrition and well-being, including safe drinking water, improved sanitation and hygiene as well as appropriate young child feeding practices and food security measures when needed.[1084]

The foregoing targets were set 'against the realization that the life chances of Africa's children are amongst the lowest in the world.'[1085] It is estimated that almost 5 million African children die every year from preventable and treatable diseases.[1086] As such, in order to enhance life chances of children in Africa, States have committed themselves under the AFFC to put in place intervention strategies and programmes to reduce mortality rates and accelerate child survival. These strategies are to be enshrined in constitutional, policy, legislative and administrative frameworks. In this context, the Constitutions, policies, laws and administrative strategies and programmes of the three common law East African countries considered in this book have guaranteed the right to health of children both directly and indirectly as shall be elaborated below.

9.1.1 The Realisation of the Child's Right to Health in Uganda

Consistent with the foregoing provisions of international human rights law, Uganda has put in place several constitutional, legislative, policy and administrative measures to ensure that children in Uganda do realise their right to health. In order to ensure that Ugandan children do adequately realize their right to health, the CROC has recommended that the Ugandan Government should:

(a) take all appropriate measures, including through international cooperation, to prevent and combat infant and maternal mortality and malnutrition;

(b) strengthen its information and prevention programmes to combat HIV/AIDS, particularly to prevent the transmission to children of HIV/AIDS and other sexually transmitted diseases and to eliminate discriminatory attitudes towards children affected by or infected with HIV/AIDS; and

(c) pursue and strengthen family planning and reproductive health educational programmes, including for adolescents.

Ever since, Uganda has endeavoured to implement these recommendations through a number of measures as set out below.

1084 See particularly Africa Wide Movement for Children, *An Africa Fit for Children: Progress and Challenges* Kampala: Africa Wide Movement for Children, 2012, p. 19.

1085 *Ibid*, p. 20.

1086 *Ibid*.

a) The Child's right to Health and Access to Health Services

Consistent with the foregoing recommendations, Article 34(3) of the 1995 Constitution of Uganda clearly provides that: 'No child shall be deprived by any person of medical treatment, education or any other social benefits by reason of religious beliefs or other beliefs.' Furthermore, Clause (4) of the same Article states that:

> Children are to be entitled to be protected from social exploitation and shall not be employed or required to perform work that is likely to be hazardous or to interfere with their health or physical, mental, spiritual, moral or social development.

In addition, Section 5 of the Ugandan Children Act compels parents to ensure that children access health care and immunization services. Under Section 8, the Ugandan Children Act also prohibits subjecting a child to social or customary practices that are harmful to their health.

Despite this constitutional and legislative guarantee, the realization of the child's right to health is still a nightmare to most of Ugandan citizens, including children. Confirming this view, the 1998 Annual Report of the Uganda Human Rights Commission noted that many Ugandans do not enjoy the right to health. The Commission pointed out 'that many people seem not to be aware that they have a duty to protect and care for children and vulnerable people within the society.'[1087] According to the Ugandan Government, the state of health in Uganda 'is still among the lowest in sub-Saharan Africa. The infant mortality rate is estimated at 97/1,000 live births, the child mortality rate at 147/1,000 live births and the maternal mortality rate at 506/100,000 live births (UDHS, 1995). In Uganda, 38.3 per cent of children are stunted, 25.5 per cent are underweight and 5.3 per cent are wasted.'[1088]

Therefore, it is apparent that the underlying causes of the above health problems 'are socio-economic in nature and cut across different sectors. Poverty and the high illiteracy rate (about 54 per cent among females) influence the health-seeking behaviour, utilization of available services/information and, above all, affect the levels of morbidity/mortality and malnutrition.'[1089]

b) Health-care Delivery System

As noted above, the availability of facilities for the treatment of illness and rehabilitation of health is pivotal to the future of every country. This is amongst the underlying reasons why States Parties are obliged, under both the CRC and the ACRWC, to 'undertake to pursue the full implementation of this right'[1090] and 'strive to ensure that no child is deprived of his or her right of access to such health care services.'[1091] In Uganda, the availability of health-care services and their quality vary dramatically among different parts of the country. According to the Ugandan Government:

> Addressing this imbalance is a key priority and needs to be combined with a general improvement in service quality. The health-care service delivery system has been restructured and decentralized. The MoH headquarters has been restructured to enable it

1087 Republic of Uganda, 'Second Periodic Report of States Parties Due in 1997: Uganda', 5 November 2004 (CRC/C/65/Add.33), para 131.

1088 *Ibid*, para 132.

1089 *Ibid*, para 133.

1090 Article 14(2) of the ACRWC.

1091 Article 24(1) of the CRC.

> respond effectively to the challenges of a decentralized system. The introduction of health sub-districts has improved supervision and utilization of lower-level facilities.[1092]

The Ugandan Government has also introduced a policy that 'encourages strengthening of partnership between NGOs, Government and the private sector.'[1093] In practice, the responsibility for service delivery in districts is vested in the local authorities. However, this practice is constrained by a number of factors, including the fact that in many districts, ownership and accountability of the health services have not yet been taken up. In addition, management capacity in a number of districts 'is still low and requires strengthening.'[1094]

c) The Health Sector Strategic Plan

The Ugandan Government has also adopted the Health Sector Strategic Plan (HSSP), which is a core component of the Poverty Eradication Action Plan (PEAP). The development objective of the HSSP 'is to contribute to national economic growth and social development through reduction of the causes of ill-health and premature deaths and removal of inequalities.'[1095] It has five major outputs:

(a) implementing the Uganda National Minimum Health Care Package (UNMHCP);

(b) strengthening the health-care delivery system;

(c) operationalising a strengthened legal and regulatory framework;

(d) providing an integrated support system; and

(e) strengthening the management system.

Despite these policy and programmatic endeavours, the health system in Uganda still faces a number of challenges, critical amongst which being the fact that only a third of the established positions are staffed by qualified health workers.[1096] The Ugandan Government has projected that '75 per cent of established positions will be filled.'[1097] According to the Government, some of the issues that need to be addressed include equitable distribution of health workers throughout the country; review of remuneration of workers; payroll management; better management and accountability.[1098]

d) Integrated Support System

The Ugandan Government has noted that although there are many problems facing the public health sector, 'particular problems had been dealt with in isolation from other primary health-care problems through vertical programmes.'[1099] The effective use of scarce resources 'would be improved if these overlapping programmes integrated

1092 Republic of Uganda, 'Second Periodic Report of States Parties Due in 1997: Uganda', op. cit, para 135.

1093 *Ibid*.

1094 *Ibid*.

1095 *Ibid*, para 136.

1096 *Ibid*, para 137.

1097 *Ibid*.

1098 *Ibid*.

1099 *Ibid*, para 138.

their service delivery. An integrated support system, which covers human resources for health, health-care financing, health infrastructure, and procurement and control of drugs and supplies, is being implemented.'[1100]

In fact, the system aims at 'improving access by the poor to health care through: improving quality through human resource development; providing an efficient drug supply system; reducing walking distance to a health service point; and reducing cost through elaboration of appropriate health financing mechanisms, with protection of the poor.'[1101]

e) Measures Taken to Strengthen Primary Health-care and Diminish Infant and Child Mortality

According to the Government, the status of early childhood survival and nutrition (ECSN) in Uganda is still poor.[1102] As such, death rates among children are still high, with the probability of death before 5 at 14.3 per cent.[1103] Moreover, these deaths 'are mainly due to preventable causes such as malaria, pneumonia, diarrhoea and malnutrition. The level of stunting among children under 5 is one of the highest in Africa.'[1104] Nearly 40% of children below 4 are stunted reflecting chronic malnutrition, which is 17 times the level expected in a healthy, well-nourished population.[1105]

In order to overcome the foregoing challenges, the Ugandan Ministry of Health 'has spearheaded interventions in ECSN.'[1106] In the main:

> Interventions in the health sector that are concerned with early childhood include: interventions to reduce infant and child mortality; nutrition programmes targeting children; immunization of children against six major killer diseases (see figure 4 below); control of major diseases such as malaria, HIV/AIDS, intestinal worms, chest infections and diarrhoea; promoting positive health behaviours among parents; improving sanitation and promoting use of safe drinking water; providing curative and preventive health services as a primary health-care focus; and implementation of the minimum health-care package.[1107]

However, the ECSN faces a number of constraints and challenges, including 'declining national immunization coverage from 80 per cent in the mid-1990s to about 50 per cent now; high levels of malnutrition despite relatively good food production; emerging and re-emerging communicable diseases such as HIV/AIDS, cholera, dysentery and tuberculosis; and the low literacy rate in the population, particularly among women.'[1108]

1100 *Ibid*.

1101 *Ibid*.

1102 *Ibid*, para 142.

1103 *Ibid*.

1104 *Ibid*.

1105 Sempangi, K., 'Early Childhood Development Advocacy Strategy in Uganda', a paper presented at the International Early Childhood Care and Development Conference, Kampala: National Council for Children, September 1999.

1106 Republic of Uganda, 'Second Periodic Report of States Parties Due in 1997: Uganda', op. cit, para 143.

1107 *Ibid*.

1108 *Ibid*, para 144.

f) Access to Medical Assistance and Health-care

The Ugandan Government has acknowledged that there are still a number of challenges facing the child's access to medical assistance and health-care. In particular, access to quality health care is still poor. According to the Ugandan Government, 'IMR (97/1,000), U5MR (147/1,000), MMR (506/100,000) are still high and antenatal care attendance is low. The HIV prevalence rate is still high (about 9.5 per cent); teenage pregnancy and illegal abortions are still common.'[1109] In addition, immunization coverage 'is low and has shown a declining trend' over the past years.'[1110]

There is 'high malaria morbidity and mortality, high incidence of diarrhoea diseases and acute respiratory infections and regular measles outbreaks. The nutritional status of children is still poor: stunting and wasting stands at 28 and 5 per cent respectively, while 23 per cent and 50 per cent of children are underweight and have inadequate vitamin A intake respectively. The percentage of mothers who received antenatal care from trained staff (doctors, nurses, midwives) declined from 80 per cent in 1996 to 69 per cent in 2000 (UBOS, 2000).'[1111]

g) Integrated Management of Childhood Illnesses (IMCI)

The Ugandan Government has initiated and implements an Integrated Management of Childhood Illness (IMCI), whose general objective of IMCI in Uganda 'is to improve the quality of care provided to children under 5 years of age.'[1112] Its specific objectives are to:

> […] improve the performance of health workers in IMCI; improve the case management of children seen at first-level health facilities; strengthen the district capacity for implementation of IMCI; strengthen the central-level capacity for implementation of IMCI; improve the availability of drugs and supplies needed for IMCI; improve facility support for IMCI.[1113]

Through the IMCI programme there are a number of general measures being implemented, including improving quality of and accessibility of health services; integration of service delivery to minimize duplications and overlaps; improving information, education and communication on health; and conducting research on health status at household levels; monitoring and evaluating of progress in health status relating to children.[1114] Other measures are improving safe water and sanitation through community mobilization and development of water supply in rural areas and small towns.[1115]

h) Measures Adopted to Ensure a Universal Immunization System

The Ugandan Government has adopted several measures to ensure a universal immunization system for children. It is notable that the improvements in immunization rates in Uganda in the early 1980s 'succeeded in removing measles from its position as

1109 *Ibid*, para 145.
1110 *Ibid*.
1111 *Ibid*.
1112 *Ibid*, para 146.
1113 *Ibid*.
1114 *Ibid*, para 147.
1115 *Ibid*.

the single largest cause of infant and child deaths in Uganda. Neonatal tetanus, however, still remains a serious problem (6 deaths per 1,000 live births) because vaccination coverage has been low.'[1116] As a result, immunization coverage for DPT3, measles and OPV has been declining since 1996. Immunization against the six killer diseases needs to be improved upon if the progress made in the last 10 years is to be sustained.[1117]

i) Measures Taken to Combat Disease and Malnutrition

Consistent with its obligations under the ACRWC and the CRC, the Ugandan Government has undertaken several measures to combat diseases and malnutrition for children. According to the Ugandan Government, interventions in the Health Sector Strategic Plan aim at 'improving the status of ECSN include: emphasizing promotive, preventive and essential curative health care (PHC); promoting breastfeeding and good weaning practices; sensitization and counselling for good parenting; promoting simple hygiene starting with the family to ensure a safe environment; and growing and providing nutritious foods for expectant mothers. A multisectoral Early Childhood and Nutrition Project is currently being implemented with the main focus on attitudes, practice and behaviour change in matters of early childhood.'[1118]

Despite the foregoing measures, there are a number of obstacles that hinder children's access to primary health-care services in Uganda, including 'poverty; uneven geographical distribution of health units; limited knowledge of the population of preventive measures; negative cultural practices and beliefs concerning health services and treatment of diseases; distance; cost of care; inadequate supply of drugs and logistics; poor staffing levels in rural health units; less qualified staff in rural areas; conflict situation; attitudes of care providers; ignorance and lack of awareness among the community.'[1119]

j) Most Common Diseases and their Impact on Children

As in many Sub-Saharan African countries, children in Uganda lose their lives as a result of preventable diseases. For instance, according to the 1995 Burden of Disease Study in Uganda, 'about 75 per cent of life years lost were due to premature deaths caused by 10 well-known preventable diseases.'[1120] In particular, malaria causes 'about 25 per cent of morbidity among children aged 5 years and below.'[1121] It is also the leading cause of anaemia in pregnancy; and malaria infection 'leads to high rates of spontaneous abortions, stillbirths, low birth weight and premature deliveries. Low levels of awareness, poor service availability and lack of resources at the household level explain part of the increasing impact of malaria in Uganda. Other factors include the spreading resistance, which persists due to lack of safer and cheaper drugs, poor vector control and poor case management.'[1122]

1116 *Ibid*, para 148.
1117 *Ibid*.
1118 *Ibid*, para 149.
1119 *Ibid*, para 150.
1120 *Ibid*, para 151.
1121 *Ibid*, para 152.
1122 *Ibid*.

In addition, acute and chronic respiratory tract infections 'are major causes of morbidity for children aged below 5 and a cause of mortality for infants. The MoH has introduced the IMCI strategy to reduce the disease burden due to this condition.'[1123] Diarrhoea is also very most common 'at the time of weaning children, and as they start to become more mobile.'[1124] In order to tame this challenge, the Ugandan Government has adopted the Control of Diarrhoeal Diseases Programme in the MoH, which 'started off by trying to reduce morbidity from diarrhoea through the use of oral rehydration salts (ORS), and is now moving on to address the root causes of the problem, which include poor water supply, sanitation and hygiene. IMCI is intended to reduce the disease burden.'[1125]

k) Malnutrition, and Lack of Clean Drinking Water

One of the discernible implications of malnutrition on children is stunting. For instance, according to the 1995 Uganda Demographic and Health Survey, '38.3 per cent of children in Uganda [were] stunted, 25.5 per cent [were] underweight and 5.3 per cent [were] wasted.'[1126] Children stunting in Uganda is caused by several factors: (a) high incidence of low birth weight; (b) the fact that 55 per cent of households consume less than 80 per cent of the daily recommended energy intake; (c) poor weaning practices and care when the baby is between 6 and 18 months old; and (d) the low level of energy intake and inadequate knowledge concerning the nutrition-disease cycle.[1127]

In the period prior to the 2000s, Uganda had one of the highest levels of malnutrition in Africa, standing at 38.3 per cent. According to the Ugandan Government, specific problems of malnutrition 'result in the incidence of goitre, vitamin A deficiency and nutritional anaemia at levels that require remedial action. Maternal malnutrition causes 19 per cent of "reproductive wastage" (abortions, neonatal deaths and stillbirths) and low birth weights in a further 20 per cent of new babies.'[1128] As a result, the rate of infant mortality in Uganda is high, standing at 76 per 1,000 births.[1129]

l) Access to Health Care Services for Children with Disabilities

It is estimated that 3.5% of Uganda's estimated population of 24.2 million are persons with disabilities, out of which 205,000 are children with disabilities.[1130] Recognizing the existence of this section of the country's population, Article 35(2) of the Ugandan Constitution (1995) obliges Parliament to enact law(s) relevant for ensuring legal protection of the rights of persons (including children) with disabilities (PWDs). In

1123 *Ibid*, para 153.

1124 *Ibid*, para 154.

1125 *Ibid*.

1126 *Ibid*, para 155.

1127 *Ibid*.

1128 *Ibid*.

1129 The problem of high rate of maternal and infant mortality has attracted litigation in the Ugandan Constitutional Court. In *Centre for Human Rights, Health and Development and others v A.G.* Constitutional Court of Uganda, Constitutional Petition No. 61 of 2011, it has been alleged that the current of maternal and infant mortality rate in Uganda is in violation of the Constitution of Uganda (1995), particularly Article 22. This matter is discussed in African Child Policy Forum, *Harmonisation of Children's Laws in Eastern and Southern Africa: Country Briefs*, op. cit, p. 188

1130 Uganda Bureau of Statistics, *Uganda National Housing and Population Census* (2002). Available at www.ubos.org (Accessed on 25 April 2013).

discharging this constitutional obligation, in 2006 the Ugandan Parliament enacted the Persons with Disabilities Act (PDA).[1131] Consistent with the United Nations Convention on the Rights of Persons with Disabilities (2006), the PDA guarantees a number of rights to PWD's, including the rights to health;[1132] rehabilitation;[1133] and accessibility.[1134]

In addition, the Ugandan Children Act contains specific provisions for the protection of the rights of children with disabilities. In particular, Section 9 of the Children Act requires both the State and parents to take appropriate steps to ensure that children with disabilities are:

(a) assessed as early as practicable in respect of the extent and nature of their respective disabilities;

(b) offered treatment commensurate with their disabilities; and

(c) afforded facilities for their rehabilitation and equal opportunities to education.

In terms of Section 10 of the Children Act, local government authorities or councils are obliged to keep a register of all children with disabilities within their respective jurisdictions and provide appropriate assistance to such children whenever possible in order to enable them to grow up with dignity among other children and develop their full potential and self-reliance.

As the African Child Policy Forum (ACPF) notes, although Uganda is often cited for its good child policy and for enshrining the rights of persons (including children) with disabilities in its Constitution, policy and legislation,[1135] 'there is no evidence on ground to show that the local councils have discharged this obligation.'[1136] This assertion is verified by yet another study done by ACPF in, *inter alia*, Uganda.[1137] According to a study by ACPF, children with disabilities in Uganda suffer violence in a number of forms: physical, emotional and sexual violence, more than their peers who do not have disabilities,[1138] as a result of 'non-implementation of existing child protection laws alongside inadequate referral, judiciary and police services.'[1139]

In particular, the study has noted that in Uganda 'there have been reports of increasing numbers of ritual sacrifices of disabled and albino children within the country.'[1140] The study names shame, poverty and negative cultural beliefs as amongst the factors that 'increase the vulnerability of children with disabilities to violence, especially from caregivers' in Uganda.[1141]

1131 Act No. 20 of 2006.

1132 *Ibid*, Section 7.

1133 *Ibid*, Section 10.

1134 *Ibid*, Part IV.

1135 African Child Policy Forum, *Violence against Children with Disabilities in Africa: Field Studies from Cameroon, Ethiopia, Senegal, Uganda and Zambia* Addis Ababa: African Child Policy Forum, 2011, p. 45.

1136 African Child Policy Forum, *Harmonisation of Children's Laws in Eastern and Southern Africa: Country Briefs,* op. cit, p. 189.

1137 African Child Policy Forum, *Violence against Children with Disabilities in Africa: Field Studies from Cameroon, Ethiopia, Senegal, Uganda and Zambia,* op. cit.

1138 *Ibid*, p. v.

1139 *Ibid*, p. 12.

1140 *Ibid*, p. 2 (quoting *The New Vision newspaper* (Uganda), 27 March 2009).

1141 *Ibid*, p. 11.

m) Prevention of the Infection of HIV/AIDS amongst Children and Adolescents

One of the measures States Parties are obliged to undertake by the CROC in its General Comment No. 4 on "Adolescent Health and Development", is to formulate adolescent-health policies and programmes in the school curriculum, with a particular focus on the prevention of teenage pregnancies, unsafe abortions and sexually transmitted diseases, including HIV/AIDS. This has been further elaborated in the CROC's General Comment No. 3 on "HIV/AIDS and the Rights of Children" (2003)[1142] and in the International Guidelines on HIV/AIDS and Human Rights (1997).[1143]

Consistent with the foregoing obligation imposed on States Parties to both the CRC and the ACRWC, the Ugandan Government, through the Uganda AIDS Commission, has developed a number of programmes to prevent the infection of HIV/AIDS to children. The pioneer of such programmes was a five-year national strategic framework for HIV/AIDS activities in Uganda 2000/01-2005/06, which had the following three goals: reduction of HIV prevalence by 25 per cent by the year 2005/06; mitigation of health and socio-economic effects of HIV/AIDS at individual, household and community levels; and strengthening the national capacity to respond to the epidemic.[1144]

By mid-2000s it was estimated that about 9.5 per cent (estimated 2 million) of the Uganda's population of the then 21 million was infected with HIV, about a quarter of which were women of childbearing age (15-49). About 1.1 million children (below 15) had then lost one or both parents to AIDS.[1145] According to official data:

> The HIV infection rate also varies significantly with age. HIV prevalence is very low between ages 0-5 and 5-14, but begins to rise in the age group 15-19, particularly among girls. Young people's increased vulnerability to HIV infection is attributed to the fact that a number of them initiate sex early (15.6 years for girls and 17.6 years for boys), and with older partners. Most of the sexual encounters are without the benefit of consistent and correct condom use. Rape and defilement are becoming common though most cases go unreported. Young women aged 15-24 are at a higher risk of HIV infection than men. Overall, about 54 per cent of the reported AIDS cases are females. AIDS is the fourth leading cause of death among children under 5 and is expected to increase the mortality rate significantly. Mother-to-child transmission of HIV is responsible for the HIV prevalence among children. About 15 per cent of the children fed on breastmilk of infected mothers acquire the virus.[1146]

As a result of concerted efforts by the Ugandan Government to stave off HIV/AIDS, HIV prevalence amongst women attending antenatal clinics in selected sites 'declined from 1992 till 1996 when the rates stabilized at about 10 per cent. Data from sentinel sites indicate that the decline is particularly pronounced among urban pregnant women aged 15-19, followed by women aged 20-24. Studies on knowledge, attitudes, beliefs and practices conducted by the Ministry of Health also indicate an increase in

1142 CROC, General Comment No. 3 on 'HIV/AIDS and the Rights of Children' (2003), (CRC/GC/2003/3).

1143 International Guidelines on HIV/AIDS and Human Rights (1997) (E/CN.4/1997/37).

1144 Republic of Uganda, 'Second Periodic Report of States Parties Due in 1997: Uganda', op. cit, para 163.

1145 *Ibid*, para 164.

1146 *Ibid*.

the age at first sex, a reduction in number of casual sexual partners, and an increase in general condom use, especially between casual sexual partners.'[1147]

According to the Ugandan Government, the predisposing factors include: 'inadequate access to relevant information and education on the dynamics of HIV infection and prevention; inadequate life and negotiation skills; poverty; negative cultural practices such as widow inheritance, polygamy, and female genital mutilation; consumption of alcohol and other intoxicants leading to irresponsible and/or unprotected sex; child abuse; extensive sexual network; civil strife and armed conflict and war in parts of the country.'[1148] However, the Government of Uganda has acknowledged that:

> The HIV/AIDS problem has clear adverse implications for the attainment of national goals for socio-economic development. For some sectors, HIV/AIDS threatens to erode the achievements already made. At the individual level, the failure to access prompt treatment for opportunistic infections prevents affected persons from full participation in social and economic activities.[1149]

One of the major impacts of the HIV/AIDS scourge on Ugandan children is that many of them 'have been orphaned by the HIV/AIDS epidemic resulting from the loss of one or both parents.'[1150]

9.1.2 The Realisation of the Child's Right to Health in Kenya

Consistent with international child law, the Kenyan Government has undertaken constitutional, policy, legislative and administrative measures to make sure that children in its jurisdiction do realise the right to health, as considered below.

a) Constitutional and Legislative Measures

Both the Constitution of Kenya (2010) and the Kenyan Children Act (2001) guarantee the child's right to health and access to health services. In particular, Article 43 of the Constitution of Kenya and Section 9 of the Children Act guarantee the child's right to 'the highest attainable standard of health which include the right [to access] to health care services.' In respect of children with disabilities, Section 12 of the Children Act guarantees to such children, *inter alia*, the right to have access to special care and to be treated with appropriate health treatment.

This guarantee is strengthened in the Persons with Disabilities Act (2003), which provides for the rights, rehabilitation and equal opportunities for persons (including children) with disabilities.[1151] These constitutional, legislative and policy measures are further implemented through a number of programmes as discussed below.

b) Access to Health Care Services for Children with Disabilities

In its previous Concluding Observations in respect of the child's realization of basic health and welfare rights in the context of Articles 6, 18(3), 23, 24, 26, and 27(1)

1147 *Ibid*, para 165.

1148 *Ibid*, para 166.

1149 *Ibid*, para 167.

1150 African Child Policy Forum, *Harmonisation of Children's Laws in Eastern and Southern Africa: Country Briefs,* op. cit, p. 188.

1151 This matter is discussed at some considerable length in African Child Policy Forum, *Ibid*, p. 71.

and (3) of the CRC, the CROC urged the Government of Kenya to take fully into account the CROC's General Comment No. 9 (2006) on the Rights of Children with Disabilities[1152] and more specifically:

(a) Further encourage the inclusion of children with disabilities into the regular educational system and their inclusion into society;

(b) Pay more attention to special training for teachers and making the physical environment, including schools, sports and leisure facilities and all other public areas, accessible for children with disabilities;

(c) Improve and strengthen early detection and treatment services through the health and education sector;

(d) Initiate programmes for public education on children with disabilities. The programmes should aim at addressing the stigmatization of and discrimination against children with special needs. Similarly, initiate community-based programmes to support families and parents with children with special needs;

(e) Increase the financial allocation given to children with disabilities in schools. The allocation of resources should take into consideration the specific needs of each child; and

(f) Ensure the effective implementation of the Persons with Disabilities Act of 2003 so as to enable the National Council for Persons with Disabilities to carry out the necessary programmes.[1153]

Consistent with the foregoing Concluding Observations, the Government of Kenya has undertaken several measures, most significant of which being the launch of the Special Needs Education Policy framework on 11 March 2010. This policy has led to increased enrolment of children with disabilities into primary/integrated units from 255,650 in 2007 to 272,911 in 2008.[1154] The Government has also integrated able-bodied persons in the 11 vocational training centres for Persons with Disabilities.[1155]

Significantly, the Government of Kenya has entrenched in its Constitution (2010) provisions that recognize sign language, Braille and other communication formats and technologies accessible to persons with disabilities.[1156] Legislatively, Kenya has enacted the Persons with Disabilities Act (2003), which provides, *inter alia*, for the rights, rehabilitation and equal opportunities for persons (including children) with disabilities.[1157]

1152 CROC, General Comment No. 9 (2006) on the Rights of Children with Disabilities (CRC/C/GC/9).

1153 CROC, 'Concluding Observations on Kenya's Second Periodic Report' 19 June 2007, CRC/C/KEN/CO/2.

1154 Republic of Kenya, '3rd, 4th and 5th State Party Report to the UNCRC Committee – Geneva 2005-2011', op. cit, para 222.

1155 *Ibid*, para 223. The vocational training centres are located in Bura, Kabarnet, Nairobi, Odiado in Busia, Itando in Vihiga, Kakamega, Muranga, Kisii, Nyandarua and Embu vocational training centres. The training curriculum of these vocational centres has been reviewed to suit the market needs.

1156 Article 7(3)(b) of the Constitution of Kenya (2010).

1157 See particularly African Child Policy Forum, *Harmonisation of Children's Laws in Eastern and Southern Africa: Country Briefs* op. cit, p. 71.

In addition, the Kenyan Government has established 345 sub-district disability assessment centres and 52 district-based Educational Assessment and Resource Services (EARS), which 'have been taken close to the communities.'[1158] However, the number of children taken for assessment and placed in education programmes 'is still small compared to those whose parents have not taken advantage of these facilities. This is partly attributed to ignorance and apathy by parents.'[1159]

At a policy level, the National School Health Policy (2009) 'has addressed the physical environment in schools, sports and leisure facilities.'[1160] In addition, 'there are guidelines for early identification and referral for children with disabilities and special needs. Community-based rehabilitation programmes for children with disabilities are in place and guidelines being developed.'[1161] The Kenyan Government offers special training at Kenya Institute for Special Education (KISE) for teachers who are eventually posted to both primary and secondary schools.'[1162]

To complement the foregoing constitutional, policy, legislative and administrative measures, the Kenyan Government, in collaboration with CSOs and the National Council for Persons with Disabilities (NCPWD), conducts regular awareness programmes for children with disabilities 'to reduce stigmatization, and at the same time encourage parents to seek medical and education services for their children. The awareness campaign has contributed to increased enrolment of children with special needs in primary, secondary and vocational training centres.'[1163] In particular, the NCPWD has published, the Persons with Disabilities Act (2003) in simple readable language including Braille and circulated it widely in Kenya.

In addition to awareness creation, the NCPWD has undertaken several capacity building forums for organizations working with disabled persons.[1164] On programmatic intervention Kenya launched a Cash Transfer Programme in 2010 'to assist households with disabled persons and children. This programme is still on pilot basis and will be scaled up progressively.'[1165]

c) The Child's Right to Health and Access to Health Services

In order to ensure that the Kenyan child adequately realizes his or her right to health and access to health services, the CROC has recommended that the Kenyan Government should:

(a) Allocate more financial and human resources to health services, in particular with a view to rationalizing their distribution to ensure availability in all parts of the country;

(b) Undertake all necessary measures to reduce infant and under-five mortality rates and take into account General Comment No. 7 on Implementing

1158 Republic of Kenya, '3rd, 4th and 5th State Party Report to the UNCRC Committee – Geneva 2005-2011', op. cit, para 225.

1159 *Ibid*.

1160 *Ibid*, para 226.

1161 *Ibid*, para 226.

1162 *Ibid*.

1163 *Ibid*, para 227.

1164 *Ibid*, para 228.

1165 *Ibid*, para 229.

Child Rights in Early Childhood,[1166] including by improving prenatal care and preventing malaria and communicable diseases;

(c) Establish more child health clinics in order to reduce distances for mothers and pregnant mothers;

(d) Improve access to safe drinking water and sanitation facilities and ensure sustainability, availability, sufficiency and affordability to all, particularly children;

(e) Develop appropriate national strategies to address the critical nutritional needs of children, particularly among the most vulnerable groups, through a holistic and intersectoral approach;

(f) Ensure that regional and other free-trade agreements do not have a negative impact on the enjoyment of the right to health by children, in particular with regard to access to generic medicine; and

(g) Step up anti-corruption measures relating to the management of funds for the health sector.[1167]

Consistent with the foregoing recommendations, the Kenyan Government has undertaken the following measures to ensure the child in its jurisdiction adequately realizes his or her right to health and access to health services:

(i) Increasing Funding to the Health Sector

In its recent national budgets, the Kenyan Government has ensured that the budgetary allocation for children issues and welfare has averaged 5%, with 8% being the highest in 2001/2002 and the lowest, 4.6% in 2010/2011. However, the government allocation 'has increased from KShs 28.93 billion in 2005/06 to KShs 47.93 billion in 2009/2010. Funds have been allocated for construction of health centres in 200 constituencies and more health workers have been employed and deployed to reduce the shortage of staff.'[1168]

(ii) Reduction of Infant Mortality

In order to scale down infant mortality rates, the Government of Kenya put in place several measures, including immunization. In particular, between 2003 and 2008/09 full immunization of children aged 12-23 months increased from 57% to 77% respectively, while immunization against measles for children aged 12-23 months rose from 73% to 85% during the same period. According to the Government, 'the highest proportion of children who were fully vaccinated were in Central province (86%) followed by Rift Valley (85%). Nyanza and North Eastern had the lowest proportion of children fully vaccinated with figures of 65% and 48% respectively. Whereas all the regions

1166 CROC, General Comment No. 7 on Implementing Child Rights in Early Childhood (CRC/C/GC/7/Rev.1), para 27.

1167 CROC, 'Concluding Observations on Kenya's Second Periodic Report', op. cit.

1168 Republic of Kenya, '3rd, 4th and 5th State Party Report to the UNCRC Committee – Geneva 2005-2011', op. cit, para 230.

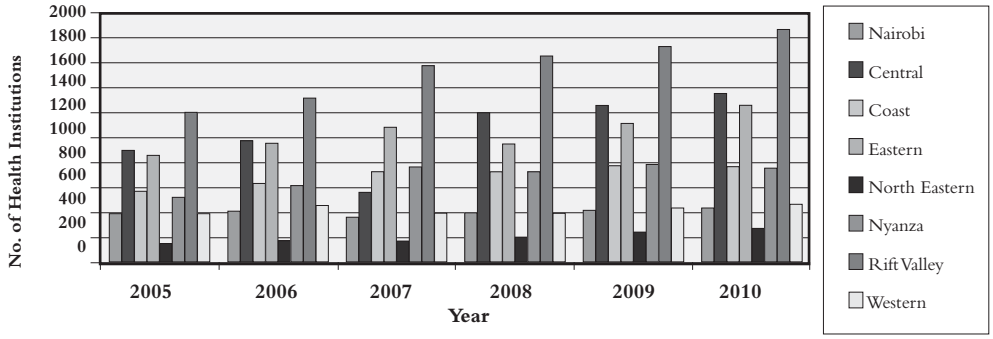
need resources to reach the national target of 90% by 2015 the last two provinces will need extra resources to ensure they are at par with other provinces.'[1169]

Another measure put in place by the Government of Kenya in order to scale down infant mortality rates, is pneumococcal vaccine to the national immunization schedule. Between 2007 and 2011 the Kenyan Government distributed 'over 13.5 million insecticide treated mosquito nets and continues to provide the same at MCH clinics to pregnant women and infants in high risk districts. Other measures to address malaria are indoor residual spraying and use of Artemisinin Combination Therapies.'[1170]

(iii) Reducing Distances to Health Facilities

In a order to reduce the distance to health facilities which children and their parents have to cover in accessing such facilities in Kenya, there has been 'a significant increase of primary health care facilities under the strategic plan for rationalization of health care services in levels 3 and 4. To this effect, the number of health facilities increased from 4,912 to 7,111 between 2005 and 2010.'[1171] According to the Government of Kenya, the Rift Valley province has 'recorded the highest number of health facilities while North Eastern had the lowest number' in reducing the distances to health facilities.[1172]

Figure 1: Health Institutions by Province



Source: MOMS (2010). Facts and Figures (Reproduced in Republic of Kenya, '3rd, 4th and 5th State Party Report to the UNCRC Committee – Geneva 2005-2011').[1173]

The Kenyan Government has acknowledged that the provision of health services to its citizens, including children, 'is a major concern and hence it has established the health policy framework which supports and encourages other health providers to set up health facilities in underserved communities and especially in rural and remote areas including urban informal settlements.'[1174] Under the Economic Stimulus Programme funding 'has been allocated for construction of a Health Centre in 200 Constituencies. This was accompanied with constituency-based yearly hiring of health workers. The

1169 *Ibid*, op. cit 231.
1170 *Ibid*, para 232.
1171 *Ibid*, para 233.
1172 *Ibid*.
1173 *Ibid*.
1174 *Ibid*, para 234.

[Government of Kenya] works in partnership with FBOs, NGOs and private health providers.'[1175]

iv) Nutrition Status of Children Under Five Years of Age

In medical terms, children whose weight-for-age 'is below minus two standard deviations (-2 SD) from the median of the reference population are considered underweight.' This measure 'reflects the effects of both acute and chronic malnutrition. 20.3% of Kenyan children under five are underweight, 5.6% are classified as severely underweight, while those stunted were estimated to be 29.6%. Peak levels of low weight-for-age are found among children aged 24-35 months, as well as children in North Eastern Province and those whose mothers have no education.'[1176] Comparison of the 2008-09 KDHS results with those of the 2003 KDHS 'indicate that there has been an insignificant change in the proportion of children who are underweight.'[1177] In addition, it is policy 'for children 6-59 months to receive Vitamin A every month. Exclusive breastfeeding rates have also increased from 13% in 2003 to 32% in 2008/09.'[1178]

v) Safe and Clean Drinking Water and Sanitation

The Government of Kenya recognizes that safe water for drinking and other household uses 'is no doubt a fundamental human right. Lack of access to safe drinking water particularly is a recipe for public health hazards of monumental consequences to children who are susceptible to diarrhoea and other water-borne diseases.'[1179] Recognizing this actuality, Kenya has entrenched the right to water in Article 43(1)(d) of the Constitution (2010), which states that: 'every person has the right to clean and safe water in adequate quantities.' Translating this constitutional provision into reality, access to improved water sources in Kenya 'has increased from 74%, and 32% in urban and rural households respectively to 91% and 54% from 2003 to 2008/09 respectively (KDHS, 2003 and 2008/09). These figures highlight the great disparities between rural and urban populations.'[1180]

The Kenyan Government recognizes that improving universal access to decent and safe sanitation 'is one of the least expensive and most effective means to improve public health and save lives. Decent sanitation minimizes exposure to excreta-related diseases which are caused by direct or indirect contact with pathogens associated with excreta and/or vectors breeding in excreta; this includes trachoma and most water-borne diseases. Sanitation has improved from 95% and 79% in urban and rural households respectively in 2003 to 99% and 84% in 2008/09.'[1181] This importance is underscored by the constitutional provision in Article 43(1)(b) of the Kenyan Constitution, which explicitly provides that: 'every person has the right to accessible and adequate housing and to reasonable standards of sanitation.'

1175 *Ibid*.

1176 *Ibid*, para 235.

1177 *Ibid*.

1178 *Ibid*, para 236.

1179 *Ibid*, para 237.

1180 *Ibid*.

1181 *Ibid*, para 238. See also KDHS, 2003 and 2008/09.

According to the Kenyan Government, although urban sanitation coverage is high, 'there are significant disparities between populations especially in urban informal settlements.'[1182] As from 2008/9 financial year, 'one of the items on the performance contract of the Permanent Secretary in the Ministry of Public Health and Sanitation and the Chief Public Health Officer is improvement of latrine coverage by 5%. This has been communicated to all districts to ensure they increase their respective coverage by 5% every year.'[1183]

d) Adolescent Health

In its previous Concluding Recommendations, the CROC has urged the Kenyan Government to:

(a) Undertake a comprehensive study to assess the nature and the extent of adolescent health problems and, with the full participation of adolescents, use this as a basis for formulating adolescent-health policies and programmes in the school curriculum, with a particular focus on the prevention of teenage pregnancies, unsafe abortions and sexually transmitted diseases, including HIV/AIDS, taking into account the CROC's General Comment No. 4 on "Adolescent Health and Development";[1184]

(b) Strengthen developmental and mental-health counselling services, as well as reproductive counselling, and make them known and accessible to adolescents; and

(c) Continue to provide support to pregnant teenagers and ensure the continuation of their education.[1185]

Consistent with the foregoing recommendations, the Kenyan Government has undertaken a comprehensive study to assess the nature and the extent of adolescent health problems. In its Demographic and Health Survey in 2008/09, the Kenya National Bureau of Statistics (KNBS),[1186] incorporated issues concerning adolescent health, teenage pregnancy and ability to access services. In the context of CROC's General Comment No. 4 on "Adolescent Health and Development":

> This information has provided an avenue for planning for the adolescents health programmes and policies. The survey showed that by the age of 19 years 36.2% of adolescents begun childbearing.[1187]

Using the findings of this survey as a basis for formulating adolescent-health policies and programmes in the school curriculum, the Kenyan Government, through the Ministry of Education, 'has designated teachers who offer counselling in schools to prevent unwanted pregnancies. Reproductive health (Sex Education) is taught in primary and secondary schools as part of Social Studies and Ethics.'[1188]

1182 *Ibid*, para 239.

1183 *Ibid*.

1184 CROC, General Comment No. 4 on 'Adolescent Health and Development', CRC/GC/2003/4).

1185 CROC, 'Concluding Observations on Kenya's Second Periodic Report', op. cit.

1186 The KNBS is the main state institution that collects and collates official statistical data in Kenya.

1187 Republic of Kenya, '3rd, 4th and 5th State Party Report to the UNCRC Committee – Geneva 2005-2011', op. cit, para 240.

1188 *Ibid*, para 241.

In its bid to scale up its efforts aimed at the prevention of teenage pregnancies and unsafe abortions, the Kenyan Government has, through the Ministry of Education, 'issued a circular that allows teenage mothers to go back to school' after giving birth.[1189] Although it is viewed by the Government of Kenya as 'a way forward to ensuring that rights of adolescent mothers are respected '[1190], this circular 'has been undermined by the stigmatization of young mothers which deters them from returning to school.'[1191] However, the Kenyan Government 'has made all necessary efforts to ensure that girls who are victims of unwanted and early pregnancies are not stigmatized nor denied re-entry opportunity by school administrators.'[1192]

e) Prevention of the Infection of HIV/AIDS amongst Children and Adolescent

One of the measures States Parties are obliged to undertake by the CROC in its General Comment No. 4 on "Adolescent Health and Development", is to formulate adolescent-health policies and programmes in the school curriculum, with a particular focus on the prevention of teenage pregnancies, unsafe abortions and sexually transmitted diseases, including HIV/AIDS. This has been further elaborated in the CROC's General Comment No. 3 on "HIV/AIDS and the Rights of Children" (2003)[1193] and in the International Guidelines on HIV/AIDS and Human Rights (1997).[1194] Reinforcing this obligation, the CROC has, in its previous Concluding Observations, urged the Kenyan Government to undertake measures aimed at:

(a) Strengthening its efforts in combating the spread and effects of HIV/AIDS, in particular by effectively implementing the National Strategic Plan, policies and guidelines on HIV/AIDS, infant and child feeding and the programme for preventing mother-to-child transmission of HIV/AIDS;

(b) Providing all pregnant women with adequate health and social services free of charge, and by ensuring the provision of anti retroviral drugs and formula-feeding for infants;

(c) Systematically including comprehensive information about HIV/AIDS and sex education to youth, including confidential counselling and testing and the promotion of contraceptive use, and provide training to health workers, teachers and education personnel on teaching about HIV/AIDS and sex education;

(d) Integrating respect for the rights of the child into, and involve children in, the development and implementation of its HIV/AIDS policies and strategies;

(e) Expanding assistance to orphaned children and made vulnerable by HIV/AIDS; and

1189 *Ibid*, 242.

1190 *Ibid*.

1191 *Ibid*.

1192 *Ibid*.

1193 CROC, General Comment No. 3 on 'HIV/AIDS and the Rights of Children' (2003), (CRC/GC/2003/3).

1194 International Guidelines on HIV/AIDS and Human Rights (1997) (E/CN.4/1997/37).

(f) Ensuring that public-awareness campaigns seek to prevent discrimination against children infected with and affected by HIV/AIDS.[1195]

Consistent with the foregoing recommendations and in fulfilment of its obligation under international law in this regard, the Kenyan Government has enacted the HIV and AIDS Prevention and Control Act (2006),[1196] which prohibits discrimination against people living with HIV and AIDS. The objects and purposes of this law are to:

(a) promote public awareness about the causes, modes of transmission, consequences, means of prevention and control of HIV and AIDS;

(b) extend to every person suspected or known to be infected with HIV and AIDS full protection of his human rights and civil liberties by

  (i) prohibiting compulsory HIV testing save as provided in this Act;

  (ii) guaranteeing the right to privacy of the individual;

  (iii) outlawing discrimination in all its forms and subtleties against persons with or persons perceived or suspected of having HIV and AIDS;

  (iv) ensuring the provision of basic health care and social services for persons infected with HIV and AIDS;

(c) promote utmost safety and universal precautions in practices and procedures that carry the risk of HIV transmission; and

(d) positively address and seek to eradicate conditions that aggravate the spread of HIV infection.[1197]

One of the principles enshrined in this law, which domesticate principles set out in both the ACRWC and the CRC, is the principle of non-discrimination. Accordingly, Part VIII of this law prohibits discriminatory acts, practices and policies against persons, including children, infected with or affected by HIV/AIDS in all settings.[1198] The most operable phraseology in these provisions is: "on the grounds only of the person's actual, perceived or suspected HIV status". Of particular importance to this study is the prohibition of discrimination in schools. In this regard, Section 32 explicitly provides that:

> No educational institution shall deny admission or expel, discipline, segregate, deny participation in any event or activity, or deny any benefits or services to a person on the grounds only of the person's actual, perceived or suspected HIV status.
>
> Section 38 of this law makes an offence for discriminatory acts and practices.

In accordance with Part II of this law, the Government of Kenya is obliged to provide HIV and AIDS education and information to its citizens, including children

1195 CROC, 'Concluding Observations on Kenya's Second Periodic Report', op. cit.

1196 Act No. 14 of 2006.

1197 *Ibid*, Section 3.

1198 These settings are: prohibition of discrimination in the workplace (Section 31); prohibition of discrimination in schools (Section 32); restriction on travel and habitation (Section 33); inhibition from public service (Section 34); exclusion from credit and insurance services (Section 35); discrimination in health institutions (Section 36); and denial of burial services (Section 37).

in both settings.[1199] It is also obliged to 'promote public awareness about the causes, modes of transmission, consequences, means of prevention and control of HIV and AIDS through a comprehensive nationwide educational and information campaign conducted by the Government through its various Ministries, Departments, authorities and other agencies.'[1200] The educational and information campaign referred to in this law entails, *inter alia*, focus on the family as the basic social unit;[1201] and be carried out in schools and other institutions of learning, all prisons, remand homes and other places of confinement, amongst the disciplined forces, at all places of work and in all communities throughout Kenya.[1202]

In terms of Section 13(1) of the Act, 'no person shall compel another to undergo an HIV test.'[1203] In particular, the Act prohibits a person to compel another to undergo an HIV test as a precondition to, or for continued enjoyment of employment;[1204] marriage;[1205] admission into any educational institution;[1206] entry into or travel out of the country;[1207] or the provision of health care, insurance cover or any other service.[1208] However, a person charged with an offence of a sexual nature under the Sexual Offences Act (2006) 'may be compelled to undergo an HIV test.'[1209]

Whereas the Act prohibit a person to undertake an HIV test in respect of another person without informed consent of that other person;[1210] it allows this if that person is a child, in which case there must be a written consent of a parent or legal guardian of the child.[1211] This provision provides a safeguard to children to avoid them being subjected to HIV testing without the consent of their parents or legal guardian. However, the proviso to Section 14(1)(b) of the HIV and AIDS Prevention and Control Act is problematic when it comes to a child who is pregnant, married or is engaged in behaviour which "puts him or her at risk of contracting HIV". Such categories of children 'may, in writing, directly consent to an HIV test.'[1212] In the absence of any empirical justification this proviso enhances discrimination of children contrary to the provisions of Article 3 of the ACRWC and Article 2 of the CRC.

1199 The Act sets out the following settings: in institutions of learning (Section 5); in health care services (Section 6); in the workplace (Section 7); and in communities (Section 8). In the context of Section 4(3) (3) in conducting the educational and information campaign referred to in this section, the Government 'shall collaborate with relevant stakeholders to ensure the involvement and participation of individuals and groups infected and affected by HIV and AIDS, including persons with disabilities.'

1200 *Ibid*, Section 4(1).

1201 *Ibid*, Section 4(2)(b).

1202 *Ibid*, Section 4(2)(c).

1203 Under Section 13(4) of this law, a person who contravenes any of the provisions of Section 13 commits an offence.

1204 *Ibid*, Section 13(2)(a).

1205 *Ibid*, Section 13(2)(b).

1206 *Ibid*, Section 13(2)(c).

1207 *Ibid*, Section 13(2)(d).

1208 *Ibid*, Section 13(2)(e).

1209 *Ibid*, Section 13(3).

1210 *Ibid*, Section 14(1)(a).

1211 *Ibid*, Section 14(1)(b).

1212 This situation also applies to the confidentiality of the results of HIV test as provided for in Section 18(a) and (b) of this law. According to this provision, the results of an HIV test are treated confidential and must only be released to the tested person; and in the case of a child, to a parent or legal guardian of such child. As in Section 14, Section 18(b) has a proviso which provides that: 'Provided that where any such child consents to an HIV test directly under Section 14(1)(b), the results thereof shall be released to the child.' See also a proviso to Section 22(1)(c) concerning the disclosure of information.

In a very progressive way, Section 19(1) of this law obliges every health institution, whether public or private, and every health management organisation or medical insurance provider to 'facilitate access to health care services to persons [including children] with HIV without discrimination on the basis of HIV status.' In order to ensure this provision is rendered effective:

> The Government shall, to the maximum of its available resources, take the steps necessary to ensure the access to essential health care services, including the access to essential medicines at affordable prices by persons with HIV or AIDS and those exposed to the risk of HIV infection.[1213]

In order to enforce the provisions of this law, the HIV and AIDS Tribunal is established under Section 25 with the jurisdiction:

(a) to hear and determine complaints arising out of any breach of the provisions of this Act;[1214]

(b) to hear and determine any matter or appeal as may be made to it pursuant to the provisions of this Act;[1215] and

(c) to perform such other functions as may be conferred upon it by this Act or by any other written law being in force.[1216]

However, this Tribunal does not have criminal jurisdiction in respect of offences committed in breach of this law.[1217]

In order to reinforce these legislative measures to stave off discrimination and stigma against persons (including children) living with or affected by HIV/AIDS, a number of public-awareness campaigns against such discrimination and stigmatization 'have been mounted by the non-state actors, National Aids Control Council, Ministry of Public Health and Sanitation and the Ministry of Education.'[1218]

The Kenyan Government has also developed the National HIV/AIDS Strategic Plan (2009/10 to 2012/13), 'which has a prevention of mother-to-child transmission (PMCT) component and the National Guidelines on Prevention of Mother to Child Transmission.'[1219] In fact:

> Between 2003 and 2007 the proportion of women attending Antenatal Care (ANC) who got tested for HIV increased from 45% to 70%. PMCT services are free in government facilities and the country has adapted WHO current guidelines on infant and young child feeding in the context of HIV, which promotes breastfeeding with use of Anti Retroviral Therapy (ARVs) to protect infants, and early infant diagnosis. During this reporting period children accessing ARV treatment increased from 1,500 in 2005 to 36,000 in 2010 and 48,000 in 2011. However, from the national data there were about 229,953 children in 2010 infected by HIV.[1220]

1213 *Ibid*, Section 19(2).

1214 *Ibid*, Section 26(1)(a).

1215 *Ibid*, Section 26(1)(b).

1216 *Ibid*, Section 26(1)(c).

1217 *Ibid*, Section 26(2).

1218 Republic of Kenya, '3rd, 4th and 5th State Party Report to the UNCRC Committee – Geneva 2005-2011', op. cit, para 249.

1219 *Ibid*, para 243.

1220 Republic of Kenya, '3rd, 4th and 5th State Party Report to the UNCRC Committee – Geneva 2005-2011', op. cit, para 243.

In addition, the Kenyan Government 'is committed to scale up its financial budget in order to meet the Abuja commitment as well as increase paediatric services to children infected by HIV and AIDS.'[1221] In fact, in 2001 Heads of States of the African Union (AU) member states, meeting in Abuja, Nigeria, committed to allocating at least 15% of annual government budgets to their health sectors. At the same time they called upon donor countries to complement their efforts 'to mobilise resources domestically by fulfilling their commitment to devoting 0.7% of their GNP as ODA (overseas development assistance) to developing countries and cancelling Africa's external debt in favour of increased investment in the social sector.'[1222]

Besides, the Kenyan Government 'has developed the National Programme Guidelines on Orphans and Other Children made Vulnerable by HIV and AIDS';[1223] and, as such, HIV and AIDS information 'has been included in primary teacher training curriculum and the school syllabus.'[1224] To supplement these efforts by the Kenyan Government, several non-state actors 'have continued to undertake awareness programmes on adolescent reproductive health to reduce incidences of sexual harassment, teenage pregnancies and general violence against children including prevention of HIV.'[1225]

Other administrative measures put in place to address the impact of HIV/AIDS on children and adolescents include the Cash Transfer Programme for Orphans and Vulnerable Children, whereby resources 'increased from KShs 48 million to KShs 816 million between 2006 and 2010.'[1226] In addition, pregnant women and children under the age of five years 'are entitled to free medical services including access to ARVs at public health facilities. This is further subsidized by faith-based institutions and other institutions specializing in providing health services to people living with HIV and AIDS.'[1227]

f) Factors Constraining Kenya's Realisation of the Child's Right to Health

Despite the foregoing measures – constitutional, policy, legislative and administrative – adopted by the Kenyan Government consistent to the provisions of the ACRWC and the CRC, the child's right to access to health services 'is to be marked by poor indicators in general.'[1228] According to the African Child Policy Forum (ACPF) – an independent, pan-African policy research and dialogue institution based in Addis Ababa, Ethiopia – the factors affecting households' health status in Kenya include 'low income per capita, low literacy levels, poor government spending in the health

1221 *Ibid*, para 244.

1222 Social Accountability Platform for Africa (SAP4Africa), 'Meeting the Promise: Progress on the Abuja Commitment of 15% Government Funds to Health'. Available online at http://sap4africa.net/publications/meeting-promise-progress-abuja-commitment-15-government-funds-health (Accessed on 20 May 2013).

1223 Republic of Kenya, '3rd, 4th and 5th State Party Report to the UNCRC Committee – Geneva 2005-2011', op. cit, para 246.

1224 *Ibid*.

1225 *Ibid*, para 245.

1226 *Ibid*, para 250.

1227 *Ibid*, para 251.

1228 African Child Policy Forum, *Harmonisation of Children's Laws in Eastern and Southern Africa: Country Briefs*, op. cit, p. 71.

sector resulting in restricted immunisation coverage and inadequate household access to doctors by households and the high HIV/AIDS prevalence rates.'[1229]

In addition, the Kenyan Government has yet to abolish 'the imposition of user fees in the public health institutions.'[1230] According to the ACPF:

> The applicable government policy still requires the standard payment of KShs 10 (USD 0.08) to access the lowest health unit (dispensary) and KShs 20 (USD 0.16) for access to health centres. For many low income families these standard payments are beyond their reach and often entail a balancing of expenditure between health care and other basic needs such as food.[1231]

Given the significance of government spending and complementary private sector support to health sector in relation to the improvement of the existing poor health indicators and to children's adequate access to health care services, the ACPF urges the Kenyan Government to increase its spending in this area. It also urges the government to 'expand the household/child-support programme in addition to examining how the user-fees in the public health sector inhibit access to health care especially for the majority poor family households.'[1232]

9.1.3 The Child's Realisation of the Right to Health in Tanzania

Tanzania has yet to constitutionalize the right to health. But it has put in place legislative, policy and administrative measures to ensure that children in its jurisdiction realize their right to health, as considered below.

a) Reduction of Infant Mortality Rate

Consistent with Article 24 of the CRC, in its previous Concluding Observations, the CROC urged the Government of Tanzania to undertake all necessary measures to reduce infant and under-five mortality rates, including by improving prenatal care and preventing communicable diseases. In compliance with this recommendation, the Tanzanian Government has undertaken a number of measures to reduce infant and under-five mortality rates. Recent statistics from the *Tanzania Demographic and Health Survey* (TDHS, 2010)[1233] indicates that Tanzania has made significant strides in reducing child mortality as evidenced by the reduction of Infant Mortality from 71 to 51 deaths per 1,000 live births during the 2001-2010 period as well as the lessening of post neonatal mortality rate from 36 to 25 deaths per 1,000 live births during the 2004 - 2010 period. Further evidence shows that the under-five mortality rate declined by 41 percent from 137 deaths per 1,000 live births in 1992-1996 to 81 deaths in 2006-2010.

Over the same period, the infant mortality rate declined by 42 percent, from 88 to 51 deaths per 1,000 live births. The decline in childhood mortality can be attributed to continued improvement in the health sector, especially in the areas of maternal and child health, with specific reference to immunization and malaria prevention initiatives.

1229 *Ibid*.

1230 *Ibid*, note 16.

1231 *Ibid*.

1232 *Ibid*, p. 71.

1233 Full Report Please see *hdptz.esealtd.com/fileadmin/.../2010_TDHS_FINAL_REPORT.pdf* (Accessed on 28 July 2013).

While the trends and levels of under-five children, infant and neonatal mortality rates from 1990 to 2010 indicate a positive gain that has been made towards achieving the Millennium Development Goals (MDGs) in infant and under-five mortality rates, most experts argue that if the pace of decline is sustained at this rate, Tanzania will be able to reach the MDG goals in infant and under-5 mortality rate indicators.[1234]

This officially reported trend just shows that there is a rapid decline in child mortality.[1235] The Government of Tanzania estimates a decline in infant mortality 'from 71 in the 5- to 9-year period preceding the survey (approximately 2001-2005) to 51 per 1,000 live births during the 2006-2010 period.'[1236] The 2010, TDHS estimate for the 5- to 9-year period preceding the survey is almost identical to the 2004-05, TDHS rate of 68 deaths per 1,000 live births for the same period (i.e., 0 to 4 years preceding the 2004-05 survey). Therefore:

> [...] results of the two surveys indicate a significant decrease in infant and child mortality rates in recent years. The largest decline is shown by the post neonatal mortality rate, which dropped from 36 deaths per 1,000 live births in the 2004-05 TDHS to 25 deaths per 1,000 live births in the 2010 TDHS. The decline in childhood mortality can be attributed to continued improvement in the health sector, especially in the areas of maternal and child health, with specific reference to immunization and malaria prevention initiatives.[1237]

b) Development of Appropriate National Strategies to Improve Nutritional Needs

In previous Concluding Recommendations, the CROC urged the Tanzanian Government 'to develop appropriate national strategies to address the critical nutritional needs of children' particularly among the most vulnerable groups, through a holistic and intersectoral approach that recognizes the importance of feeding practices. Consistent with this recommendation, the Tanzanian Government has undertaken a number of measures to improve nutritional needs for children. Of particular importance is the formulation of the National Nutrition Strategy (12 July 2011 – 16 June 2015), which was launched by Honourable Prime Minister of Tanzania, Mizengo Pinda on 20 September 2010. Eight strategies have been developed to achieve the goal and objectives of the Strategy:

i) ***Accessing Quality Nutrition Services***: Nutrition interventions must be delivered at scale and with high coverage if they are to have impact on prevalence of malnutrition at the population level. The focus will be on delivering a package of high-impact nutrition services. District nutrition services will be well managed, of high quality and accessible to all, particularly women and children and other vulnerable groups.

ii) ***Advocacy and Behaviour Change Communication***: Advocacy will be intensified to raise the visibility and profile of malnutrition at all levels, and increase the commitment and resources for its alleviation. At the household and community levels, improved knowledge on caring practices for infants,

1234 United Republic of Tanzania, 'Tanzania 3rd, 4th and 5th Reports on the Implementation of the Convention on the Rights of the Child (CRC) 2005-2011', submitted to the CROC by the Ministry of Community Development, Gender and Children (Tanzania Mainland) and the Ministry of Social Welfare, Youth, Women and Children Development (Zanzibar), 9 January 2012, para 126.

1235 *Ibid*, para 127.

1236 *Ibid*.

1237 *Ibid*.

young children and women of child-bearing age is a necessary component of sustainable efforts to reduce malnutrition.

iii) ***Legislation for a Supportive Environment***: Legislation, policies and standards are needed to create a supportive environment conducive to good nutrition. They include measures to prevent unethical marketing of breast-milk substitutes, to protect the breastfeeding rights of employed women, to ensure adequate labelling and quality of products intended for consumption by infants and young children, and for the fortification of food.

iv) ***Mainstreaming Nutrition into National and Sectoral Policies, Plans and Programs***: The multi-sectoral nature of nutrition requires advocacy for its inclusion in national and sector policies and plans. Nutritional indicators have been included in the MKUKUTA but further efforts are needed so that nutrition is firmly part of policies and strategies in the health, agriculture, education, community development and industry sectors.

v) ***Institutional and Technical Capacity for Nutrition***: Nutrition needs to attain the required institutional and technical capacity that is necessary in the decentralization framework. As LGAs are now responsible for implementation of nutrition services, it is essential that there be district level nutrition focal points who are accountable for the delivery of quality nutrition services, and supportive structures at the regional and national levels to provide technical backstopping, guidance and supportive supervision. Increasing the numbers and quality of human resources for nutrition at all levels and in all relevant sectors is critical for improving the quality of nutrition services. For health service providers, pre-service and in-service training courses need to keep pace with latest policies, strategies, guidelines and scientific thinking.

vi) ***Resource Mobilization***: The budget gap in nutrition needs to be reduced by mobilizing adequate and sustainable financial resources and improving the efficiency in the use of financial resources for nutrition. Despite hard budget constraints, additional budget for nutrition exists, including larger aid from development partners, increased budget allocation from MOHSW, increased efficiency in delivering nutrition interventions and collaboration with other sectors and programs.

vii) ***Research, Monitoring and Evaluation***: Research, monitoring and evaluation are essential for evidence-based decision making and enhancing public accountability. Monitoring is continuous and aims to provide the management and other stakeholders with early indications of progress in the achievement of goals, objectives and results. Evaluation is a periodic exercise that attempts to systematically and objectively assess progress towards and the achievement of a program's objectives or goals. Research tests specific interventions and approaches for the betterment of nutritional status, and provides further evidence for policy and programming.

viii) ***Coordination and Partnerships***: Because there are multiple causes of malnutrition, action is needed across a range of sectors including health, food and agriculture, water supply and sanitation, education and others.

A coordinated response maximizes the use of available technical and financial resources and can create greater synergy of efforts. Public-private partnerships and collaboration with NGOs can increase the opportunities for delivering and scaling up nutrition services.

c) Ensuring Regional and Free-Trade Agreement do not have Negative Impact on Child Health

In order to adequately guarantee the child's realisation of his or her right to health, the CROC, in its previous Concluding Observations, urged the Tanzanian Government to ensure that regional and other free-trade agreements do not have a negative impact on the enjoyment of the right to health by children, in particular with regard to access to genetically modified medicine and genetically modified organism (GMO). The Government of Tanzania has reported that, in its endeavours to comply with the foregoing recommendations and in implementing Article 24 of the Convention, which requires state parties to recognize 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, it 'has carried out a number of measures (policy, legislative and administrative) aimed at ensuring that no child is deprived of his or her right of access to health care services and facilities.'[1238]

d) The Health Policy

Tanzania has put in place a policy framework to ensure that all persons, including children, realise their right to health. The National Health Policy was adopted in 1990. And was firstly reviewed in 1990 and recently in 2007 'so as to incorporate ongoing socio-economic changes, new government directives, emerging and re-emerging diseases and changes in science and technology among others.'[1239] Overall the policy is geared 'towards improving the health and wellbeing of citizens, with special focus on those at risk and encouraging the health system to be more responsive to the needs of the people.'[1240] The mission is to provide basic health services in accordance with geographical conditions, which are of acceptable standards, affordable and sustainable. Specifically the policy aims at:

- Reducing morbidity and mortality in order to increase the lifespan of all Tanzanians by providing quality health care;
- Ensuring that basic health services are available and accessible;
- Preventing and controlling communicable and non-communicable diseases;
- Sensitizing the citizens about the preventable diseases;
- Creating awareness to individual citizen on his/her responsibility on his/her health and health of the family;
- Improving partnership between public sector, private sector, religious institutions, civil society and community in provision of health services;

1238 *Ibid*, para 133.

1239 *Ibid*, para 134.

1240 *Ibid*.

- Planning, training, and increasing the number of competent health staff;
- Identifying and maintaining the infrastructures and medical equipment; and
- Reviewing and evaluating health policy, guidelines, laws and standards for provision of health services.

In addition to the National Health Policy,Tanzania has adopted various complementary policies and strategies 'in support to the quest for realization of improved health and wellbeing of her citizens including children.'[1241] These complementary policies include the National Policy on HIV/AIDS, which was adopted in 2001; the Health Sector Strategic Plan III (HSSP III) (July 2009 – June 2015);Vision 2025; and the National Programme for Economic Growth and Poverty Reduction (popularly known in its Kiswahili acronym: MKUKUTA),[1242] among others.

e) The National Policy on HIV/AIDS

In response to the HIV/AIDS pandemic, in November 2001 the Government of Tanzania adopted the National Policy on HIV/AIDS, which aims at providing a framework for leadership and coordination of the national multi-sectoral response to the HIV/AIDS epidemic. It also provides a framework for strengthening the capacity of institutions, communities, and individuals in all sectors to stop the spread of the epidemic. This includes formulation by all sectors of appropriate interventions to prevent the transmission of HIV/AIDS and other sexually transmitted infections, to protect and support vulnerable groups, and to mitigate the social and economic impact of HIV/AIDS.

The National Policy on HIV/AIDS and the National Multisectoral Strategic Framework are tools that guide the implementation of national multisectoral responses. The Tanzania Commission for AIDS (TACAIDS) provides strategic leadership and coordination of multisectoral responses, including monitoring and evaluation, research, resource mobilization, and advocacy.[1243]

f) Efforts to Legally Combat and Prevent HIV/AIDS

In its previous Concluding Observations, the CROC recommended that, taking into account its General Comment No. 3 on "HIV/AIDS and the Rights of Children"[1244] and the International Guidelines on HIV/AIDS and Human Rights (1997),[1245] Tanzania should continue to integrate respect for the rights of the child into, and involve children, in the development and implementation of its HIV/AIDS policies and strategies.

Consistent with the foregoing recommendation, the Tanzanian Government has undertaken a number of policy, legislative and administrative measures. One

1241 *Ibid*, para 135. Under Section 20 of the HIV and AIDS (Prevention and Control) Act (No 28 of 2008), the Ministry responsible for health, in collaboration with other ministries, is obliged to prepare programmes and conduct training for persons living with HIV and AIDS on (a) their survival needs; (b) life skills; and (c) formation of support groups for the purpose of providing palliative services and care.

1242 This is an abbreviation for Kiswahili words: *Mkakati wa Kukuza Uchumi na Kupambana na Umasikini Tanzania*.

1243 United Republic of Tanzania, 'Tanzania 3rd, 4th and 5th Reports on the Implementation of the Convention on the Rights of the Child (CRC) 2005-2011', para 138.

1244 CROC, General Comment No. 3 on 'HIV/AIDS and the Rights of Children' (CRC/GC/2003/3).

1245 International Guidelines on HIV/AIDS and Human Rights (E/CN.4/1997/37).

of the milestones recorded in recent years is the enactment of the HIV and AIDS (Prevention and Control) Act in 2008,[1246] which applies in Tanzania Mainland only. This law provides for the rights, care and treatment of persons affected by or victims of HIV/AIDS; to provide support and promote public health in relation to HIV/AIDS; and to provide for prevention and control of HIV/AIDS. In particular this law imposes a general duty to every person, institution and organization living, registered or operating in Tanzania to, *inter alia*:

(a) promote public awareness on causes, modes of transmission, consequences, prevention and control of HIV and AIDS;[1247]

(b) to fight stigma and discrimination;[1248]

(c) discourage negative traditions and usages which may enhance HIV and AIDS spread in the community;[1249] and

(d) promote all traditions and usages which may reduce the transmission and prevalence of infection in the community.[1250]

(i) Rights and Obligations

In a very emphatic note, the law sets out rights and obligations of persons, including children, with HIV and AIDS.[1251] In this context, any person living with HIV and AIDS has the right to the highest attainable standard of physical and mental health;[1252] and the right to treatment of opportunistic infections.[1253] Subject to the provisions of sub-section (1) of Section 33, any person living with HIV and AIDS shall have an obligation to protect others from infection;[1254] and to share in scientific advancement and its benefits.[1255]

In respect of children, the law obliges every local government authority to design, formulate, establish and coordinate mechanisms and strategic plans 'for ensuring that the most vulnerable children[1256] within its respective area are afforded means to access education, basic health care and livelihood services.'[1257]

In order to ensure that aid directed to service persons, including children, with HIV and AIDS is not misappropriated, the law requires every body corporate, NGO, CBO, FBO public institution or private organization and any person receiving aid or other kind of assistance for the purpose of providing preventive, research, treatment,

1246 Act No. 28 of 2008.

1247 *Ibid*, Section 4(1)(a).

1248 *Ibid*, Section 4(1)(c)(iii).

1249 *Ibid*, Section 4(1)(d).

1250 *Ibid*, Section 4(1)(e).

1251 *See* particularly Part VIII (Sections 33-35).

1252 *Ibid*, Section 33(1)(a).

1253 *Ibid*, Section 33(1)(b).

1254 *Ibid*, Section 33(2)(a).

1255 *Ibid*, Section 33(2)(b).

1256 Under sub-section (3) of Section 34, for the purpose of this section, the term 'most vulnerable children' includes orphans.

1257 *Ibid*, Section 34(1). In order to ensure that this provision is effectively implemented sub-section (2) of Section empowers the Minister responsible for health, in consultation with the Minister responsible for local government, to make regulations setting out criteria for identifying the most vulnerable children referred to under sub-section (1).

support or care to persons living with HIV and AIDS, widows, widowers, orphans or the most vulnerable children to ensure that the aid and assistance received is used for that purpose. Where it is established that such person (juristic or natural) has misused any aid such person shall be liable on conviction.[1258] Any person (juristic or natural) who is convicted pursuant to sub-section (1) of Section 35, 'may be deregistered from the register of body corporate, NGOs, CBO, FBO or Private Organization as the case may be.'[1259]

The Act also imposes a general duty on the Government, political parties, institutions, organizations, religious, traditional leaders and employers in the public and private sectors are obliged to:

(a) integrate or prioritize on HIV and AIDS in their proceedings and public appearances;[1260] and

(b) advocate against stigma and discrimination of people living with HIV and AIDS.[1261]

(ii) Prohibition of Compulsory HIV Testing

Under Section 7(1) of the HIV and AIDS (Prevention and Control) Act the Tanzanian Government, through the ministry responsible for health, is obliged to consult the respective local government authority and other relevant stakeholders 'with a view to formulating education programmes relating to prohibition of stigma and discrimination against persons living with or taking care of patients living with HIV and AIDS.' Interestingly, sub-section (2) of Section 7 provides that for purposes of this Section the term "stakeholders" includes the youths. In the context of African Youth Charter, which defines a youth as a person aged between 15 and 35 years,[1262] this means that children aged between 15 and 18 years have to also be consulted in this process.

Although the law allows every person residing in Tanzania, on his or her or own motion, volunteer to undergo HIV testing,[1263] it prohibits compulsory HIV testing.[1264] Without prejudice to the generality of sub-section (3) of Section 15, no consent shall be required on HIV testing under an order of the Court;[1265] on the

1258 Section 35(2) provides categorically that: 'Any body corporate, NGO, CBO, FBO or Private Organization which misuses any aid shall be liable on conviction:

(a) in case of an individual, to imprisonment for a term of not less than three years and not exceeding five years or confiscation of property worth the value of the aid or assistance received and refund of the misused funds;

(b) in case of an NGO, CBO or FBO Private organization a body corporate, to a fine of not less than five million shillings and not exceeding fifty million shillings or confiscation of property worth the value of aid or assistance received and refund of the misused funds.'

1259 *Ibid*, Section 35(3).

1260 *Ibid*, Section 4(2)(a).

1261 *Ibid*, Section 4(2)(b).

1262 The African Youth Charter is available online < http://www.africa-union.org/root/ua/conferences/mai/hrst/charter%20english.pdf > In its definition part, it provides that: 'For the purposes of this Charter, youth or young people shall refer to every person between the ages of 15 and 35 years.'

1263 Section 15(1) of the HIV and AIDS (Prevention and Control) Act.

1264 *Ibid*, Section 15(3). Under Section 15(7) it is explicitly provided that: 'Any health practitioner who compels any person to undergo HIV testing or procures HIV testing to another person without the knowledge of that other person commits an offence.'

1265 *Ibid*, Section 15(4)(a).

donor of human organs and tissues;[1266] and to sexual offenders.[1267] However, in case of a child or a person with inability to comprehend the result written consent of a parent or recognized guardian may be obtained.[1268] In order to ensure safe delivery and principled development of the toddler, the law requires every pregnant woman and the man responsible for the pregnancy or spouse and every person attending a health care facility to be counselled and offered voluntary HIV testing.[1269]

Although the law requires the results of an HIV test to be confidential and to be released only to the person tested,[1270] such results may be released to, *inter alia*, a parent or recognized guardian of a child.[1271] This requirement is intended to safeguard the best interests of the child, who is not able to understand or handle the outcome of the results, given the child's maturity and age. Under such circumstances, a parent or guardian of the child is 'obliged to observe confidentiality in respect of the HIV result received by him under that section.'[1272]

(iii) Government's Obligation to Provide Basic Services to Vulnerable Children and Orphans

The HIV and AIDS (Prevention and Control) Act also obliges the Government, using available resources, to 'ensure that, every person living with HIV and AIDS, vulnerable children and orphans are accorded with basic health services.'[1273] CBOs, private organizations and FBOs dealing with HIV and AIDS matters are also obliged, in consultation with the local government authority in the area of its jurisdiction, to provide community-based HIV and AIDS prevention, support and care services.[1274] Owners, managers or persons in-charge of health care facilities or medical insurance schemes, whether public or private, are obliged to 'facilitate access to health care services to persons living with HIV and AIDS without discrimination on the basis of their status.'[1275]

In order to ensure safe delivery for expectant mothers, the Ministry responsible for health is obligated to regulate the care and treatment of HIV infected pregnant women, mothers infected with HIV while giving birth and measures to reduce HIV

1266 *Ibid*, Section 15(4)(b).

1267 *Ibid*, Section 15(4)(c).

1268 *Ibid*, Section 15(2).

1269 *Ibid*, Section 15(5).

1270 *Ibid*, Section 16(1). However, under Section 18 of the HIV and AIDS (Prevention and Control) Act there are a number of circumstances in which confidentiality of the result of HIV testing may be waived. The section expressly provides that:

'The medical confidentiality shall not be considered breached in:

(a) complying with reportorial requirements in conjunction with the monitoring and evaluation programmes;

(b) informing other health practitioners directly involved or about to be involved in the treatment or care of a person living with HIV and AIDS;

(c) responding to an order of the Court over legal proceedings where the main issue is HIV status of an individual; or

(d) giving information to the appointed member of the deceased's family.'

1271 *Ibid*, Section 16(2)(a).

1272 *Ibid*, Section 17(2).

1273 *Ibid*, Section 19(1). In terms of Section 24(2) the Ministry responsible for health is obliged, where resources allow, to 'take necessary steps to ensure the availability of ARVs and other health care services and medicines to persons living with HIV and AIDS and those exposed to risk of HIV infection.'

1274 *Ibid*, Section 19(2).

1275 *Ibid*, Section 24(1).

transmission from mother to child. In an endeavour to prevent the mother to child[1276] transmission of HIV the following measures are to be undertaken:

(a) trained and authorized persons shall provide counselling services to HIV infected pregnant and breastfeeding women and to men responsible for the pregnancies or spouses respectively;[1277]

(b) health care facilities shall monitor, provide treatment and apply measures necessary to reduce HIV transmission from mother to child;[1278] and

(c) prevention of mother to child transmission of HIV health services should be parent friendly.[1279]

(iv) Prohibition of Stigma and Discrimination

The HIV and AIDS (Prevention and Control) Act prohibits stigma and discrimination against persons, including children, affected by or infected with HIVS/AIDS in about three settings: prohibition of discriminatory laws, policies and practice;[1280] restriction of health practitioners to stigmatize or discriminate;[1281] and prohibition of other forms of discrimination.[1282] The law emphatically requires any person to refrain from stigmatizing or discriminating 'in any manner any other person on the grounds of such other person's actual, perceived or suspected HIV and AIDS status.'[1283] In order to combat stigma and discrimination against a person on the grounds of such other person's actual, perceived or suspected HIV and AIDS status, the law makes this an offence; and, on conviction, a person 'shall be liable to a fine of not less than two million shillings or to imprisonment for a term not exceeding one year or to both.'[1284]

g) Awareness on HIV/AIDS

Section 7(1) of the HIV and AIDS (Prevention and Control) Act imposes a duty on the Ministry responsible for health to consult the respective local government authority and other relevant stakeholders 'with a view to formulating education programmes relating to prohibition of stigma and discrimination against persons living with or taking care of patients living with HIV and AIDS.' In Tanzania, HIV/AIDS prevention programmes focus messages and efforts on three important aspects of behaviour: using

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1276 *Ibid*, Section 25(1).

1277 *Ibid*, Section 25(2)(a).

1278 *Ibid*, Section 25(2)(b).

1279 *Ibid*, Section 25(2)(c).

1280 Section 28 explicitly provides that: 'A person shall not formulate a policy, enact any law or act in a manner that discriminates directly or by its implication persons living with HIV and AIDS, orphans or their families.'

1281 Section 29 categorically provides that: 'Any health practitioner who deals with persons living with HIV and AIDS shall provide health services without any kind of stigma or discrimination.'

1282 Section 30 stipulates that: 'A person shall not -

(a) deny any person admission, participation into services or expel that other person from any institution;

(b) deny or restrict any person to travel within or outside Tanzania;

(c) deny any person employment opportunity;

(d) deny or restrict any person to live anywhere; or

(e) deny or restrict the right of any person to residence, on the grounds of the person's actual, perceived or suspected HIV and AIDS status.'

1283 *Ibid*, Section 31.

1284 *Ibid*, Section 32.

condoms, limiting the number of sexual partners (or staying faithful to one partner), and delaying sexual debut (abstinence) of the young and the never married.[1285]

According to official information, there 'is widespread knowledge of HIV/AIDS prevention methods. Nearly nine in ten respondents (87 percent of women and 90 percent of men) know that the chance of becoming infected with the AIDS virus is reduced by limiting sexual intercourse to one uninfected partner who has no other partners. Three-quarters of respondents (76 percent each of women and men) know that the chance of contracting HIV/AIDS is reduced by using condoms.'[1286]

i) Knowledge on Prevention of Mother-to-Child Transmission of HIV (PMTCT)

According to the Government of Tanzania, increasing the level of general knowledge of HIV transmission from mother to child and reducing the risk of transmission using anti retroviral drugs (ARVs) 'is critical to reducing mother-to-child transmission (MTCT) of HIV during pregnancy, delivery, and breastfeeding. To assess MTCT knowledge, respondents were asked if the virus that causes AIDS can be transmitted from a mother to a child through breastfeeding and whether a mother with HIV can reduce the risk of transmission to the baby by taking certain drugs during pregnancy.'[1287]

Official data shows that, '89 percent of women and 81 percent of men know that HIV can be transmitted through breastfeeding. Somewhat fewer (75 percent of women and 67 percent of men) know that the risk of MTCT can be reduced through the use of ARVs during pregnancy.'[1288] In addition, seventy-two percent of women and 61 percent of men 'are aware that HIV can be transmitted through breastfeeding and that the risk of MTCT can be reduced by taking ARVs. This is a significant increase from the data reported in the 2004-05 TDHS (29 percent of women and 30 percent of men) and the 2007-08 THMIS (49 percent of women and 38 percent of men).'[1289]

ii) Attitudes Towards People Living with HIV/AIDS

It is well-established that widespread stigma and discrimination towards people infected with HIV or living with AIDS 'can adversely affect both people's willingness to be tested for HIV and also their adherence to anti retroviral therapy.'[1290] Therefore, the Tanzanian Government recognizes that 'reduction of stigma and discrimination is an important indicator of the success of programmes targeting HIV/AIDS prevention and control.'[1291] In the light of statistical information offered by the Government, most women and men 'would be willing to care at home for a relative with AIDS (nine in ten respondents), seven in ten would buy fresh vegetables from a market vendor with the AIDS virus, and eight in ten believe that an HIV-positive female teacher should be allowed to continue teaching.'[1292]

1285 United Republic of Tanzania, 'Tanzania 3rd, 4th and 5th Reports on the Implementation of the Convention on the Rights of the Child (CRC) 2005-2011', para 172.

1286 *Ibid*, para 173.

1287 *Ibid*, para 176.

1288 *Ibid*, para 177.

1289 *Ibid*.

1290 *Ibid*, para 178.

1291 *Ibid*.

1292 *Ibid*, para 179.

While there are small gender differences on these three indicators, 'less than half of female respondents (44 percent) and just over half of male respondents (57 percent) would not want to keep secret the fact that a family member is infected with the AIDS virus. Only 30 percent of women and 41 percent of men expressed acceptance on all four indicators: they would care for an HIV-positive family member in their own home, buy fresh food from a shopkeeper with AIDS, allow an HIV positive teacher to continue teaching, and not keep the HIV-positive status of a family member a secret.'[1293] Interestingly:

> Women and men in Zanzibar show a higher acceptance of all four indicators of tolerance, (40 percent of women and 53 percent of men) compared with those in Mainland (30 percent of women and 41 percent of men). Among women, the highest rate of acceptance is in the Eastern zone (39 percent), and the lowest is in the Lake and Southern zones (22 percent). Among men, the highest rate of acceptance is in the Central zone (54 percent), and the lowest is in the Lake zone (30 percent).[1294]

From the official data, it is indicated that respondents in urban areas are 'one and a half times as likely as those in rural areas to show acceptance on all four indicators.'[1295] Indeed, education and wealth 'are correlated with positive attitudes towards those who are HIV positive. Women and men with higher educational attainment and in wealthier households are more likely than other respondents to accept all four indicators.'[1296]

iii) Coverage of HIV Testing

Recent scientific findings have indicated that knowledge of HIV status 'helps HIV-negative individuals make specific decisions to reduce risk and increase safer sex practices so they can remain disease free.'[1297] For those who are HIV infected, knowledge of their status allows them to take appropriate action to protect their sexual partners, to access treatment, and to plan for the future. To assess the awareness and coverage of HIV testing services, respondents interviewed for the 2010 TDHS were asked whether they had ever been tested for HIV. If they said that they had been, they were asked whether they had received the results of their last test and where they had been tested. If they had never been tested, they were asked if they knew a place where they could go to be tested. As a result:

> Data shows that nine in ten women and men know where to get an HIV test. The tables also show that 59 percent of women and 43 percent of men have ever been tested for HIV, and 55 percent of women and 40 percent of men have been tested at some time and received the results of their HIV test. Three in ten women and 25 percent of men were tested for HIV in the year preceding the survey and received the results of their test. These figures are much higher than those recorded in the 2004-05 TDHS (6 percent of women and 7 percent of men) and in the 2007-08 THMIS (19 percent of women and 19 percent of men). These figures suggest that Tanzanians are increasingly aware of opportunities for testing and learning their HIV status. Women age 20-39 and men age 25 and older are the most likely to have been tested for HIV. Respondents in urban areas are more likely than

1293 *Ibid*.

1294 *Ibid*, para 180.

1295 *Ibid*, para 181.

1296 *Ibid*.

1297 *Ibid*, para 182.

> those in rural areas to have an HIV test. Women and men who have never had sex are the least likely to have taken the test. Similar patterns are observed in testing and receiving results for women and men.[1298]

In reality, regional variations exist and differ among women and men. For instance, Tanzanians living in Mainland 'are more likely than those living in Zanzibar to have been tested and received the results.'[1299]

h) Health Sector Strategic Plan III (HSSP III)

In addition to the foregoing initiatives, Tanzania has adopted the Health Sector Strategic Plan III (HSSP III), which is the crosscutting strategic plan for the health sector of Tanzania spanning between July 2009 and June 2015. It provides an overview of the priority strategic directions across the sector which is guided by the National Health Policy; Vision 2025; the National Programme for Economic Growth and Poverty Reduction (MKUKUTA); and the Millennium Development Goals. Detailed policies, strategies and work plans are in place for health related issues and for disease control. HSSP III does not reiterate those, but summarizes their strategic directions. In principle, it 'serves as the guiding document for development of Council and hospital strategic plans and for annual work plan. MOHSW has identified eleven strategies',[1300] which the health sector should achieve during the period of implementation as follows:

(i) District Health Services;

(ii) Referral Hospital Services;

(iii) Central Support;

(iv) Human Resources for Health;

(v) Health Care Financing;

(vi) Public Private Partnerships;

(vii) Maternal, New-born and Child Health;

(viii) Disease Prevention and Control;

(ix) Emergency Preparedness and Response;

(x) Social Welfare and Social Protection; and

(xi) Monitoring & Evaluation and Research.

i) Integrated Management of Childhood Illness (IMCI)

The Integrated Management of Childhood Illness (IMCI) initiative, *inter alia*, develops the capacity of child caregivers in first-level health facilities and communities 'to improve quality of care and address the major causes of under-five mortality and morbidity.'[1301] IMCI commenced in 1997 in two pilot districts (Morogoro Rural and Rufiji) with support from the Canadian-funded Tanzania Essential Health

1298 *Ibid*, para 183.

1299 *Ibid*, para 184.

1300 *Ibid*, para 141.

1301 *Ibid*, para 153.

Interventions Project (TEHIP). By the end of 2005, the strategy had been rolled out to 107 districts (94% average of districts).[1302]

In its recent report to the CROC, the Tanzanian Government noted that evidence from IMCI and TEHIP 'suggests that with training and health systems support, productivity of health workers is improved and the greater burden of disease in under-fives can be addressed cost-effectively.'[1303] Findings from IMCI evaluations demonstrated that: first, after two years, mortality levels were 13% lower in the two TEHIP/IMCI districts compared with control districts, and there was also a significant reduction in stunting. Second, IMCI costs less than conventional care. The cost of under-five care per child was estimated at USD 11.19 in IMCI districts compared with USD 16.09 in non-IMCI districts. Third, children in IMCI districts received more thorough assessments, and were more likely to be correctly diagnosed and to receive appropriate treatment.

Fourth, supportive supervision of health workers was much more common in IMCI districts. Case management of sick children is improved by IMCI training – those caring for sick children were routinely informed of how to look after the children and how to administer medicines. Fifth, improved quality of care provided to children in health facilities with IMCI-trained health workers resulted in greater utilisation of health facilities; in Morogoro Rural and Rufiji districts, the utilization increased from 30% in 1997 to 70% in 2001. Seventh, introduction of a series of practical management, priority-setting tools for19 District Health Management.

j) Drinking Water and Sanitation

Increasing access to improved drinking water is one of the Millennium Development Goals (MDGs) adopted by the United Nations General Assembly in 2002. The source of drinking water 'is important because water-borne diseases, including diarrhoea and dysentery, are prevalent in Tanzania. Sources of water expected to be relatively free of these diseases are piped water, protected wells, and protected springs. Other sources such as unprotected wells, rivers or streams, and ponds, lakes, or dams are more likely to carry disease-causing agents.'[1304]

According to official statistics, the majority of Tanzanian households have access to clean water sources (33 percent from piped water, 13 percent from a protected well and 8 percent from a spring).[1305] However, urban households do get drinking water provided by the authority more than rural ones. Overall, 46 percent of Tanzanian households are less than 30 minutes from a water source and 45 percent take 30 minutes or longer to obtain drinking water.[1306]

Ensuring the availability of adequate sanitation facilities for citizens, particularly children, is one of the Millennium Development Goals (MDGs). Given the importance of this aspect, Tanzania has committed itself and strives to ensure that there are available adequate health and sanitation facilities to its citizens, particularly children. Official data indicate that 13 percent of households in Tanzania use improved toilet facilities

1302 *Ibid*.

1303 *Ibid*, para 154.

1304 *Ibid*, para 185.

1305 *Ibid*, para 186.

1306 *Ibid*, para 187.

that are not shared with other households. In Mainland urban areas, 22 percent of households have improved toilet facilities compared with 9 percent in rural areas. The most common type of non-improved toilet facility is an open pit latrine or one without slabs, used by 71 percent of households in rural areas and 50 percent of households in urban areas. Overall, 14 percent of households have no toilet facility. Most of these households are in rural areas (18 percent).[1307]

However, seven in ten households in Tanzania do not share their toilet facility, 13 percent share with another household, 12 percent share with two to four households, and 5 percent share the facility with five or more households. Although the likelihood of sharing a sanitation facility with one other household in urban and rural households of Mainland Tanzania is the same, urban households are much more likely than rural households to share the facility with two or more households. For example, 28 percent of urban households share the toilet facility with two to four households compared with 6 percent of rural households.[1308]

k) Adolescence Health

In relation to adolescence health, the CROC has urged the Government of Tanzania to undertake a number of measures, including:

(a) undertaking a comprehensive study to assess the nature and the extent of adolescent health problems and, with the full participation of adolescents, use this as a basis to formulate adolescent health policies and programmes with particular focus on the prevention of HIV/AIDS and other sexually transmitted diseases, taking into account the Committee's general comment No. 4 (2003) on adolescent health and development;

(b) strengthening developmental and mental health counselling services, as well as reproductive counselling, and make them known and accessible to adolescents;

(c) ensuring the inclusion of reproductive health education in the school curriculum and fully inform adolescents of reproductive health rights, including the prevention of teenage pregnancies and sexually transmitted diseases, including HIV/AIDS; and

(d) continuing to provide support to pregnant teenagers and ensure the continuation of their education.[1309]

Consistent with the foregoing recommendations, the Tanzanian Government has undertaken a number of measures aimed at ensuring that problems facing adolescents 'deserve greater visibility and attention from policy makers.'[1310] It should be appreciated that Tanzanian youths face a number of threats to their health, including HIV infections. Millions more suffer from sexually transmitted diseases, which can leave young women infertile and stigmatized by their families and communities. Teenage mothers are at

1307 *Ibid*, para 188.

1308 *Ibid*, para 189.

1309 CROC, 'Consideration of Reports Submitted by States Parties under Article 44 of the Convention – Concluding Observations: United Republic of Tanzania', 42nd Session, 21 June 2006 (CRC/C/TZA/CO/2).

1310 United Republic of Tanzania, 'Tanzania 3rd, 4th and 5th Reports on the Implementation of the Convention on the Rights of the Child (CRC) 2005-2011', op. cit, para 190.

a much higher risk of dying of pregnancy-related causes. Increasing young people's knowledge of sexual and reproductive health (SRH) is critically important in its own right. Given the burden of morbidity and mortality among the youth and the greater likelihood of risky behaviours in this population, every effort should be made to facilitate their access to SRH services. At the same time, knowledge alone does not reduce exposure to infection.[1311]

Notably, available empirical evidence points 'to the importance of structural as well as behavioural interventions.'[1312] In this regard, the Tanzanian Government has committed itself to ensure that gender and social morals, poverty and vulnerability that disproportionately impact young women 'must also be addressed.'[1313] According to the Government, the youth population in Tanzania 'is reaching unprecedented levels, and formal educational systems are unable to accommodate the growing demand.'[1314] As a result, 'many young people fail to complete primary education, and access to secondary and higher education is even more limited.'[1315]

Young people, therefore, 'face an uphill battle to gain the skills and experience they need to compete in the job market or make a living through self-employment.'[1316] Consequently, the majority of the youth end up working in the informal sector 'with limited opportunities to earn sufficient income to break out of the poverty cycle. Further investment in education, vocational training and life skills, and in creating meaningful employment opportunities for young people [are] essential to enable them to thrive as tomorrow's earthy, informed, and active citizens.'[1317]

9.2 The Child's Right to an Adequate Standards of Living

It is well-established that the right to an adequate standard of living is recognized as a human right in international human rights law and 'is understood to establish a minimum entitlement to food, clothing and housing at a subsistence level.'[1318] The right to food and the right to housing have been further defined in international human rights instruments. In particular, the right to an adequate standard of living is enshrined in Article 25 of the Universal Declaration of Human Rights (UDHR) and Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). In respect of children's entitlement to the right to an adequate standard of living, Article 27(1) of the CRC is more particular; and it explicitly provides that: 'States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.'

In the context of the CRC, the parent(s) or other persons responsible for the child 'have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.'[1319] States Parties to the CRC are obliged, under Article 27(3), to 'take appropriate measures to assist

1311 *Ibid*.
1312 *Ibid*, para 192.
1313 *Ibid*.
1314 *Ibid*.
1315 *Ibid*.
1316 *Ibid*.
1317 *Ibid*.
1318 http://en.wikipedia.org/wiki/Right_to_an_adequate_standard_of_living (Accessed on 8 May 2013).
1319 Article 27(2) of the CRC.

parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.'[1320] However, this obligation is to be undertaken 'in accordance with national conditions and within [the States Parties'] means.'[1321]

The CRC further obliges States Parties to take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad.[1322] In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties 'shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.'[1323] This is geared towards ensuring that the child's right to adequate standard of living is guaranteed through adequate provision of maintenance by parents or other persons responsible for the child, even where they do not reside in the same country.

It has been argued that the most significant inspiration for the inclusion of the right to an adequate standard of living in the foregoing international human rights instruments 'was the Four Freedoms speech by US President Franklin Roosevelt, which declared amongst others the freedom from want.'[1324] In this context, fulfilment of the right to an adequate standard of living 'depends on a number of other economic, social and cultural rights, including the right to property, the right to work, the right to education and the right to social security.'[1325]

Therefore, in order for States Parties to the CRC to guarantee the child's realisation of his or her right to an adequate standard of living, it is imperative for them to adopt and implement constitutional and statutory provisions as well as to formulate policies and develop programmes to guarantee to their children a basic standard of living. This is essentially achieved through creating a conducive environment that can create a basic income level to enable all citizens, particularly children, to meet basic needs such as food, housing and shelter. Therefore, in the discussion below we analyze the extent to which the three common law East African countries under this study have guaranteed the child's right to an adequate standard of living in the context of the foregoing international human rights law.

1320 The UN Committee on Economic, Social and Cultural Rights has provided a comprehensive clarification and interpretation of the right to adequate housing in its General Comment No. 4 on the Right to Adequate Housing. The General Comment has identified seven aspects that determine "adequacy": (i) legal security of tenure including legal protection against forced eviction; (ii) availability of services, materials, facilities and infrastructure; (iii) affordability; (iv) habitability; (v) accessibility for disadvantaged groups; (vi) location; and (vii) cultural adequacy. Basing on, and inspired by, this broad interpretation, Michael Freeman defines the right to adequate housing as: 'the right of every woman, man, child and youth to gain and sustain a secure home and community in which to live in peace and dignity.' *See* Freeman, M., 'The Right to Adequate Housing', in Smith, R.K.M. and C. van den Anker (Editions), *The Essentials of Human Rights* New York: Oxford University Press, 2005, pp. 154-6, p. 155.

1321 *Ibid*.

1322 Article 27(4) of the CRC.

1323 *Ibid*.

1324 http://en.wikipedia.org/wiki/Right_to_an_adequate_standard_of_living (Accessed on 8 May 2013).

1325 *Ibid*.

9.2.1 Realisation of the Child's Right to an Adequate Standard of Living in Uganda

Consistent with the provisions of Article 27 of the CRC and other relevant international human rights instruments, the Ugandan Government strives to ensure that its children do realise their right to an adequate standard of living. This is undertaken through a number of measures. To start with, the Ugandan Government has identified poverty 'as the main constraint to development and the improvement of the quality of life of the population in general and the vulnerable groups such as children in particular as a priority.'[1326] In order to ensure that every Ugandan, including a child, enjoys his or her right to an adequate standard of living, the Government has prepared and is implementing the Vision 2025 Strategy and the Poverty Eradication Action Plan 1997-2017 (PEAP) as analyzed below.

(a) Vision 2025

Vision 2025[1327] is a strategic framework for national development that 'outlines the national aspirations in the long term and provides the context in which shorter-term plans are drawn up.'[1328] It envisions to have a Uganda which is prosperous, harmonious and beautiful, popularly stated as: "Prosperous People, Harmonious Nation, Beautiful Country". The national aspirations for Uganda's future development are to:

(i) attain high and sustainable economic growth in a competitive global environment, with export diversification and competitiveness as critical factors;

(ii) evolve a society that is healthy and well educated, with a high quality of life;

(iii) achieve sustainable socio-economic development that ensures environmental quality and the resilience of the ecosystem; and

(iv) establish fully decentralized and democratic governance at all levels, and a peaceful and secure country with a united, patriotic and nationalistic people.

b) The Poverty Eradication Action Plan (1997-2017)

The Poverty Eradication Action Plan (PEAP) is the principal guide for all developmental activities of the central and local governments in the medium term.[1329] Both the PEAP and Vision 2025 'set out the commitment of Government to reduce the incidence of absolute poverty from 44 per cent to 10 per cent and relative poverty to 30 per cent of the total population by the year 2017.'[1330] The priority social sector interventions of the PEAP that 'directly address the needs of children are primary education, primary health care and rural water supply and sanitation. The 1997 PEAP is currently being revised into the 2000 PEAP.'[1331]

1326 Republic of Uganda, 'Second Periodic Report of States Parties Due in 1997: Uganda', 5 November 2004 (CRC/C/65/Add.33), para 168.

1327 The process of developing Vision 2025 began in May 1997 and was concluded in February 1999.

1328 Republic of Uganda, 'Second Periodic Report of States Parties Due in 1997: Uganda', op. cit, para 169.

1329 *Ibid*, para 170.

1330 *Ibid*.

1331 *Ibid*.

9.2.2 Realisation of the Child's Right to an Adequate Standard of Living in Kenya

In its previous Concluding Observations, the CROC reiterated its previous recommendation[1332] urging the Kenyan Government, in accordance with Article 27 of the CRC, to reinforce its efforts to provide support and material assistance to marginalized and disadvantaged families and to guarantee the right of children to an adequate standard of living. The CROC also urged the Kenyan Government to pay particular attention to the rights and needs of children in the implementation of the Poverty Eradication Plan; the Poverty Reduction Strategy; the Constituency Development Fund (CDF) under the CDF Act (2003); the Local Authorities Transfer Fund (LATF); the Local Authority Service Delivery Action Plan (LASDAP); and all other programmes intended to improve the standard of living in the country, including coordinated efforts with civil society and local communities.

The CROC, therefore, recommended that the Kenyan Government should, taking into account General Comment No. 7 on Implementing Child Rights in Early Childhood,[1333] urgently develop a comprehensive social protection framework, giving the highest priority to the most vulnerable children, particularly children belonging to disadvantaged families, rural communities, orphans, children infected with HIV and/or affected by HIV/AIDS, children with disabilities and street children.

Consistent with the provisions of Article 27 of the CRC and other relevant international human rights instruments as well as in compliance with the foregoing recommendations, the Kenyan Government has undertaken a number of follow up actions. Some of these measures are discussed below.

a) Cash Transfer and Other Income-generating Measures

The Social Protection Policy has been developed and applied in 60 districts already participating in Cash Transfer. The Social Protection Programmes for OVC are implemented through the Ministry of Gender, Children and Social Development. The Cash Transfer Programme now serves 134,000 households as of 2010 across the country.[1334] In addition, through the devolved fund, such as CDF, LASDAP/LATF and the private sector such as banks, 'poor and bright children get education bursary for their secondary education.'[1335] The Kenyan Government has also established the Youth Enterprise Development Fund 'as a vehicle to enhance youth socio-economic empowerment.'[1336]

In order to empower the youth to be self-reliant, the Government has designated KShs 15 billion for the "*Kazi Kwa Vijana*" (i.e. jobs for the youth) programme 'to create three hundred thousand (300,000) jobs for the youth in urban and rural

1332 CRC/C/15/Add.160, para 5.

1333 CROC, 'General Comment No. 7 on Implementing Child Rights in Early Childhood' (CRC/C/GC/7/Rev.1), para 26.

1334 Republic of Kenya, '3rd, 4th and 5th State Party Report to the UNCRC Committee – Geneva 2005-2011', op. cit, para 260.

1335 *Ibid*, para 261.

1336 *Ibid*, para 262.

communities.'[1337] This initiative 'is aimed at addressing goal number one of the MDG to eradicate extreme poverty and hence improve the status of vulnerable children.'[1338]

b) Comprehensive National Programmes to Enhance Survival and Development and an Adequate Standard of Living for Children

With reference to Article 6 of the CRC (on survival and development of the child), the Kenyan Government has developed and adopted the Child Survival and Development Strategy (2008-2015), 'which provides a framework for progressive realization of child survival. Over time the national immunization program has added more antigens which include pneumococcal vaccine to the national immunization schedule.'[1339] The Government has also 'instituted Safety Standards incorporated within the National Schools Health Guidelines of 2009.'[1340]

Regarding improving the child's standards of living in the context of Article 27 of the CRC, indicators for improved standards of living and good health are access to improved sanitation, access to safe water and good housing, disposable income and education. In this regard, the Government has embarked on undertaking the following measures:

(i) The Kenya Slum Upgrading Programme (KENSUP)

In order to improve the living standards of children living in slums, the Kenyan Government is currently implementing 38 slum upgrading projects in Nairobi, Kisumu and Mombasa which house approximately 2 million slum dwellers.[1341] The programme has developed 1,800 decanting houses to create space for development of decent shelters within Kibera informal settlement, and over 600 dwellers were recently relocated to the decanting houses.[1342]

Through this initiative, a unit has been set up for promotion of use of low cost building technologies, 'where building technology centres will be built and operationalised in all the 210 constituencies. To date, 37 centres have been established. Informal settlements throughout the country are expected to benefit from these centres in terms of putting up durable low cost housing.'[1343] As a result:

> A number of slum residents have been given security of tenure through registration and issuance of title deeds to residents of the informal settlements, which has resulted into development of more durable decent shelters in urban centres such as Kakamega, Embu and Nairobi. In 2006/07, a total of 128, 232 title deeds were issued in one informal settlement, while in 2007/08, 166,296[1344] title deeds were issued in five informal settlements.[1345]

1337 *Ibid*, para 263.

1338 *Ibid*.

1339 *Ibid*, para 264.

1340 *Ibid*.

1341 *Ibid*, para 284.

1342 Ministry of State for Planning, National Development and Vision 2030, June 2010; and Millennium Development Goals, *Status Report for Kenya*, 2009. p. 44.

1343 Republic of Kenya, '3rd, 4th and 5th State Party Report to the UNCRC Committee – Geneva 2005-2011', op. cit, para 285.

1344 *Ibid*, para 286. See also Millennium Development Goals, *Status Report for Kenya*, op. cit.

1345 Ministry of State for Planning, National Development and Vision 2030, June 2010; and Millennium Development Goals, *Status Report for Kenya*, op. cit, p. 44.

In addition, the Kenyan Government has also put in place housing incentives to encourage developers to construct low cost housing.[1346] A comprehensive Housing Bill 'to provide legal basis for regulation, coordination, guidance, monitoring and evaluation of housing and human settlement including a building code to regulate planning and construction.'[1347]

(ii) Hand Washing

In order to enhance hand washing for children, the Kenya Government brought together 18,035 children drawn from various primary schools and a total of 1,300 adults in a hand washing drive held on 15 October 2010.[1348] The project's goal 'is to sensitize children on the importance of hand washing at critical times to avoid various infections.'[1349] The Kenyan Government has conceded that, although this initiative has been very successful in teaching children the importance of hand washing, 'some of the children involved complained of limited water supplies at home.'[1350]

9.2.3 Realisation of the Child's Right to an Adequate Standard of Living in Tanzania

Consistent with the provisions of Article 27 of the CRC, Tanzania has enacted the Law of the Child Act and adopted MKUKUTA, which strategize matters relating to child survival and development, aiming at improving quality of life and their social wellbeing. Likewise, the two strategies strive to ensure food and nutrition security and promoting issues relating to human rights, national and personal security. There is a notable progress in child survival in relation to access to health services, nutrition and HIV that has been achieved over the last decade; the targets for reduction in infant and under-five mortality in MKUKUTA and MKUZA as well as MDGs. Preventive measures such as vaccination, vitamin supplementation campaigns and malaria control have contributed to such progress.[1351]

The State Party's socio-economic development is premised around two different long-term development goals: the Tanzania Development Vision (popularly known as Vision 2025) for Tanzania Mainland, which strives to eradicate poverty by 2025; and the Zanzibar Development Strategy (Vision 2020), which aspires to eradicate poverty in Zanzibar by 2020. The Tanzanian economy is also framed in support of the implementation of the Millennium Development Goals (MDGs), which aim, *inter alia*, at enabling developing countries to work in partnership towards the eradication of poverty throughout the world.[1352] Both Tanzania Mainland and Zanzibar implement respectively Vision 2025 and Vision 2020 together with the MDGs through a number of strategies, including the second National Strategy for Growth and Reduction of

1346 Republic of Kenya, '3rd, 4th and 5th State Party Report to the UNCRC Committee – Geneva 2005-2011', op. cit, para 286.

1347 *Ibid*, para 287.

1348 This was done through the sponsorship by Lifebuoy in partnership with Ecotact. *Ibid*, para 288.

1349 *Ibid*.

1350 *Ibid*.

1351 REPOA, et al, *Childhood Poverty in Tanzania: Deprivation and Disparities in Child Wellbeing*. DJPA Partnership (Africa) Ltd, 2009, p. 23-27.

1352 Legal and Human Rights Centre and Zanzibar Legal Services Centre, *Tanzania Human Rights Report* 2010, op. cit., p. 29.

Poverty (NSGRP II or MKUKUTA[1353] II) for Tanzania Mainland and Mkakati wa Kukuza Uchumi Zanzibar (MKUZA).

(a) MKUKUTA

The second National Strategy for Growth and Reduction of Poverty (NSGRP II or MKUKUTA II) is a continuation of the government and national commitments to accelerate economic growth and fighting poverty. This is a result- and MDG-based strategy adopted to sustain and scale up achievements as well as addressing the challenges to growth and poverty reduction agenda. It is, thus, an organizing framework to rally national efforts for the next 5 years (2010/11 – 2014/15) in accelerating poverty-reducing growth by pursuing pro-poor intervention and addressing implementation bottlenecks. The strategy emphasizes on the following key outcomes:

(i) focused and sharper prioritization of interventions – projects and programmes – in key priority growth and poverty reduction sectors;

(ii) strengthening evidence-based planning and resource allocation in the same priority interventions;

(iii) aligning strategic plans of MDAs and LGAs to this strategy;

(iv) strengthening government's and national implementation capacity;

(v) scaling up the role and participation of the private sector in priority areas of growth and poverty reduction;

(vi) improving human resources capacity, in terms of skills, knowledge, and efficient deployment;

(vii) fostering changes in mind-set toward hard work, patriotism, and self-reliance;

(viii) mainstreaming cross cutting issues in MDAs and LGAs processes;

(ix) strengthening the monitoring and reporting systems; and

(x) better implementation of core reforms, including paying strong attention to further improvement of public financial management systems.

The economy in Tanzania Mainland depends heavily on agriculture that accounts for more than 50% of the GDP. It also contributes to 80% of exports and employs about 80% of the workforce.[1354] In 2009 the Tanzanian Government introduced the agricultural improvement/revolutionary programme, popularly known in its Kiswahili description as *Kilimo Kwanza*. This ambitious programme strives to transform agriculture into the modern one. Through the *Kilimo Kwanza* Programme, the Government aims at achieving maximum productivity in agriculture through the following pillars:

(i) political will to support and put on the political agenda the agricultural transformation;

(ii) enhanced financing for agriculture;

1353 MKUKUTA is an abbreviation of Swahili words: *Mkakati wa Kukuza Uchumi na Kuunguza Umaskini Tanzania*.

1354 United Republic of Tanzania, *Participatory Agricultural Development and Empowerment Project (PADEP): Resettlement Policy Framework* Dar es Salaam: Ministry of Agriculture and Food Security, 2003. p. 1.

(iii) institutional reorganization and management of agriculture;

(iv) paradigm shift to strategic agricultural production;

(v) availability of land for agriculture;

(vi) incentives to stimulate investments in agriculture;

(vii) industrialization for agricultural transformation;

(viii) science, technology and human resources to support agricultural transformation;

(ix) infrastructure development to support agricultural transformation; and

(x) mobilization of Tanzanians to support and participate in the implementation of the *Kilimo Kwanza* Programme.

Tanzania Mainland also depends to a lower extent on the industrial sector, which accounts for 10% of the national GDP. This is due to a number of challenges facing this sector, common amongst which being inadequacy electricity supply in the country. According to a speech made in Parliament by the Minister for Finance and Economic Planning in June 2010, rural electrification in Tanzania Mainland is only 20% and in urban areas it is only 14%.[1355] This situation is compounded by the fact that the country's electricity generation depends on hydropower; and with the rampant short supply of rainfall in the country, this has proved to be problematic.

Tanzania recorded an increase in the real GDP growth rate to 6.5% in 2010 from 6.0% in 2009. This was the case even though Tanzania was recovering its economy from the global economic meltdown that has adversely affected the world economic order. An overall real GDP growth rate in the period under report has averaged 7% per year on strong gold production and tourism.[1356]

(b) Poverty Profile

(i) Income Poverty and Challenges of Income Distribution

During the last ten years, Tanzania's GDP growth rate has been impressive. However, between 2000/01 and 2007 the incidence of income poverty did not change significantly. The incidence of income poverty shows that out of every 100 Tanzanians, 36 were poor in 2000/01 compared to 34 in 2007. Income poverty (basic needs and food poverty) was also variable across geographical areas, with the rural areas containing 83.4 percent of the poor in 2007 compared to 87 percent in 2000/01. Households engaged in farming, livestock keeping, fishing, and forestry, were the poorest. Rural growth per annum in the period, as proxy by growth of the agricultural sector was about 4.5 percent. When this growth is contrasted with the national population growth rate of 2.9 percent the change in rural per capita income becomes small, thus perpetuating the poverty situation in rural areas.

1355 *See* Speech of Parliament by the Minister for Finance and Economic Planning, Hon. Mustafa Haidi Mkulo (MP), presenting before Parliament 'The State of National Economy Report for 2009 and Plans for 2010/2011 – 2012/2013' in Dodoma, June 2010. p. 6.

1356 Available at http://www.theodora.com/wfbcurrent/tanzania/tanzania_economy.html (Accessed on 27 April 2013).

Table 1. Incidence of Poverty in Tanzania (Poverty Head Count Index)

Incidence of poverty					
	Year	**Dar es Salaam**	**Other Urban Areas**	**Rural Areas**	**Mainland Tanzania**
Food					
	2000/01	7.5	13.2	20.4	18.7
	2007	7.4	12.9	18.4	16.6
Basic Needs					
	2000/01	17.6	25.8	38.7	35.7
	2007	16.4	24.1	37.6	33.6

Source: National Bureau of Statistics, Household Budget Survey 2000/01 and 2007.

Chapter Ten

The Child's Enjoyment of Socio-Economic Rights: The Rights to Education, Leisure, Recreation and Cultural Activities

10.0 The Scope and Dimension of the Right to Education

Under international law, the right to education is one of the most indispensable rights for the upbringing and development of children to be able to reach their full potential and assume their respective and rightful place in society as responsible and productive adults. In its General Comment No. 13 (On the Right to Education), the United Nations Committee on Economic, Social and Cultural Rights points out that education is 'both a human right in itself and an indispensable means of realizing other human rights.'[1357] It has been argued that:

> For children, education provides a unique space where they can play in order to learn about life, be less burdened by household tasks, and entirely free from child labour. Education also empowers traditionally marginalized groups like women, minorities, rural populations and the poorest members of society to break the cycle of poverty and oppression.[1358]

This is why UNESCO has pointed out that free and compulsory primary and secondary education is one of the fundamental pillars of sustainable development.[1359] Access to quality education is an important component of early child development (ECD). Article 11(2) of the ACRWC expressly stipulates, *inter alia*, that education of the child should be directed towards the preservation and strengthening of positive African morals, traditional values and cultures.

10.1 The Purpose of Education

The child's right to education is specifically guaranteed under Article 11 of the ACRWC and Article 28 of the CRC. Article 11(1) of the ACRWC explicitly provides that: 'Every child shall have the right to an education.' It has been contended that education 'is not just about learning facts.'[1360] In terms of sub-article 2 of the ACRWC, education of the child shall be directed to:

(a) the promotion and development of the child's personality, talents and mental and physical abilities to their fullest potential;

(b) fostering respect for human rights and fundamental freedoms with particular reference to those set out in the provisions of various African instruments on human and peoples' rights and international human rights declarations and conventions;

1357 United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 13 on the right to education. Available at http://www2.ohchr.org/english/bodies/cescr/comments.htm (Accessed on 11 May 2013).

1358 Amnesty International, *Haki Zetu – ESC Rights in Practice: The Right to Education* Amsterdam: Amnesty International Special Programme on Africa/ActionAid – Right to Education Project, 2012, p. 9.

1359 UNESCO, *Draft International Implementation Scheme for United Nations Decade for Sustainable Development 2005-2014* Paris: UNESCO, 2005, p. 14.

1360 Amnesty International, op. cit, p. 16.

(c) the preservation and strengthening of positive African morals, traditional values and cultures;

(d) the preparation of the child for responsible life in a free society, in the spirit of understanding tolerance, dialogue, mutual respect and friendship among all peoples ethnic, tribal and religious groups;

(e) the preservation of national independence and territorial integrity;

(f) the promotion and achievements of African Unity and Solidarity;

(g) the development of respect for the environment and natural resources;

(h) the promotion of the child's understanding of primary health care.

In addition, Article 13 of the ICESCR sets out four purposes of education, which are:

(a) Education should lead to the full development of the human personality and the sense of its dignity;

(b) Education should strengthen respect for human rights and fundamental freedoms;

(c) Education should enable everyone to participate effectively in a free society; and

(d) Education should promote human rights, equality and non-discrimination and peace through understanding, tolerance, respect and friendship among all nations and all ethnic or religious groups.

Therefore, it is important that adequate investment in education is made by governments in order to ensure that all children go to school; that the quality of education they receive is improved; and that opportunities for secondary, technical and higher levels of education are improved.[1361]

10.2 State Obligation to Ensure the Child's Realization of the Right to Education

Under international human rights law, States Parties to all international human rights treaties that guarantee the right to education have the obligation to respect, protect and fulfil the right to education. The fulfilment of this obligation necessarily entails making education available, accessible, acceptable and adaptable.[1362] Amnesty International has summarized the obligation on States Parties to respect, protect and fulfil the right to education as set out below:

> The *obligation to respect* the right to education entails that governments must: first, refrain from any action, such as unnecessarily closing a school, that prevents the enjoyment of the right to education; second, allow private schools to open and ensure that they conform to human rights standards relating to education; and, third, recognize the rights of parents, teachers and learners in education, including their rights to question and challenge the school curriculum, textbooks, methods of instruction, and rules for school discipline or the way the rules are applied (i.e. freedom in education).[1363]

1361 Leach, V., Children and Vulnerability in Tanzania: A Brief Synthesis Dar es Salaam: Research on Poverty Alleviation/UNICEF, 2007, p. 15.

1362 Amnesty International, op. cit, p. 44.

1363 *Ibid*, p. 44.

The *obligation to protect* the right to education entails that governments must: first, ensure that families or others do not keep girls or children with disabilities out of school; second, ensure that families are not dependent on child labour; third, forbid and end discriminatory practices in State and private education institutions; fourth, stop the use of corporal punishment in schools; and, fifth, ensure that education facilities, learners and teachers are protected from violence or intimidation.[1364]

The *obligation to fulfil* the right to education requires governments to: first, take positive measures that enable individuals and communities to enjoy the right to education; second, provide free and compulsory primary education for all; third, make secondary and higher education affordable and take steps to make it free; fourth, establish sufficient teacher training colleges, schools and other educational institutions; fifth, hire trained and qualified teachers; ensure that gender is taken into account in programmes and curricula; sixth, enforce minimum standards of health and safety; and, seventh, allocate the maximum available resources.[1365]

The ACRWC obliges States Parties to take all appropriate measures with a view to achieving the full realization of the child's right to education.[1366] In particular States Parties are obliged to:

(a) provide free and compulsory basic education;

(b) encourage the development of secondary education in its different forms and to progressively make it free and accessible to all;

(c) make higher education accessible to all on the basis of capacity and ability by every appropriate means;

(d) take measures to encourage regular attendance at schools and the reduction of drop-out rates; and

(e) take special measures in respect of female, gifted and disadvantaged children, to ensure equal access to education for all sections of the community.

States Parties to the ACRWC are also obliged to 'respect the rights and duties of parents, and where applicable, of legal guardians to choose for their children's schools, other than those established by public authorities, which conform to such minimum standards as may be approved by the State, to ensure the religious and moral education of the child in a manner with the evolving capacities of the child.'[1367] In addition, States Parties to the ACRWC have the duty to 'take all appropriate measures to ensure that a child who is subjected to schools or parental discipline shall be treated with humanity and with respect for the inherent dignity of the child and in conformity with the present Charter.'[1368]

1364 *Ibid*, pp. 44 & 45.

1365 *Ibid*, p. 45.

1366 Article 11(3) of the ACRWC. The obligation to take measures or steps to ensure the child realizes his or her right to education is 'an immediate obligation and it requires States to make plans and pass any necessary laws. The State must then allocate the maximum possible resources for carrying out the plans progressively.' Amnesty International, op. cit.

1367 *Ibid*, Article 11(4).

1368 *Ibid*, Article 11(5). In a similar tone, Article 28(2) of the CRC provides explicitly that: 'States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.' See also *Zakaria Kamwela and 126 others v The Minister of Education and Vocational Training and AG* Court of Appeal of Tanzania at Dar es Salaam, Civil Appeal No. 3 of 2012 (Unreported).

In a very progressive tone, the ACRWC obliged States Parties to undertake 'all appropriate measures to ensure that children who become pregnant before completing their education shall have an opportunity to continue with their education on the basis of their individual ability.'[1369]

On its part, Article 28(1) of the CRC expressly provides that States Parties 'recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity.' In particular, States Parties are obliged to:

(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;

(c) make higher education accessible to all on the basis of capacity by every appropriate means;

(d) make educational and vocational information and guidance available and accessible to all children; and

(e) take measures to encourage regular attendance at schools and the reduction of drop-out rates.[1370]

In addition, Article 28(3) of the CRC requires States Parties to promote and encourage international cooperation in matters relating to education, in particular 'with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.'

10.3 The Link Between the Right to Education and Other Human Rights

It is a well-established principle of international human rights law that all human rights are interdependent. It is basing on this principle that there is a great linkage between the right to education and other rights. As Amnesty International points out, in addition to being a right in itself, 'education is an "enabling" right. It "enables" or allows people to obtain the information, skills and confidence to claim other rights and to live a more dignified life.'[1371] Amnesty International provides an example of this linkage by elaborating that, through education, people are enabled to:

- participate in democratic governance;

1369 *Ibid*, Article 11(6). Under sub Article (7) of Article 11 of the ACRWC it is provided that: 'No part of this Article shall be construed as to interfere with the liberty of individuals and bodies to establish and direct educational institutions subject to the observance of the principles set out in paragraph 1 of this Article and the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the States.'

1370 Article 28(1) of the CRC.

1371 Amnesty International, *Haki Zetu – ESC Rights in Practice: The Right to Educatio*n, op. cit, p. 17.

- become more respectful of the rights of others (non-discrimination); and
- have better access to jobs and other opportunities for earning a decent living, to health care and other rights.[1372]

Viewed in this context, education provides people 'with knowledge and skills (reading, writing, calculating, expressing one's views, problem solving, gender-awareness) that contribute to autonomy, empowerment and self-consciousness.'[1373] According to the Committee on Economic, Social and Cultural Rights General Comment No. 13, education enables everyone to 'participate effectively in a free society' and 'promote understanding, tolerance, and friendship' amongst different groups and societies. Therefore, education is related to and dependent upon other rights. As such, one can only realize the right to education if one has access to other rights – the right to housing, the right to food, the right to health, the right to water and sanitation, the right not to be discriminated, the right to survival and development/livelihood, the right to participate, the right to enjoy one's culture and language, freedom of religion, etc.[1374]

10.4 Salient Features of the Right to Education

Four salient features pertaining to the right to education have been advanced by the Committee on Economic, Social and Cultural Rights General Comment No. 13: availability, accessibility, acceptability, and adaptability. These salient features – labelled as 4As – are summarized by Amnesty International as follows:

- ***Availability*** – education must be free, and there must be a sufficient number of educational institutions and trained teachers, as well as education materials, so that education is available to all;
- ***Accessibility*** – the institutions and programmes must be:
  - Accessible to all, without discrimination, including marginalized groups;
  - Physically accessible within a safe and reasonable distance and accessible to those with disabilities; and
  - Accessible in terms of cost: primary education must be free for all, whereas secondary and higher education must be affordable and progressively made free;
- ***Acceptability*** – the content of education and the way it is delivered, must be relevant, acceptable for all, including minorities, and of good quality; and
- ***Adaptability*** – education must be flexible and able to respond to the needs of students in different social and cultural settings. This includes those with learning difficulties as well as gifted children.[1375]

1372 *Ibid*.

1373 *Ibid*, pp. 17, 19.

1374 *Ibid*, p. 18.

1375 *Ibid*, pp. 19-20.

In addition, paragraph 7 of the Committee on Economic, Social and Cultural Rights General Comment No. 13 clearly stipulates that States must ensure, with regard to each of the 4As, that 'the best interests of the student shall be a primary consideration.' It should be noted that, in practice, the 4As are interlinked and cannot be implemented in isolation.

Goal Two of the Millennium Development Goals (MDGs) enshrines the principle that by the year 2015, 'children everywhere – boys and girls alike – should complete a full course of primary schooling.'[1376] To measure progress toward achievement of this goal, three indicators were chosen: (i) the Net Enrollment Ratio (NER), (ii) the proportion of pupils starting Grade One who reach the last grade of primary education, and (iii) the literacy rate of the youth aged 15–24.

10.5 Main Violations of the Right to Education

The duty to uphold, respect, protect and fulfil the right to education is bestowed on States Parties, failure to undertake which amounts to violation of the right. This necessarily entails that violation of the right to education occurs 'when a government, either deliberately or through neglect, fails to carry out its human rights obligations.'[1377] Amnesty International provides a number of instances in which a government may be taken to have violated the right to education, as set out below:

(i) Failing to make primary education free and compulsory for all children of primary school-age;

(ii) Not taking deliberate, concrete and targeted steps towards providing secondary, vocational and higher education;

(iii) Providing schools and education services for privileged sections of the population and not prioritising those with no or little access;

(iv) Not ensuring that private educational institutions conform to minimum educational standards;

(v) Ignoring the need to increase the enrolment of girls;

(vi) Not providing schools with enough textbooks and other necessary supplies;

(vii) Failing to provide good training for teachers or to pay them adequate salaries;

(viii) Making no efforts to ensure that literacy programmes are available to illiterate people;

(ix) Doing nothing to ensure that secondary and higher education is affordable;

(x) Failing to provide technical and vocational education for people who need to improve their work skills; or

(xi) Allowing discrimination, for example, by excluding children who cannot produce a birth certificate.[1378]

1376 Tamusuza, A., 'Leaving School Early: The Quest for Universal Primary Education in Uganda' *Journal Statistique Africain*, numéro 110 13, novembre 2011.

1377 *Ibid*, p. 20.

1378 *Ibid*, p. 21.

10.6 The Situation of Education in Sub-Saharan Africa

Although the right to education has been enshrined in many Constitutions and enacted in many laws in Sub-Saharan Africa consistent with international human rights law, education 'remains out of reach for millions of children.'[1379] Data indicate that in Sub-Saharan Africa the percentage of children in primary school increased at an average of 56% in 1999 to 73% in 2007. Although this is seen as a significant increase, 'it means that one in four children in Sub-Saharan Africa still does not go to school – a total of 32 million primary school-age children.'[1380] In fact, this is almost half (45%) of the global out-of-school population.[1381] The significant number of out-of-school children are girls. UNICEF estimates that while 19% of boys in Sub-Saharan Africa do not go to primary school, 'an even higher percentage of girls (23%) are enrolled.'[1382]

In addition, the quality of education in Sub-Saharan Africa 'is not always of good standard.'[1383] As a result of the socio-economic developments in the 1980s and mid-1990s, there were unprecedented overcrowding in schools, lowering of teacher qualifications and salaries, and inadequate teaching and learning materials in schools across the continent.[1384] It should be noted that, as a result of the introduction of the World Bank-sponsored structural adjustment programmes (SAPs) in the 1980s, school fees were introduced in all public schools across Sub-Saharan Africa. The school fees were only eliminated in the mid-1990s as a result of campaigning by development agencies.[1385]

The consequences of overcrowding and lowering of standards of teaching in Sub-Saharan African countries have resulted in an unprecedented increase in the situation where teachers have to deal with an average of 45 children per class; and in some cases the number has reached a record 70 to 100 per class.[1386] The gross outcome of this deteriorating state of education in Sub-Saharan Africa is yet another unprecedented phenomenon: 'many students who complete their education do so without learning how to read and write properly.'[1387]

Another factor hampering education in Sub-Saharan Africa is lack of investment in education, 'partly due to a lack of understanding of the long-term benefits that education brings to the individual and society.'[1388] This situation is in defiance of the commitment made in the 2000 global framework (*Dakar Declaration on Education for All*),[1389] where about 164 governments from across the world 'reaffirmed their resolve

1379 *Ibid*, p. 12.

1380 *Ibid*.

1381 *Ibid*.

1382 *Ibid*. See also UNICEF, *State of the World's Children 2011*, Table 5.

1383 Amnesty International, *Haki Zetu – ESC Rights in Practice: The Right to Education*, op. cit, p. 13.

1384 *Ibid*.

1385 See, for instance, World Bank and UNICEF, *Abolishing School Fees in Africa: Lessons from Ethiopia, Ghana, Kenya, Malawi, and Mozambique* (2009). Available online at www.unicef.org/publications/files/Abolishing_School_Fees_in_Africa.pdf (Accessed on 12 May 2013).

1386 The pupil-teacher ratio tables in Sub-Saharan Africa are set out in www.uis.unesco.org/Education/pages/teachers-statistics.aspx (Accessed on 12 May 2013).

1387 Amnesty International, *Haki Zetu – ESC Rights in Practice: The Right to Education*, op. cit, p. 13.

1388 *Ibid*.

1389 The Dakar Declaration on Education for All was adopted by 164 governments at the World Education Forum held in Dakar, Senegal, in 2000.

to expand learning opportunities for every child, young person and adult.'[1390] The Declaration categorically stipulates that governments should allocate at least 7% of their GDP to education by 2005 and eventually raise it to 9% by 2010.[1391] The Declaration's core goals include ensuring that by 2015 all children (particularly girls, children in difficult circumstances and those belonging to ethnic minorities) have access to complete, free and compulsory primary education of good quality. However, only six of the current 54 African countries members of the African Union have attained the 9% target. In the rest of the African States, the average spending on education is still 4% of the GDP.[1392]

10.7 Realisation of the Child's Right to Education in East Africa

Consistent with international human rights law, all the three common law East African countries considered in this book have undertaken constitutional, policy, legislative, judicial and administrative measures to domesticate the child's right to education, as considered below.

10.7.1 Realisation of the Child's Right to Education in Uganda

In the succeeding part, we examine the extent to which Uganda has domesticated and implemented the child's right to education. Measures that the Government of Uganda has undertaken to ensure that the child in Uganda realises his or her right to education are constitutional, policy, legislative, judicial and administrative in nature.

(a) Constitutional and Statutory Guarantees of the Right to Education

Uganda has enshrined the right to education in its 1995 Constitution, which stipulates in Article 30, that: 'All persons have a right to education.' Article 23(i) provides that the State 'shall promote free and compulsory education.' In addition, Objective XVIII of the National Objectives and Directive Principles of State Policy,[1393] which are supposed to help the Courts in Uganda to interpret the Constitution, *inter alia*, states as follows:

(i) The State shall take appropriate measures to afford every citizen equal opportunity to attain the highest educational standard possible.

(ii) Individuals, religious bodies and other non-governmental organizations shall be free to found and operate educational institutions if they comply with the general educational policy of the country and maintain national standards.

The Education Act (2008) recognizes pre-primary education as the first level of education in Uganda. It is also listed by the Ministry of Education and Sports 'as a key policy priority.'[1394]

1390 Africa Wide Movement for Children, *An Africa Fit for Children: Progress and Challenges* Kampala: Africa Wide Movement for Children, 2012, p. 37.

1391 *Ibid*.

1392 African Child Policy Forum, 'Political Commitment for Children's Rights: Global and African promises', *The African Report on Child Wellbeing 2011* Addis Ababa: The African Child Policy Forum, 2010, p. 2.

1393 This Objective was considered by the Ugandan Supreme Court in *Sharon and others v Makerere University* [2012] 1 EA 394, at p. 428.

1394 Africa Wide Movement for Children, *An Africa Fit for Children: Progress and Challenges*, op. cit, p. 39.

(b) Administrative and Programmatic Measures Promoting the Child's Right to Education

Consistent with the provisions of the ACRWC and the CRC, the Ugandan Government 'is committed to the fulfilment of the right to education and learning of the children of Uganda.'[1395] Uganda's endeavours to improve its education system in the context of the ACRWC and the CRC predates the UN MDG Conference that was held in 2000 and whose Goal Two requires Governments to take initiatives to scale up the Net Enrollment Ratio (NER); to increase the proportion of pupils starting Grade One who reach the last grade of primary education, and to increase the literacy rate of the youth aged 15–24.

One of such endeavours is the introduction of tuition-free primary education in 1997.[1396] Over the years, the programme has been "hugely successful" in a number of areas: 'in increasing access to education, especially for the poor; removing bias toward girls; improving school infrastructure; and in increasing budgetary allocation to the education sector.'[1397] However, there are several challenges remaining: 'notably, to attain universal enrollment and low primary school completion rates.'[1398]

Currently, the Ugandan education system is a four-tier, consisting of primary, secondary, vocational, and tertiary levels. It entails seven years of primary education, officially for pupils aged 6–12 years, followed by six years of secondary education. Data indicate that:

> In 2010, 22% of the population aged 6–12 attended primary school. There are seven grades of primary education, referred to as Primary 1 through Primary 7, abbreviated as P1, P2, P3, P4, P5, P6, and P7. As of 2010, there were about 16,000 primary schools in the country, and approximately 75% of these were government owned, that is, by the Ministry of Education and Sports (MOES 2008a). At the end of P7, students sit terminal exams, and depending on their academic performance, they may proceed to secondary or vocational education.[1399]

This trend verifies the Ugandan Government's commitment to ensure that every child in its jurisdiction enjoys his or her rights to education equally and adequately.

(i) Universal Primary Education (UPE) System

In 1987 an Education Policy Review Commission was inaugurated 'to review all sectors of education in the country (MOES, 1998).'[1400] After undertaking an extensive consultation with the stakeholders, the Commission conceived the idea of universal primary education (UPE), recognizing that: 'only when every child is enrolled at the right age and does not leave school without completing the full cycle of primary education' would all citizens be equipped with the basic education they would need to lead a full and productive life.[1401] In principle, UPE 'was also seen as a way of helping

1395 Republic of Uganda, 'Second Periodic Report of States Parties Due in 1997: Uganda', 5 November 2004 (CRC/C/65/Add.33), para 171.

1396 Tamusuza, A., 'Leaving School Early: The Quest for Universal Primary Education in Uganda', op. cit.

1397 *Ibid*.

1398 *Ibid*.

1399 *Ibid*, pp. 111 & 112.

1400 *Ibid*, p. 112.

1401 *Ibid*.

to transform society, fostering greater unity among the people, higher moral standards, and an accelerated growth of the economy.'[1402]

The Commission's propositions were later 'synthesized in a White Paper on Education, which was published in 1992';[1403] leading to the introduction of free primary education in 1997. Initially, the policy 'envisioned the provision of free primary education for up to four children per family.'[1404] However, the government 'quickly realized that this restriction would be too complicated to implement, therefore a decision was made to change the policy, so that all pupils wishing to access education would qualify for free tuition.'[1405] So:

> To concretize the policy, a Capitation Grant was introduced. This was to be used for purchasing instructional materials such as textbooks, with the amount contingent on the number of pupils enrolled in each school. A School Facilitation Grant was also introduced, to be used for infrastructure, namely the construction of classrooms and teachers' houses. With the decentralization policy in place, the financing arrangement allowed funds to be transmitted by the central government to local governments (via the District Administration Officer), who in turn would pass them on to the schools.[1406]

In principle, the UPE programme underpinned gender equality, where apart from requiring that out of the four allowable children two were to be girls, 'practical steps were taken by government officials to encourage girls' parents to enroll their daughters in school. Primary education was not made entirely free though, as parents were expected to contribute toward other costs like pens, exercise books, school uniform and sportswear, transportation to and from school, and meals at school.'[1407]

As part of the implementation of the UPE programme, a number of measures were undertaken by the Ugandan Government, including fee abolition in 1997.[1408] It is to be noted that the fee abolition measure was part of wider policy reform, which entailed change in curricula, bringing into the school system the disadvantaged and itinerant children, and training and retaining a sufficient number of teachers.[1409] One of the driving forces behind the success of the UPE programme was that it was made part of an Election Manifesto issue by President Museveni, which recognised the programme as pivotal in the improvement of the education system in Uganda.[1410]

One of the success stories of the UPE programme is dramatic raise of the total enrollment in primary school, heaving up from around 3 million pupils in 1997 to about 7.6 million currently.[1411] The reduction in costs related to schooling has also led to the elimination of the gender bias in accessing primary education and to increased

1402 *Ibid*.

1403 *Ibid*.

1404 *Ibid*.

1405 *Ibid*.

1406 *Ibid*.

1407 *Ibid*, pp. 112 & 113.

1408 Whereas tuition fees, school development charges, textbooks, terminal Primary School Examination fees were waived for parents and paid for by the Government; parents were to provide lunches, school uniforms, pencils and pens and exercise books; and were expected to contribute labour to school construction. *Ibid*, p. 113.

1409 *Ibid*.

1410 Stasavage, D., 'The Role of Democracy in Uganda's Move to Universal Primary Education' *Journal of Modern African Studies* Vol. 43, No. 1, 2005, pp. 53–73.

1411 Tamusuza, op. cit, p. 115.

access to primary education by the poor.[1412] Apart from increasing enrollment, the UPE policy 'has resulted in an improvement in the quality of the primary education system.'[1413] Thus:

> The share of education in the national budget increased from approximately 7% in 1990 to about 24% in 2003, although this was reduced to about 16% for the 2011/2012 financial year (MFPED 2011). Gender bias toward boys has been removed, while infrastructure, teacher training, and teacher availability have all improved.[1414]
>
> Therefore, the UPE programme is very pivotal in the improvement of the Ugandan education system, hence the realisation of the child's right to education.

Despite the foregoing achievements of the UPE programme in Uganda, constraints to attaining universal primary school enrollment persevere. Data from various household surveys over the last decade 'estimate the Net Enrolment Ratio (NER) for children aged 6–12 in primary school to be in the range of 85%.'[1415] A good example is that, nine years after the UPE programme was implemented, 'in the 2010 Uganda National Household Survey (UNHS), the NER was 83%.'[1416]

Data also estimate that the primary school NER 'has been fairly stable over the years, and was measured at 87% in the 2001 Uganda Demographic and Health Survey (UDHS).'[1417] Although there are subtle differences between the surveys, 'these may be attributed to a lack of uniformity in questionnaire wording, survey concepts, and procedures. Further, sampling errors were noted between the surveys, which do not necessarily reflect actual changes in the estimated NER. Notably, in the 2002 Census, which is devoid of any sampling errors, the NER was 86%.'[1418]

Therefore, not all children in Uganda currently do have access to primary and secondary education. The categories of children who have difficulty accessing education include: the over-aged, street children, children from semi-nomadic populations, physically and mentally challenged children, juvenile offenders, children from geographically marginalized populations, domestic workers, working children, orphans, the girl-child and children affected by armed conflict such as refugees, internally displaced children and the abducted. According to the Government, these children 'lack basic educational provisions owing mainly to the unfavourable environment within which they live.'[1419] In areas affected by conflict, people generally 'lack sufficient money to pay school fees and other dues. Some children are orphaned as a result of the conflict and dropout of school owing to lack of sponsorship.'[1420]

ii) School Drop-out Rate

School drop-outs rate in Uganda is high. The Government has conceded that despite making significant progress in achieving education for all, especially primary one

1412 Deininger, K., 'Does the Cost of Schooling Affect Enrolment by the Poor? Universal Primary Education in Uganda' *Economics of Education Review* Vol. 22, No. 3, 2003, pp. 291–305.

1413 Tamusuza, op. cit.

1414 *Ibid*.

1415 *Ibid*.

1416 *Ibid*.

1417 *Ibid*.

1418 *Ibid*.

1419 Republic of Uganda, 'Second Periodic Report of States Parties Due in 1997: Uganda', op. cit, para 172.

1420 *Ibid*.

enrolment, the survival and retention rates in Ugandan schools are still low, whereby the proportion of girls who drop out is higher than that of boys especially after primary five.[1421] Girls also tend to repeat less often than boys. Some of the main "official" explanations for this situation are such like: 'Most of the children drop out because they are not interested in study. Sickness, search for jobs/child labour and inability to pay school fees are some of the main reasons for dropping out.'[1422]

In addition, some parents and community members 'still consider education of girls a waste of time.'[1423] As such, there is reluctance by most parents to pay for school costs related to hygienic conditions; and schools are particularly 'unable to protect girls from abuse. Teacher attitudes and practices are sometimes discriminatory.'[1424] The curriculum is also 'characterized by stereotyped teaching methods and absence of relevant life skills or guidance on reproductive health' with children in rural areas walking long distances to reach schools.[1425]

Given the foregoing state of the Ugandan education system, it is therefore not surprising to note that only:

> Forty-six per cent of primary schools have temporary sanitary facilities. Most primary schools (97 per cent) do not have separate facilities for children with disabilities. Attempts are being made to create "girl-friendly" school environments, e.g. improving on sanitation, having trained senior women teachers to act as counsellors, providing life skills training, etc. Other challenges that require urgent attention include the high pupil-teacher ratio, large class sizes, high pupil-textbook ratios, the low percentage of trained teachers and poor motivation of teachers.[1426]

c) Strategic Measures to Improve the Quality of Education

There are a number of strategic measures that the Ugandan Government is implementing in order 'to ensure access to and quality of education for the children of Uganda'[1427] as discussed below.

(i) Primary Teachers' Development

In order to improve the teaching quality in Uganda, a Teacher Development and Management System (TDMS) has been developed in a participatory process involving a variety of stakeholders. The plan 'aims at improving the quality of instruction of primary and secondary school teachers and ensures an equitable distribution of teachers throughout the country. An evaluation of TDMS is under way.'[1428] Under the TDMS, a network of 18 core primary teachers' colleges and 539 coordinating centres have been established and are providing: in-service teacher training for unqualified teachers; continuous professional development for trained teachers; financial management

1421 *Ibid*, para 173.
1422 *Ibid*.
1423 *Ibid*, para 174.
1424 *Ibid*.
1425 *Ibid*.
1426 *Ibid*, para 175.
1427 *Ibid*, para 176.
1428 *Ibid*, para 177.

training for head teachers; and, a number of outreach activities of support to primary schools in the country.[1429]

(ii) Primary School Classroom Construction Programme

In ensuring that Ugandan children adequately access education facilities, the Government has developed the National Classroom Construction Plan, with an initial total of UGX 186 billion having been allocated to decreasing the pupil-classroom ratio by 2003.[1430] By February 2000, 2,029 classrooms had been completed, a performance level of 70 per cent.[1431] A decentralized, community-based approach has been adopted as the main delivery modality for classroom construction in the context of the Poverty Action Plan. There is also no adequate teacher housing due to inadequate budget.[1432]

(iii) Provision of Instructional Materials

In order to ensure there are sufficient reading and reference materials for both students and teachers, the Ugandan Government has devised and is implementing a plan for investment in and replacement of instructional materials. This plan aims at maintaining 'a ratio of one textbook for every three pupils for all four core subjects.'[1433] Provision of UGX 33.7 billion has been made for procurement of textbooks over the plan period. The Ministry of Education and Sports has procured textbooks for four core subjects in primary schools. By February 2000, the pupil-textbook ratio 'was 1:7 and 1:5 for Science/Social Studies and Maths/English respectively.' The main challenge facing the implementation of this plan is to obtain resources for additional reference.[1434]

(iv) Primary Education Curriculum

In its endeavour to improve its primary school education, the Ugandan Government has developed a new primary school curriculum and has started phasing it in. The Uganda Primary School Curriculum (Volume 1) was introduced in all primary schools in January 2000 starting with primary 1 to 4. The new syllabus has four core subjects; English, Mathematics, Social Studies and Science; whereby a total of 710,256 copies of the syllabus are required, of which 40,000 have been produced.[1435] Volume 2 of the curriculum, with an additional six subjects, was developed, whereby the Ministry of Education and Sports (MoES) systematically phased in the six subjects in the education system during 2001-2003. According to the Ugandan Government, the main challenge 'is the mobilization of the huge educational resource requirements of implementing both syllabuses.'[1436]

1429 *Ibid*.
1430 *Ibid*, para 178.
1431 *Ibid*.
1432 *Ibid*.
1433 *Ibid*, para 179.
1434 *Ibid*.
1435 *Ibid*, para 180.
1436 *Ibid*.

(v) Scaling Up Gender Parity in the Education System

The Ugandan Government is one of a few Sub-Saharan African countries that are committed to scaling up gender parity. In respect of ensuring gender parity in the education system, the Ugandan Government, through the Ministry of Education and Sports, other line ministries, NGOs and donors, has been active in implementing initiatives in girls' education with the aim to improving the education and welfare of the girl child.[1437] However, this initiative is constrained by four shortcomings: little coordination among the players; the critical areas of sociocultural constraints to girls' education were not sufficiently tackled; access to education by destitute and disabled children continues to cause concern; and limited access to gender-disaggregated data to effectively identify problems and solutions.[1438]

In addition, a national strategy and plan of action for girls' education has been developed. Launched in June 2000, with support from UNICEF, the overall goal of the strategy is:

> All girls in Uganda (including the destitute and girls with disabilities) will have full access to education opportunities and will be supported by their families, schools, communities, Government and the private sector to participate fully in gender-balanced education programmes in order to attain their maximum potential as equal and effective citizens.

The strategy guides Government and other stakeholders 'in removing the numerous barriers to education of the girl child.'[1439] The strategy's sub-goal strives to ensure that the social-psychological environment is 'conducive to the full participation of all girls in education. The physical environment countrywide in educational settings will be easily accessible to persons, especially girls, with disabilities.' This strategy is also complemented by the Promotion of Girls' Education Scheme, which financially supports districts with high dropout rates and low retention and pass rates for girls.[1440]

(vi) Education for Children with Special Learning Needs

The UPE initiative in Uganda ensures that priority must be given to children with special needs.[1441] In this regard, the Educational Assessment and Resource Services (EARS) is implemented countrywide 'to support children with various impairments.'[1442] A working group has been set up 'to develop policy guidelines for special needs education by June 2000.'[1443] The Commissioner, Special Needs Education/Counselling, Career Guidance has been installed to coordinate the assessment and identification of children with disabilities and other special needs such as street children, traumatized children and the gifted/talented.[1444]

1437 *Ibid*, para 181.
1438 *Ibid*, para 182.
1439 *Ibid*, para 183.
1440 *Ibid*, para 184.
1441 *Ibid*, para 185.
1442 *Ibid*.
1443 *Ibid*.
1444 *Ibid*.

(vii) Alternative Strategies for Provision of Basic Education

"Basic education"[1445] is a right implicit in the wider right to education and it is 'for all people, whatever their age, who have never received, or who have not completed, primary education.'[1446] It also applies to 'everyone who has not yet satisfied their basic learning needs.'[1447] Therefore, it includes both formal and non-formal activities, including: adult literacy (numeracy and problem solving); and equivalency schooling or second-chance education, which is 'for children and youth who have not been to school or who have dropped out of school.'[1448] It also includes life skills training that provide to learners knowledge and skills 'to improve their lives and contribute to society.'[1449] Basic education also entails skills that lead to jobs or to self-employment.[1450]

In practice, basic education encompasses such initiatives as community learning resource centres 'where people can find books and a place to study.'[1451] It also includes community-based education programmes 'where adults learn through discussing their problems and finding ways to solve them';[1452] adult literacy and numeracy courses; and open and distance learning, 'which is usually given through media such as the Internet, radio or television.'[1453]

In order to realise the right to basic education, States are obliged to formulate and implement clear plans of policies, 'with quality education standards and an accountability mechanism.'[1454] Consistent with this obligation, the Ugandan Government has formulated a number of programmes to promote the right to basic education, including three specific alternative programmes with a flexible approach and curriculum: the Complementary Opportunity for Primary Education (COPE), the Alternative Basic Education for Karamoja (ABEK) and Basic Education for Urban Poor Areas (BEUPA). In principle, COPE 'targets children who have never attended school or have dropped out of school before acquiring basic skills.'[1455] Through this initiative, learning takes place for between three and four hours. Beneficiaries of ABEK are children and adolescents in the nomadic society in Karamoja region. The programme focuses on simple numeric and literacy skills.[1456]

1445 While Article 13 of the ICESCR uses the term 'fundamental education', 'basic education' and the former are two but similar terms in effect. The term 'basic education' is used in the World Declaration on Education For All, in the Pan African Plan of Action and the Kigali Call for Action (adopted at the Regional Workshop on Extending Fundamental Action in Africa, held in Kigali, Rwanda, in August 2007).

1446 Amnesty International, *Haki Zetu – ESC Rights in Practice: The Right to Education*, op. cit, p. 26.

1447 *Ibid*.

1448 *Ibid*, p. 27 (noting that: equivalency schooling 'covers the learning they have missed and prepares them either to return to school or to start a job').

1449 *Ibid* (noting that: topics covered in this type of basic education include how to think logically – to plan, remember, prioritize, and solve problems – and how to stay healthy: hygiene, HIV/AIDS prevention, etc).

1450 *Ibid*.

1451 *Ibid*, p. 28.

1452 *Ibid*.

1453 *Ibid*.

1454 *Ibid*.

1455 Republic of Uganda, 'Second Periodic Report of States Parties Due in 1997: Uganda', op. cit, para 186.

1456 *Ibid*.

(d) Early Childhood Development

Based on the research and philosophy of Jean Piaget (9 August 1896 – 16 September 1980),[1457] "early childhood education" (ECD) (also referred to as "early childhood learning ", or "early education", or "early childhood care and education (ECCE)"[1458]) refers to the formal teaching of young children by people outside the family or in settings outside the home. ECD or ECCE is for children in the period before the age of normal schooling (hence, the name: "pre-school education").[1459] Whereas in most countries the age ranges between 3-5 years, the U.S. National Association for the Education of Young Children defines ECD as before the age of eight.[1460]

In principle, ECD is 'both a right and a major contributor to development and poverty reduction.'[1461] In recent years, international commitment to early childhood has grown and has been underlined by a number of frameworks and conventions to which Uganda adheres, including the CRC, which focuses on guaranteeing the rights of young children to survive, develop and be protected; and the 1990 World Declaration on Education for All which states that learning begins at birth and encourages the implementation of ECD. Others include the World Education Forum, Dakar 2000, which reaffirmed the importance of ECD in reaching basic education goals; and the UN Special Session on Children, 2002.

The Dakar Framework for Action, adopted by the World Education Forum, commits signatory nations 'to attain the goals pertaining to the child with emphasis on expanding and improving comprehensive early childhood care and education especially for the most vulnerable and disadvantaged children.'[1462] The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) ratified in 1981, has several provisions which apply to the State's role in respect of ECD. In particular, in Article 5 the CEDAW 'advocates family education which includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children.'[1463]

The MDGs do not make explicit mention of the family; though their achievement requires that interventions target families and communities in their strategies to eradicate extreme poverty and hunger, reduce child mortality, combat HIV and AIDS, malaria and other diseases, and achieve UPE.

The Education for All (EFA) goal of 'expanding and improving comprehensive early childhood care and education, especially for the most vulnerable and disadvantaged children', has particular implications for extending interventions to those children not catered for in institutional programmes. Improving all aspects of the quality of education and ensuring excellence of all so that recognised and measurable learning

1457 Piaget was a Swiss developmental psychologist and philosopher known for his epistemological studies with children. He placed great importance on the education of children.

1458 The Dakar Framework for Action refers to 'early childhood care and education' (ECCE).

1459 Amnesty International, *Haki Zetu – ESC Rights in Practice: The Right to Education*, op. cit, p. 21.

1460 Early childhood Education (ECD) is described at length at https://en.wikipedia.org/wiki/Early_childhood_education (Accessed on 16 May 2013).

1461 For further information of the significance of ECD to the realisation of the child's rights and welfare, visit http://allafrica.com/stories/201205241267.html?page=2 (Accessed on 16 May 2013).

1462 *Ibid*.

1463 *Ibid*.

outcomes are achieved by all, especially in literacy, numeracy and essential life skills can be seen as requiring family and community participation.

In practice, ECD entails such learning activities as pre-reading, counting and shape recognition. Children in ECD programmes also receive nutritious meals and health care. Viewed in this context, ECD contributes to children's physical, social and emotional development.[1464]

In translating ECD into reality, in 2008 the Ugandan Government adopted the Early Childhood Development Policy to 'guide the implementation of Early Childhood Development programmes within the sector.'[1465] This has been complemented by the development of a Learning Framework for 3-6 years old in English and 16 local languages. However, these efforts are negatively affected by the low enrolment rates of children within this sub-sector. For instance, the Net Enrolment Ratio (NER) in the 2009/10 financial year 'was 6.2 percent for girls and 3.9 percent for boys.'[1466] Currently, there are sectoral interventions, which include: early childhood survival and nutrition; early childhood care and protection; and early childhood education and learning.

(i) Early Childhood Care and Protection

Early childhood care and protection (ECCP) is defined in this context to include: 'proper feeding; providing clothing, shelter and supervision; preventing and attending to illness; engaging a child in interaction; providing a stimulating and safe environment for play and exploration; providing guidance, love, affection, security and legal protection; enabling and developing self-esteem and self-confidence; and providing emotional support.'[1467] Therefore, lack of provision of these elements 'is tantamount to lack of care and protection for the child.'[1468]

ECCP in Uganda is mainly provided at household level, where mothers, grandmothers, older children and neighbours care for the children. However, working mothers in urban centres 'do not have facilities in the workplace to care for their children.'[1469] The practice 'has been for the mothers to collect young girls from rural areas to care for their children. This trend is changing due to the introduction of UPE. This has prompted working mothers to employ maids to take their children to the few day-care centres.'[1470]

However, as the Ugandan Government has admitted, the ability of caregivers to provide adequate ECCP is limited for several reasons. First, the resources available at the household level for caregivers are inadequate due to perennial poverty in the country and the stress associated with it. Second, caregivers lack the requisite skills, knowledge, physical capacity, consistency and responsiveness to children's needs. The quality of childcare and protection in Uganda is, therefore, 'characterized by poor feeding practices; poor health-care practices; inadequate household food; lack

1464 International, *Haki Zetu – ESC Rights in Practice: The Right to Education*, op. cit.

1465 Africa Wide Movement for Children, op. cit, p. 39.

1466 *Ibid*.

1467 Republic of Uganda, 'Second Periodic Report of States Parties Due in 1997: Uganda', op. cit, para 188.

1468 *Ibid*.

1469 *Ibid*, para 189 (referring to the ECD Taskforce, 1997).

1470 *Ibid*.

of psychosocial stimulation; and child abuse, including defilement.'[1471] Third, high illiteracy among parents and caregivers; and poor childcare practices.[1472]

(ii) Early Childhood Education and Learning

As in most Sub-Saharan African countries, access to ECCD education is very low in Uganda as a result of a myriad of reasons. First, most of the registered pre-primary schools are privately owned and located in urban centres; thus, children from poor and rural families cannot access them. The Ugandan Government has estimated that only about 2.6 per cent of primary entrants attend some form of organized ECCD programme.[1473] Second, while Government became aware and concerned about the need for quality ECCD in 1973, it 'is only recently that concrete action has been taken in this area. Since then, government response has been limited to gaining control of the quality of pre-primary schools.'[1474]

A Fact File that was commissioned by the Ugandan Ministry of Education and Sports (MoES) showed that early childhood education (ECE) had improved the percentage of children aged six enrolling in primary schools from 53% in 2007 to 57.4% in 2009 and 72.7% in 2010.[1475] It states that the MoES, through the Education Act (2008):

> […] recognises pre-primary as the first level of education in Uganda and that the Early Childhood Development Policy which was drafted in 2007 paved the way for a comprehensive ECD policy framework to be developed and consequently an active ECD working group was put in place comprising of relevant ministries and development partners.[1476]

In ensuring that children are cared for and protected within the parameters of the ECD principles and best practices, the MoES licenses and monitors private centres including early childhood education instructional methods used in rural and urban centers.[1477]

As a long-term strategy to institutionalize and scale up ECE and ECD, there are teacher-training institutions for Early Childhood Education, including the Makerere University Child Study Centre, Young Men's Christian Association, and Young Women's Christian Association. Others are Sanyu Babie's Home, Montessori(Entebbe), Nile Vocational Institute (Jinja), Human Resource Development (Hoima), Institute of Teachers Education Kyambogo Nangabo, Madarasa and Makerere University external degree programme at the School of Education.[1478] It should be noted that other than the Institute of Teachers Education Kyambogo and Makerere University, the rest are private initiatives. The training of ECE teachers is done at the Institute of Teachers Education Kyambogo (ITEK), 'which provides a one-year Nursery Certificate

1471 *Ibid*, para 190.

1472 *Ibid*, para 191.

1473 *Ibid*, para 192.

1474 *Ibid*, para 193.

1475 Available online at http://www.academia.edu/2129478/The_Status_of_Early_Child_Hood_Education_in_Uganda (Accessed on 20 May 2013).

1476 *Ibid*.

1477 *Ibid*.

1478 *Ibid*.

program, with the equivalent of the Uganda Certificate of Education being the entry qualification.'[1479]

In Uganda, data indicate that children aged 3-5 years 'are expected to be in nursery school while those aged 6-12 years are expected to be enrolled in primary schools.'[1480] Pre-school is, however, not accessible to the majority in rural areas 'owing to financial constraints.... Figures from the Uganda Bureau of Statistics (UBOS) from 2007 when the ECD policy in the education sector was launched followed by advocacy across the country show that the proportion of children attending pre-school increased from 2% in 2006 to 3% in 2007.'[1481] Currently, the proportion of children in pre-school 'expressed as a percentage of the population aged three to five is 9%, which translates into a gap of 91%. The existing gap is likely to persist if the government does not come up with affirmative action to avert the *status quo*.'[1482]

As in most Sub-Saharan African countries, in Uganda the provision of quality ECE faces a number of challenges:

> […] training institutions are mainly located in urban centres; play and instructional materials are inadequate; tuition for teachers and school fees for pre-school are not affordable by the majority of the population; understaffing in most training institutions; inadequate community initiative; and poverty and lack of awareness among parents regarding the importance of ECE.[1483]

In addition, ECCD 'is still a new concept to many people in Uganda, including policy makers and planners.'[1484] There is still 'no specific policy strategy to guide and direct ECCD interventions.'[1485] There is also 'a lack of data on ECCD issues; actors in ECCD are not adequately coordinated and conscious planning for ECCD at all levels is lacking. Government has, therefore, established an ECCD technical forum to provide policy and strategic guidelines, strengthen capacity for ECCD planning; promote advocacy for ECCD and monitor and evaluate ECCD activities.'[1486]

10.7.2 Realisation of the Child's Right to Education in Kenya

Consistent with its General Comment No. 1 on the Aims of Education,[1487] the CROC, has urged the Kenyan Government to:

(i) ensure that all children complete eight years of compulsory free primary education;

(ii) undertake measures to provide secondary education free of cost;

(iii) increase public expenditure in education, in particular in pre-primary, primary and secondary education;

1479 *Ibid*.

1480 *Ibid*.

1481 *Ibid*.

1482 *Ibid*.

1483 Republic of Uganda, 'Second Periodic Report of States Parties Due in 1997: Uganda', op. cit, para 194.

1484 *Ibid*, para 195.

1485 *Ibid*.

1486 *Ibid*.

1487 CROC, General Comment No. 1 on the Aims of Education (CRC/GC/2001/1).

(iv) increase enrolment in primary and secondary education, reducing socioeconomic, gender, ethnic and regional disparities in the access and full enjoyment of the right to education;

(v) undertake additional efforts to ensure access to informal education to vulnerable groups, including in particular pastoralist and hunter-gatherer children, as well as street children, orphans, children with disabilities, child domestic workers, children living in conflict risk areas and refugee camps by, for example, introducing mobile schools, evening classes and eliminating indirect costs of school education;

(vi) strengthen vocational trainings, including for children who have left school before completion; and

(vii) provide detailed information on the implementation of the Early Childhood Education Policy in its next periodic report.

(a) Constitutional Measures

Consistent with the foregoing recommendations, the Kenyan Government has undertaken a number of constitutional measures to ensure that children realise their right to education.[1488] First, the Constitution of Kenya, in Article 53(1)(b), states that every child has a right to free and compulsory basic education. Second, in Article 55(a) of the Constitution, the Kenyan Government is obliged to take measures, including affirmative action programmes, to ensure that the youth access relevant education and training. Third, minorities and marginalized groups have the right to be provided with special opportunities in the field of education under Article 56(b). Fourth, Article 22 (on the Enforcement of Bill of Rights) provides that every person has the right to institute court proceedings to challenge denial, violation, infringement or threat to his or her rights, including the right to education.[1489] Avenues to challenge this in court are provided for in Article 22(2)(a) of the Constitution, which provides that a person can institute such a suit on behalf of the child.

In addition, vulnerable groups and individuals have been protected by the Constitution in Article 2(5)(b) which requires the State to give priority to the widest possible enjoyment of the rights or fundamental freedom with regard to prevailing circumstances, including the vulnerability of particular groups or individuals such as pastoralist and hunter-gatherer children, orphans, children on the streets, children with disabilities, girls and other groups. Furthermore, Article 43(1)(f) on economic and social rights provides that every person (including the person) has the right to education.

(b) Policy and Legislative Measures

In order to enhance education across all levels and sectors, the Kenyan Ministry of Education has developed policy and legislative frameworks, which include the enactment and adoption of:

(a) The Education Act;

1488 Republic of Kenya, '3rd, 4th and 5th State Party Report to the UNCRC Committee – Geneva 2005-2011', para 308.

1489 Article 22(1) of the Constitution of Kenya.

(b) Sessional Paper No. 1 of 2005;

(c) The Education Sector Policy on HIV/AIDS;

(d) The National Early Childhood Development Policy Framework (2006) and its Guidelines;

(e) The Gender Policy in Education (2007);

(f) Policy for Alternative Provision of Basic Education and Training (2009);[1490]

(g) National School Health Policy (2009) and its Guidelines;

(h) Policy on Nomadic Education (2009);

(i) The National Special Needs Education Policy Framework (2009);

(j) Child Friendly Schools Manual (2010); and

(k) Teachers Service Commission (TSC) Bill.[1491]

In order to make sure that the foregoing legal and policy frameworks are rendered effective, the Kenyan Government has undertaken reforms in the education system as well as it has 'set up a Taskforce to facilitate in aligning the education sector to the Constitution and Vision 2030. This process will inform the review of the Education Act, Sessional Paper and other relevant Education Policies.'[1492]

In a bid to enhance effective recruitment and management of teachers, the Kenyan Constitution establishes the Teachers Service Commission to be an independent body.[1493] The Kenyan Teachers Service Commission Act,[1494] which was enacted in 2012 to enable the operationalization of the Commission has been developed.[1495] Apart from legislatively operationalising the Teachers Service Commission established under Article 237 of the Constitution, this law sets out the composition;[1496] functions[1497] and

1490 The Policy for Alternative Provision of Basic Education and Training (2009) captures the non-formal education.

1491 Republic of Kenya, '3rd, 4th and 5th State Party Report to the UNCRC Committee – Geneva 2005-2011', para 313.

1492 *Ibid*, para 314.

1493 Article 237 of the Kenyan Constitution (2010).

1494 Act No. 20 of 2012, which was assented to on 24 August 2012 and came into force on 31 August 2012. The Kenyan Teachers' Service Commission Act is published by the National Council for Law Reporting with the Authority of the Attorney-General and it is available only at www.kenyalaw.org

1495 Republic of Kenya, '3rd, 4th and 5th State Party Report to the UNCRC Committee – Geneva 2005-2011', para 315.

1496 Part 3—Teachers Service Commission: Constitution of Kenya-2010.

1497 *Ibid*, Section 11, which provides that: 'In addition to the functions set out in Article 237 of the Constitution, the Commission shall—

(a) formulate policies to achieve its mandate;

(b) provide strategic direction, leadership and oversight to the secretariat;

(c) ensure that teachers comply with the teaching standards prescribed by the Commission under this Act;

(d) manage the payroll of teachers in its employment;

(e) facilitate career progression and professional development for teachers in the teaching service including the appointment of head teachers and principals;

(f) monitor the conduct and performance of teachers in the teaching service; and

(g) do all such other things as may be necessary for the effective discharge of its functions and the exercise of its powers.'

powers of the Commission;[1498] the qualifications[1499] and procedure for appointment of members;[1500] and for connected purposes.[1501]

In addition to the foregoing legislative measures, Kenya is committed to meeting the World Declaration on Education for All (EFA) Jomtien, Thailand (1990) and the Millennium Development Goal 2 (MDG 2: Achieving Universal Primary Education by 2015). In a bid to meet these global initiatives, the Kenyan Government has set out national education targets in the Kenya Vision 2030, the Medium Term Plan (2008 to 2012) and the Kenya Education Sector Support Programme (KESSP) (2005 to 2009-2010). In principle:

> This includes increasing primary net enrolment and completion rates to 100 per cent by 2015; improving internal efficiency in education by reducing repetition, drop-out rates, and increasing primary to secondary transition levels. To address inequalities in access, the Nomadic Education Policy and its budgeted implementation plan was put in place to enhance provision of learning opportunities for children in Arid and Semi-Arid Lands (ASAL).[1502]

In addition, the Kenyan Government has also introduced the Free Day Secondary Education in public schools under the Day Secondary Education Policy in 2008. This policy 'aims at increasing accessibility to secondary schools in every community and increasing transition and retention of children in secondary schools.'[1503] As such:

> The objective of this programme is to increase access to secondary education by providing more resources in line with the policy of providing 12 years of basic education as well as meeting the constitutional requirements to provide education to all her citizens. In addition, the State Party has introduced mobile schools in arid and semi-arid areas in Kenya.[1504]

The policy has facilitated the increase in enrolment by 15% between 2008 and 2010.[1505] Both in principle and practice, the policy 'lays a framework for implementing the constitutional requirements for the State Party to provide all citizens with basic education.'[1506]

Non-formal education is one of the 23 Investment Programs under KESSP, which 'seeks to increase access to quality basic education for children and youth who due to special circumstances are unable to attend formal schools.'[1507] In order to achieve

1498 *Ibid*, Section 12, which provides that: '(1) The Commission shall have all powers necessary for the execution of its functions under the Constitution and this Act.

(2) In the performance of its functions and in the exercise of its powers, the Commission—

(a) may inform itself in such manner as it considers appropriate;

(b) may receive written or oral statements from members of the public;

(c) may require the attendance of a person before it or its committee; and

(d) shall not be bound by the strict rules of evidence.'

1499 *Ibid*, Section 6.

1500 *Ibid*, Section 8.

1501 Long citation of the Kenya Teachers' Service Commission Act (2012).

1502 Republic of Kenya, '3rd, 4th and 5th State Party Report to the UNCRC Committee – Geneva 2005-2011', para 316.

1503 *Ibid*, para 317.

1504 *Ibid*, para 319.

1505 *Ibid*, para 317.

1506 *Ibid*.

1507 *Ibid*, para 318.

this end, the Kenyan Government has adopted a policy on Alternative Provision of Basic Education Training (Non-Formal Education) in 2009, which 'guides the sub-sector in its development and ensures that quality education and training is provided through registration of non-formal schools and non-formal education centres across the country.'[1508] The policy 'seeks to establish an institutional framework and associated systems to promote inclusion and eradication of all forms of marginalization in this sub-sector.'[1509] Currently the Non-Formal Education Curriculum is already in place and being implemented.[1510]

On the budgetary front, the Kenyan budget expenditures in the education sectors have increased since 2005. In particular, in 2005/2006 the total budget expenditures were KShs 11,580.9 million, which increased to KShs 33,549.3 million in 2010/2011.[1511]

(c) Early Childhood Development and Education (ECDE)

In order to enhance ECDE, the Kenyan Ministry of Education developed a national ECDE policy framework and service standards guidelines in the 2005/2006 financial year; and, as such, it has included ECDE in the overall learning curriculum and national education policy.[1512] Currently, ECDE is being provided by the Government in partnership with Non-governmental Organizations (NGOs), Community Based Organizations (CBOs), Faith Based Organizations (FBOs), Parents and the private sector.[1513]

(d) Institutions and Programs

As elaborated below, the Kenyan Government has undertaken a number of administrative measures and programmes to ensure that children in its jurisdiction do realise their right to education. These measures include the establishment of a Technical Industrial Vocational and Entrepreneurship Training (TIVET) programme; measures to ensure that vulnerable children and children in need of care and protection access quality basic education; the School Feeding Program under the School Health, Nutrition and Feeding Investment Program of the KESSP; and ensuring retention of girls and boys in schools with a special focus on the girl child.

Other measures include an initiative to protect the rights of children affected by conflict in their countries of origin and seeking refuge in Kenya; the establishment of a grant programme to support the OVCs in schools; inclusive Education for Children with Special Needs; ensuring children access quality education and their rights protected of children dwelling in cattle rustling/militia prone areas and volatile borders such as the Kenya- Somalia, Sudan and Ethiopia; and putting in place measures to mitigate the calamity the 2007 Post Election Violence (PEV).

1508 *Ibid*.
1509 *Ibid*.
1510 *Ibid*.
1511 *Ibid*, para 320.
1512 *Ibid*, para 322.
1513 *Ibid*, para 323.

(i) Technical Industrial Vocational and Entrepreneurship Training (TIVET)

The Kenyan Government has developed a program on Technical Industrial Vocational and Entrepreneurship Training (TIVET). This is one of the Investment Programs under the KESSP, whose objective is 'to reduce inequity in society through increased training opportunities for the female students, the disabled learners, and learners from poor households'.[1514] As a result of this measure, between 2008 and 2010 the enrolment in TIVET increased by 32.1%.[1515]

(ii) Measures to Ensure that Vulnerable Children Access Quality Basic Education

The Kenyan Ministry of Education and other key line ministries, in partnership with development partners and Civil Society Organizations, have instituted measures 'to ensure that vulnerable children and children in need of care and protection access quality basic education.'[1516] These measures include, introduction of low cost boarding schools that target children from ASAL regions, mobile schools that target children of pastoral communities and School Feeding Programmes. Rescue Centres and Charitable Children Institutions 'have also been established to ensure that children in need of care and protection have an enabling environment to continue with their learning.'[1517]

(iii) The School Feeding Program

The Kenyan Government has established the School Feeding Program under the School Health, Nutrition and Feeding Investment Program of the KESSP, 'which is supported by the World Food Program and the MoE supports 661,209 children in 32 districts in the Northern part of Kenya and the Coast Province.'[1518] It also targets some schools in the informal settlements of Nairobi. MoE Home Grown School Feeding Programme (HGSFP) also supports 659,249 children in 58 semi-arid districts.[1519] Furthermore, the school feeding programme is always expanded 'during times of extensive drought to provide a cushion in the high risk areas and reduce school dropouts. The expanded school feeding programme is supported by the Ministry of Special Programmes in partnership with MOE.'[1520]

(iv) Retention of Girls and Boys in Schools with Special Focus on the Girl Child

In collaboration with education stakeholders, the Kenyan Government has ensured retention of girls and boys in schools with a special focus on the girl child. Some of the measures undertaken to further this goal include;

(a) Guidance and counselling;

1514 Ministry of Education, *National Action Plan on Education for All (2003-2015)*, p. 79.

1515 Republic of Kenya, '3rd, 4th and 5th State Party Report to the UNCRC Committee – Geneva 2005-2011', para 324.

1516 *Ibid*, para 325.

1517 *Ibid*.

1518 *Ibid*, para 326.

1519 *Ibid*.

1520 *Ibid*.

(b) Implementation of the Gender Policy in Education (2007) which ensures that schools are gender friendly and sensitive;

(c) Provision of gender sensitive facilities such as sanitary towels and building of toilets for girls in schools; and

(d) Setting aside Kenya Shillings three hundred millions (300 million) for purchase of sanitary towels in the 2011/2012 financial year.[1521]

In addition to ensuring access, retention and participation of girls in education, the Government has 'zero-rated the taxes on sanitary towels to make them cheaper and affordable.'[1522] Accordingly, a National Committee[1523] to coordinate these initiatives by the non-state actors is chaired by the Ministry of Education.[1524]

(v) Initiative to Protect the Rights of Children Affected by Conflict in their Countries of Origin and Seeking Refuge in Kenya

In order to fulfil the obligation to protect the rights of children affected by conflict in their countries of origin and seeking refuge in its jurisdiction, the Kenyan Government has partnered with non-state actors to established education facilities in the two main refugee camps (i.e. Kakuma and Dadaab). These facilities 'are meant to ensure that refugee children access and continue receiving quality education whilst upholding the principle of non-discrimination and equity to all children irrespective of race, country of origin, religion, sex or socio-economic status.'[1525]

(vi) Establishment of a Grant Programme to Support the OVCs in Schools

In 2007, the Kenyan Ministry of Education established a grant programme to support orphaned and vulnerable children (OVCs) in 3,215 primary schools. According to the Kenyan Government, the Ministry had spent by 2010, Kenya Shillings 65.8 million. This grant has further been complemented by other initiatives such as PEPFAR Scholarship Funds, Cash Transfer Funds for OVCs, LATIF and the Constituency Development Funds for Scholarship.[1526]

(vii) Inclusive Education for Children with Special Needs

The Kenyan Ministry of Education implements an Inclusive Education for Children with Special Needs, which has 'increased the number of Special Needs Education (SNE) Institutions it funds from 926 in 2002 to 1,574 in 2008.'[1527] Most of these institutions are units integrated into the normal primary schools. Further to this, the Kenyan Government 'has undertaken training of Teachers on Special Needs Education

1521 *Ibid*, para 327.

1522 *Ibid*.

1523 An example of this committee is the National Sanitary Towel Coordination Committee that was formed in May 2008 by stakeholders working to improve the girl child education as a follow-up on provision of sanitary towels. The initiative was spearheaded by Girl Child Network and is chaired by the MoE.

1524 Republic of Kenya, '3rd, 4th and 5th State Party Report to the UNCRC Committee – Geneva 2005-2011', para 328.

1525 *Ibid*, para 329.

1526 *Ibid*, para 330.

1527 *Ibid*, para 331.

and targets to have at least one of these trained teachers in all primary schools by 2015.'[1528]

(viii) Ensuring Children in Cattle Rustling/Militia-prone Areas and Volatile Borders Access Quality Education

Kenya is amongst Sub-Saharan African countries that are affected by perennial cattle rustling and militia attacks, particularly in the northern part of the country.[1529] Studies conducted in this part of Kenya have pointed to the fact that some of the conflicts within and between pastoralist communities, such as raiding and cattle rustling 'have a long history and have to some extent become an aspect of traditional pastoralist culture.'[1530] However, such "traditional" conflicts 'have become increasingly destructive and less manageable.'[1531] In fact:

> The major causes of conflict among the pastoralists include but are not limited to intensified cattle rustling, proliferation of illicit arms, inadequate policing and state security arrangements, diminishing role of traditional governance systems, competition over control and access to natural resources such as pasture and water, land issues, political incitements, ethnocentrism, increasing levels of poverty and idleness amongst the youth.[1532]

The violent conflicts ensuing from perpetual cattle rustling and militia attacks have adverse and severe impacts on the communities that are involved in these conflicts, chief amongst them being:

> Loss of human life, property, displacements of large segments of the communities, disruption of socio-economic activities and livelihoods, increased hatred between communities, environmental degradation and threat to water catchments areas, increased economic hardships as a result of loss of livelihoods, high levels of starvation and malnutrition among the displaced groups and unprecedented dependency syndrome on relief food are the main negative impacts of the increasing and severe inter-ethnic armed conflicts in northern Kenya.[1533]

Normally, cattle rustling and militia attacks have a negative impact on children's school attendance. In order to ensure that children dwelling in these areas do attend schooling, the Kenyan Government has established programmes in cattle rustling/militia prone areas and volatile borders such as the Kenya-Somalia, Sudan and Ethiopia 'aimed at ensuring children access quality education and their rights are protected.'[1534] Some of these initiatives include 'increasing security in the areas, disarmament programmes in all the cattle rustling areas, peace and reconciliation dialogues among fighting groups.'[1535]

1528 *Ibid*.

1529 Violent conflicts involving pastoralists have become widespread and increasingly severe in the North Rift and North Eastern regions of Kenya. For a detailed landscape of the implications of castle rustling in militia attacks in Northern Kenya, see particularly Pkalya, R. , et al, *Conflict in Northern Kenya: A Focus on the Internally Displaced Conflict Victims in Northern Kenya* Intermediate Technology Development Group - Eastern Africa (ITDG-EA), 2003. Available online at http://practicalaction.org/docs/region_east_africa/conflict_in_northern_kenya.pdf (Accessed on 21 May 2013).

1530 *Ibid*, p. 10.

1531 *Ibid*.

1532 *Ibid*.

1533 *Ibid*, pp. 10-11.

1534 Republic of Kenya, '3rd, 4th and 5th State Party Report to the UNCRC Committee – Geneva 2005-2011', para 333.

1535 *Ibid*.

(ix) Mitigate the Calamity of the 2007 Post Election Violence (PEV)

After the 2007 General Election, Kenya suffered 'its worst humanitarian crisis since independence following the December 30 results of a hotly-contested presidential election.'[1536] The then opposition leader, Raila Odinga, and his supporters rejected the declared victory of incumbent President, Mwai Kibaki, alleging that 'it was the result of rampant rigging. Protests degenerated into widespread violence as decades of economic frustration and ethnic rivalry spiraled out of control.'[1537] In the aftermath of results announcing, gangs of youths blocked Kenya's main roads and set fire to hundreds of homes of perceived 'outsiders'. In all, 'more than 1,200 people were killed and some 600,000 displaced into temporary camps, with an equal number seeking refuge with friends or relatives.'[1538] Amongst the adversely affected sectors, were the education and health sectors, which 'were also compromised by the large-scale displacement of professionals.'[1539]

In fact, the 2007 Post Election Violence (PEV) had a negative impact on the education sector, which compelled the Kenyan Government to see to it that measures 'to mitigate the calamity were put in place to ensure that children affected by PEV continued to access education.'[1540] Some of these measures included establishing temporary schools within the IDP camps and later integrating the children into schools near the IDP camps.[1541] As a long-term strategy to avoid the recurrence of violence of this nature, the Kenyan Government, in partnership with non-state actors, has developed a Peace Education Curriculum, 'which is aimed at fostering peaceful co-existence, national unity, patriotism and nurturing children as agents of peace.'[1542]

As families affected were resettled, the schools that were destroyed during the violence were reconstructed, '19 schools were fully reconstructed in areas such as Molo, Burnt Forest, Trans-Nzoia and Nyanza-Rift Valley borders. The Kenyan Government ensured that all affected pupils and students registered and sat for their National Examinations.'[1543]

The Government has also been working in partnership with non-state actors, in areas such as Mt. Elgon region 'in conflict transformation and peace building initiatives targeting the local community as well as strengthening of the education sector [and] these efforts are also being replicated in other regions that are prone to conflict.'[1544]

10.7.3 Realisation of the Child's Right to Education in Tanzania

Tanzania has committed itself to protecting the child's right to education in a number of ways. Constitutionally, the right to education is decreed in Article 11(2) of the Constitution of Tanzania in the following regards:

1536 IRIN, 'In-depth: Kenya's Post Election Crisis' Nairobi: IRIN, 7 January 2008. Available online at http://www.irinnews.org/In-depth/76116/68/Kenya-s-post-election-crisis (Accessed on 21 May 2013).

1537 *Ibid*.

1538 *Ibid*.

1539 *Ibid*.

1540 Republic of Kenya, '3rd, 4th and 5th State Party Report to the UNCRC Committee – Geneva 2005-2011', para 334.

1541 *Ibid*.

1542 *Ibid*, para 332.

1543 *Ibid*, para 335.

1544 *Ibid*, para 336.

(2) Every person has the right to access education, and every citizen shall be free to pursue education in a field of his choice to his merit and ability, the highest level according to his merit and ability.[1545]

In accordance with Article 11(3) of the Tanzanian Constitution, every person has 'the right to access education and every citizen shall be free to pursue education and technical education.' However, this Article is contained in the unenforceable part of the Constitution in terms of Article 7(2) of the Constitution of Tanzania.[1546] Crafted on the old school model of Constitution-making, the Constitution of Tanzania largely contains justiciable civil and political rights to the exclusion of socio-economic rights, which are not justiciable.[1547] There are only three categories of socio-economic rights

1545 Similarly, Article 28(1) of the 1984 Zanzibar Constitution recognizes the child's right to education, with a view to achieving this right progressively and on the basis of equal opportunity. According to clause 4.2.2. of the Zanzibar Education Policy (2006), 'Primary school is part of universal free basic education offered to all children within the age group of 7-13 years.' However, parents contribute a little amount of money for their children education.

1546 For the legal effect of this aspect, see particularly Mashamba, C.J., 'Enforcing Social Justice in Tanzania: The Case of Economic and Social Rights', LL.M. Thesis, Open University of Tanzania, 2007; Mashamba, C.J., 'Are Economic, Social and Cultural Rights Judicially Enforceable?' Open University Law Journal Vol. 1 No. 1, 2007; Mashamba, C.J., 'Casting the Net Wide: Litigating Socio-Economic Rights beyond the Bill of Rights in Tanzania' Justice Review Vol. VII No. 1, August 2008; Mashamba, C.J., 'Using Directive Principles of State Policy to Interpret Socio-Economic Rights into the Tanzanian Bill of Rights' The Law Reformer Journal Vol. II No. 1, 2009; and Machibya, E.M., 'Realizing the Right to Education in Tanzania in the Context of the Convention on the Rights of the Child' The Justice Review Vol. VIII No. 2, 2009, pp. 220-248, p. 227.

1547 Mashamba, C.J., 'The Promotion of Basic Employee Rights in Tanzania' African Human Rights Law Journal Vol. 7 No. 2, November 2007; and Mashamba, C.J., 'Are Economic, Social and Cultural Rights Judicially Enforceable?' *East African Journal of Peace and Human Rights* Vol. 15 No. 2, 2009. Most of the proposed rights in the proposed Bill of Rights in the Draft Constitution (2013) are socio-economic rights, which in the current Constitution are relegated to the unjusticiable or 'unenforceable' part of the Constitution (Article 7(2)) – i.e., in Part II of Chapter One of the Constitution that contains Fundamental Objectives and Directive Principles of State Policy. This seems to be 'a deliberate omission since history had shown that the government was against the idea of having a justiciable Bill of Rights'. (*See* Ruhangisa, J.E., 'Human Rights in Tanzania: the Role of the Judiciary', Ph.D. Thesis, University of London, 1998). This view, indeed, has been supported by the conformist views held by some of the senior government legal experts in the establishment in those days, who have supported this omission. For example, the then Chief Justice, the late Francis Nyalali, once paradoxically argued that if the entire provisions of the UDHR, particularly economic and social rights, were included in the Bill of Rights and were made part of the justiciable rights, the country would be thrown into frequent conflicts that could undermine national stability. (See Nyalali, F.L., 'The Bill of Rights in Tanzania' *University of Dar es Salaam Law Journal* Vol. 8, 1991, p. 2). This view was also held by the then A.G., Andrew Chenge, who argued that as the implementation of economic and social rights depends on the economic capacity of a respective country, it was apt for the Bill of Rights to exclude them as justiciable rights. According to Hon. Chenge:

> 'Article 11(1) of the Tanzanian Constitution makes it clear in the most explicit terms that, so far as the social policies referred to in Part II are concerned, t*hey too are dependent on the economic capacity of the State to provide them*. It *must* follow therefore that as a matter of common sense that *rights set out in Part II of Chapter One of the Tanzanian Constitution cannot be justiciable in a court of law*. On the other hand, it is the general practice to include in a Bill of Rights those rights which are set out in the International Covenant on Civil and Political Rights.' [Emphasis supplied] (See Chenge, A.J., 'The Government and Fundamental Rights and Freedoms in Tanzania,' in PETER, C.M., and Juma, I.H. (Editions), *Fundamental Rights and Freedoms in Tanzania* Dar es Salaam: Mkuki na Nyota Publishers, 1998, p. 4).

Arguing from a conformist perspective, the former A.G. justified his contention by saying that, for states like Tanzania the rights set out in the ICCPR 'create a very different category of obligations' from those set out in the ICESCR. According to him, rights set out in ICCPR are 'intended to limit the extent to which the State can interfere with or restrict the activities of its citizens, and specify and define the circumstances in which such interference or restriction may be justified in the public interest.' *Ibid*. Some of the proposed socio-economic rights in the Draft Constitution include the right to education (Article 41); the right to a clean and safe environment (Article 40); the rights of persons with disabilities (Article 44); the rights of minorities (Article 45); the rights of women (Article 46); the right not to be subjected to slavery and servitude (Article 25); the right of employees and employers (Article 35); and the rights of the aged or the elderly (Article 47).

enshrined in the enforceable part of the Constitution:[1548] the right to work,[1549] the right to fair remuneration,[1550] and the right to property.[1551]

The problem with the incorporation of the right to education in an unenforceable part of the Constitution of Tanzania is better explained by Machibya, who strongly argues that such enactment 'is just a promulgation of the fundamental policy of the government.'[1552] To him, 'there is no reflection of the compulsory and free education for all and with requisite quality as required by international [human rights] instruments.'[1553] Therefore, with such a situation, 'no one can hold the government liable for any wrong caused to [a] child to fail [to] access education.'[1554] To use Mchome's observation, one can, therefore, conclude that:

> […] the right to education, as stated in the Union Constitution, is a mere policy statement and indeed it is not justiciable under Tanzanian laws since it is only the basic rights and freedoms in the Bill of Rights in the Union Constitution that can be enforced.[1555]

As a result of this constitutional anomaly, Tanzanians, particularly children, 'have been accessing education on the basis of various laws such as those regulating primary, secondary and tertiary education.'[1556] These laws are complemented by various programmes and plans of actions that the Tanzanian Government strives to ensure that the child in its jurisdiction enjoys his or her right to education, as discussed in the succeeding part.

(a) Legislative Measures to Guarantee and Improve the Right to Education

In its previous Concluding Observations, the CROC urged the Tanzanian Government to improve the overall quality of education. In compliance with this recommendation, the State government has undertaken a number of policies, legislative and administrative measures to ensure that it effectively implements the provisions of Article 28 of the CRC and Article 11 of the ACRWC, which oblige Tanzania to ensure that children in its jurisdiction have the right to education, including vocational training and guidance. Legislatively, the Law of the Child Act and the Zanzibar Children's Act have made it clear that the primary responsibility to maintain a child by providing him or her with, *inter alia*, education and guidance rests on a parent, guardian or any other person having custody of a child.[1557]

In order to make sure that education is freely available for all children, the Tanzanian Government has undertaken concrete legislative measures to make primary education free and compulsory in the context of Article 28(1)(a) of the CRC and Article 11 of

1548 The enforceable part of the Constitution – i.e. Part Three (Articles 12-32) – *inter alia*, comprises of the Bill of Rights.

1549 Article 22 of the Constitution of Tanzania.

1550 *Ibid*, Article 23.

1551 *Ibid*, Article 24.

1552 Machibya, E.M., 'Realizing the Right to Education in Tanzania in the Context of the Convention on the Rights of the Child', op. cit, p. 228.

1553 *Ibid*.

1554 *Ibid*.

1555 Mchome, S.E., 'Constitutional Development in Tanzania.' Available at http://www.kituochakatiba.co.ug/Contsm%20TZ%201004.pdf (Accessed on 24 May 2013).

1556 *Ibid*.

1557 Section 8(1)(e) of the Law of the Child Act (2009); and Section 12(1) of the Zanzibar Children's Act.

the ACRWC.[1558] In this regard, Section 35 of the Education Act (1978)[1559] provides for compulsory enrolment and attendance of pupils at school. It makes it mandatory 'for every child who has reached the age of seven years to be enrolled for primary education.'[1560]

The law also obliges a parent or parents of every child compulsorily enrolled for primary education to 'ensure that the child regularly attends the primary school at which he is enrolled until he completes primary education.'[1561] This obligation is also reciprocated on every pupil enrolled at any school, who is obliged to 'regularly attend the school at which he is enrolled until he completes the period of instruction specified in respect of the level of education for the attainment of which he is enrolled at the school.'[1562]

The foregoing obligations are carried out through a number of regulations, rules and orders made by the Minister responsible for education under the powers vested on him or her under Section 35(4) of the Education Act. Of particular importance to this study are the Primary School (Compulsory Enrolment and Attendance) Rules (1979)[1563] and the Public Primary Schools (Compulsory Enrolment and Attendance) Order (1977).[1564] In particular, Rule 3 of the Primary School (Compulsory Enrolment and Attendance) Rules provides that:

> The enrolment and regular attendance of every child in primary school shall be compulsory as from the effective date and every child enrolled at any primary school shall, attend school until the completion of primary education.

On its part, the Public Primary Schools (Compulsory Enrolment and Attendance) Order (1977) requires that 'enrolment and regular attendance of every child in a public primary school shall be compulsory.'[1565]

Therefore, Tanzania has made primary school enrolment and attendance compulsory for children aged between 7 and 13.[1566] In ensuring that primary education is compulsory[1567] and availably free to all children, Rule 6 of the Primary School (Compulsory Enrolment and Attendance) Rules (1979) obliges the Ward Executive Officer (WEO) or the Village Executive Officer (VEO) to ensure that every child in his or her area of jurisdiction is enrolled and attends school regularly.[1568] In addition, this rule obliges the WEO or the VEO to initiate legal action against any parent, any

1558 Section 35 of the Education Act, Cap. 353 R.E. 2002. See also the Zanzibar Education Act of 1982, under which free and compulsory education comprises 7 years in primary school and 3 years in secondary school.

1559 Cap. 353 R.E. 2002.

1560 *Ibid*, Section 35(1).

1561 *Ibid*, Section 35(2). See also Clause 4 of the Public Primary Schools (Compulsory Enrolment and Attendance) Order (1977).

1562 *Ibid*, Section 35(3). See also Clause 5 of the Public Primary Schools (Compulsory Enrolment and Attendance) Order (1977).

1563 G.N. No. 280 of 2002.

1564 G.N. No. 150 of 1 November, 1977

1565 Clause 3 of the Public Primary Schools (Compulsory Enrolment and Attendance) Order (1978).

1566 United Republic of Tanzania, 'Tanzania 3rd, 4th and 5th Reports on the Implementation of the Convention on the Rights of the Child (CRC) 2005-2011', submitted to the CROC by the Ministry of Community Development, Gender and Children (Tanzania Mainland) and the Ministry of Social Welfare, Youth, Women and Children Development (Zanzibar), 9 January 2012, para 206.

1567 In particular, Rule 3 of the Primary School (Compulsory Enrolment and Attendance) Rules (1979) [G.N. No. 280 of 2002] provides that: 'The enrolment and regular attendance of every child in primary school shall be compulsory as from the effective date and every child enrolled at any primary school shall, attend school until the completion of primary education.'

1568 *Ibid*. Rule 6(1).

person other than the parent, or any child who contravenes the requirement to enrol or ensure that a child regularly attends school.[1569]

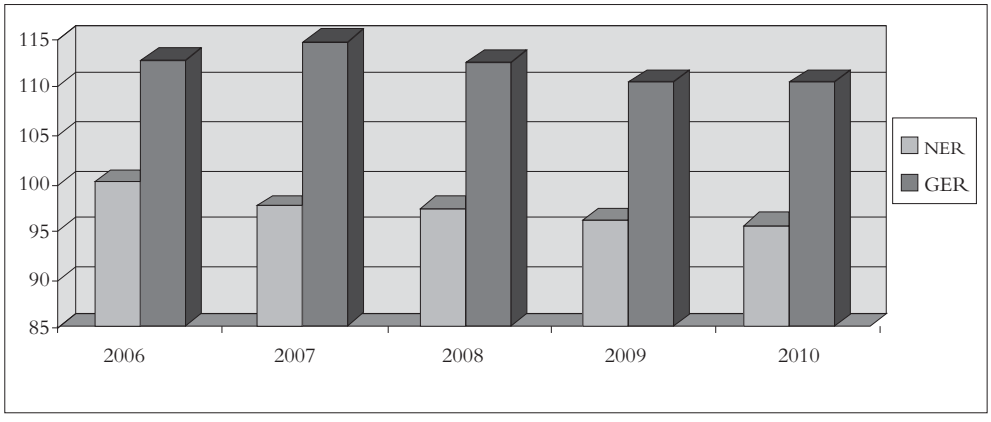
(b) Policy and Administrative Measures to Improve the Quality of Education

In a bid to complement the foregoing legislative measures undertaken to guarantee the right to education and to improve the quality of education for all children in Tanzania, a number of policy and administrative measures have been put in place. They include the adoption of the Primary Education Development Plan (PEDP) for primary education; and the Secondary Education Development Plan (SEDP) for secondary education.[1570] These policy and administrative measures are elaborated below.

(i) Increasing Enrolment Rates in Secondary Schools and Vocational Training Centres

In its previous Concluding Observations, the CROC has urged the Tanzanian Government to increase enrolment rates in secondary education as well as to bring dropouts back to schools and to other vocational training centres. In its endeavours to implement Article 28 of the Convention and in compliance with the foregoing CROC's recommendation, the Tanzanian Government has devised and implemented various strategies and plans to ensure that pre-primary and primary education is compulsory and free for all.[1571] For instance, through PEDP,[1572] enrolment rate in primary schools have increased resulting in the high rate of transition to secondary schools and later to higher learning levels.[1573] These milestones are explicitly illustrated in the figures and tables below:

Chart 1: Gross and Net Enrolment Ratios (GER) and (NER) in Percentage for Primary Schools (2006-2010)



***Source**: Best Education Statistics in Tanzania (BEST) 2006-2010: Revised National Data, September 2010. P. 24.*

1569 *Ibid*. Rule 6(2).

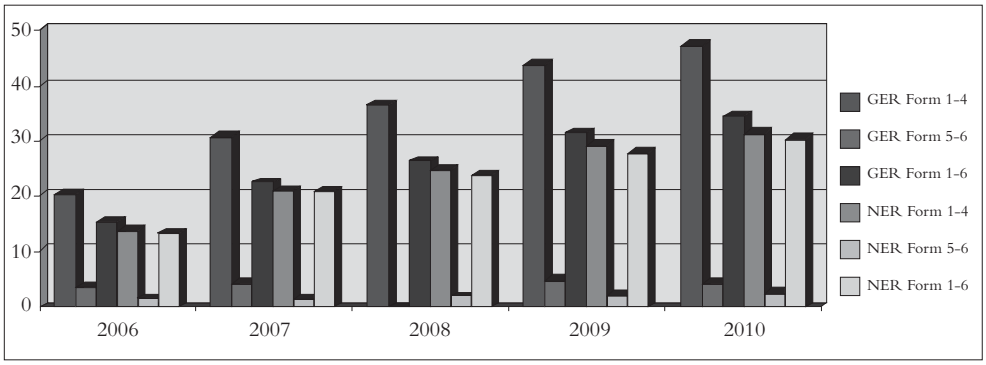
1570 PEDP was adopted in 2001 in the context of the Education Sector Development Programme (ESDP).

1571 United Republic of Tanzania, 'Tanzania 3rd, 4th and 5th Reports on the Implementation of the Convention on the Rights of the Child (CRC) 2005-2011', op. cit, para 211.

1572 Originally, PEDP had five main objectives: (i) to expand access to primary education; (ii) to improve education quality at the primary education level; (iii) to increase pupil retention and completion; (iv) to improve institutional arrangements; and (v) to enhance capacity building for efficient and effective delivery of education services.

1573 Machibya, E.M., 'Realizing the Right to Education in Tanzania in the Context of the Convention on the Rights of the Child', op. cit, p. 231 (note 793).

Chart 2: Summary of Gross and Net Enrolment Ratios (GER) and (NER) in Percentage for Secondary Schools (2006-2010)



***Source**: Best Education Statistics in Tanzania (BEST) 2006-2010: Revised National Data, September 2010, p. 61.*

Table 2: Standard VII Completion Rates in Government and Non-Government Primary Schools

Age in Years	**2008**			**2009**			**2010**		
	M	F	T	M	F	T	M	F	T
<11	1967	19	1986	25	35	60	77	81	158
11	461	571	1032	761	1094	1855	1637	1508	3145
12	10695	14250	24945	23453	28072	51525	20554	26161	46715
13	262988	269974	532962	280905	293956	574861	257974	270840	528814
>13	265120	239774	504894	226357	204960	431317	184701	184999	369700
Grand Total	**541231**	**524588**	**1065819**	**531501**	**528117**	**1059618**	**464943**	**483589**	**948532**
Population 13 years							499219	498699	997918
Gross Completion Rate (%)							93.1	97.0	95.1
Net Completion Rate (%)							51.7	54.3	53.0

***Source**: Best Education Statistics in Tanzania (BEST) 2006-2010: Revised National Data, September 2010, p. 25.*

Table 3: Completion and Transition Rates in Secondary Schools (Form 4, 2008-2010)

Form 4 (Age)	**2008**				**2009**				**2010**			
	M	F	T	%	M	F	T	%	M	F	T	%
<16	458	617	1075	0.8	728	1134	1862	0.9	1419	1801	3220	1.0
16	2634	3909	6543	5.0	4176	5669	9845	4.9	7251	9331	16582	5.1
17	12591	14935	27526	21.0	16920	21301	38221	19.0	25963	32777	58740	18.0
18	19134	18345	37479	28.6	28104	29813	57917	28.8	46896	48560	95456	29.2
19	17685	11632	29317	22.3	27898	20412	48310	24.0	41345	31673	73018	22.3
20	11973	5257	17230	13.1	17879	9029	26908	13.4	30962	16998	47960	14.7
21	5623	1846	7469	5.7	8692	3384	12076	6.0	14363	5725	20088	6.1
22	2560	708	3268	2.5	3501	1072	4573	2.3	6290	1943	8233	2.5
>22	1017	270	1287	1.0	1307	397	1704	0.8	2687	831	3518	1.1
Total	**73675**	**57519**	**131194**	**100.0**	**109205**	**92211**	**201416**	**100.0**	**177176**	**149639**	**326815**	**100.0**
Population 17 years										454236	451638	905874
Gross Completion Rate (%)										39.0	33.1	36.1
Net Completion Rate (%)										5.7	7.3	6.5

***Source**: Best Education Statistics in Tanzania (BEST) 2006-2010: Revised National Data, September 2010, p. 66.*

Table 4: Completion rate for Secondary Schools (Form 6, 2008-2010)

Form 4 (Age)	**2008**				**2009**				**2010**			
	M	F	T	%	M	F	T	%	M	F	T	%
<17	364	398	762	3.7	449	117	566	2.6	414	383	797	2.4
17	851	372	1223	6.0	737	365	1102	5.1	429	456	885	2.6
18	1369	936	2305	11.3	1086	1067	2153	9.9	2096	2064	4160	12.4
19	2242	1836	4078	20.1	1737	2961	3798	17.4	4080	3462	7542	22.4
20	2933	1744	4677	23.0	3019	2081	5100	23.4	5016	3160	8176	24.3
21	2475	1157	3632	17.9	2818	1571	4389	20.1	4188	2141	6329	18.8
22	1955	543	2498	12.3	2118	719	2837	13.0	2669	1076	3745	12.11
>22	969	193	1162	5.7	1281	565	1846	8.5	1489	557	2046	6.1
Total	**13158**	**7179**	**20337**	**100.0**	**13245**	**8546**	**21791**	**100.0**	**20381**	**13299**	**33680**	**100.0**
Population 19 years										427370	426291	853661
Gross Completion Rate (%)										4.8	3.1	3.9
Net Completion Rate (%)										1.0	0.8	0.9

***Source**: Best Education Statistics in Tanzania (BEST) 2006-2010: Revised National Data, September 2010, p. 67.*

Despite the foregoing achievements in increasing the enrolment rate of children in schools, there are several bottlenecks in this particular area of the education sector. Foremost, there is low pace of enrolment of children in schools due to lack of effective law enforcement and implementation mechanisms. Machibya[1574] singles out that there is non-adherence to the provisions of Rule 7 of Primary School (Compulsory Enrolment and Attendance) Rules,[1575] which provides that:

> Before the end of July of each year the Ward Executive Officer shall submit to the Ward Education Co-ordinator and to all head teachers in his area of jurisdiction a list of children who shall attain seven years by the 31 March of the following year.

The requirement to submit such a list of children is intended to accurately inform the Ward Education Coordinator and head teachers of the potential children for enrolment in primary schools in the subsequent year. However, according to Machibya, this legal requirement has two problems: first, there is no directly responsible person or authority to enforce this law for it provides either the VEO or WEO to submit the list of children. Second, although the lists of children (who shall attain seven years by 31 March of the following year) are submitted to the Ward Education Co-ordinator and to all head teachers in his area of jurisdiction, the latter 'have no any obligation to follow up the effectiveness of the enrolment.'[1576]

This is because the Rules do not vest on the WEO,VEO or teachers any obligation to anyhow act on the lists. It is argued that the Rules would have provided specific obligation and sanctions on these officials to act on the lists of children submitted by the WEO or VEO as well as the timeframe within which to discharge this obligation.

Another bottleneck to increasing and maintaining an even level in the enrolment rates is the geometrical increase of poverty, particularly so in rural areas where parents normally find themselves unable to pay school fees.[1577] *The Millennium Development Goals Report 2006*[1578] points out that:

> High rates of poverty in rural areas limit educational opportunities because of the demands for children in labour, low levels of parental education and lack of access to good quality schooling. Based on household surveys in 80 developing countries, 30 per cent of rural children of primary school-age do not attend school, compared to 18 per cent in urban areas. And because rural areas have large population of children, they account for 82 per cent of children who are not in school in developing countries.

In respect of Tanzania, a recent study by the Research on Poverty Alleviation (REPOA) and UNICEF indicates that due to poor household income or due to being geographically located in rural areas, many children in the country find themselves heavily involved in some sort of work. According to this study, most of the children are 'engaged in work related to domestic provisioning, but they also attend school for the most part.'[1579] Accordingly, 'a greater percentage of rural children work, especially at an early age, than their urban peers, and proportionately fewer of Dar es Salaam's

1574 Machibya, op. cit, p. 233.

1575 GN. No. 280 of 2002.

1576 *Ibid*.

1577 *Ibid*.

1578 *The Millennium Development Goals Report 2006*, p. 7 (quoted in Machibya, *Ibid*, note 799).

1579 Leach,V., *Children and Vulnerability in Tanzania: A Brief Synthesis* Dar es Salaam: Research on Poverty Alleviation/ UNICEF, 2007, p. 15.

total child population work.'[1580] However, the survey notes that: 'There are a few areas of the country with relatively higher proportions of working children who are not attending school, and these tend to be areas where pastoralism and mining activity are more prevalent.'[1581]

(ii) Improving the Quality of Education

Regarding the quality of education as far as the Committee's recommendation is concerned, the Tanzanian Government has developed and implements the following policy and administrative measures:

a) The Integrated Early Childhood Development (IECD) Operational Guidelines and minimum standards for children aged 0 – 8;

b) The IECD In-Services Training Programme for day care-centres and-givers and pre-primary education teachers;

c) The IECD playing/teaching/learning guide;[1582] and

d) Primary education teachers have been employed yearly which leads to improvement of the National average of teacher pupil ratio from 2007 – 2012.[1583]

In addition, in its endeavour to improve the quality of education in primary school the Government has developed the service teacher training programme for primary school teachers; and employed more teachers in order to improve on the national average of teachers.[1584]

In respect of secondary education, a number of milestones have been achieved in Tanzania Mainland, including increasing the number of Universities which are offering teacher education courses. The employment of secondary education teachers has also been increasing; and an In-Services Training Programme for Science Subjects Teachers has been developed and launched.

(iii) Reviewing the Law to Prohibit Expulsion of Pregnant Girls from School

As it can be gathered, the Tanzanian Government was urged by the CROC, in its previous Concluding Observations, to review the Education Act applicable in Tanzania Mainland to prohibit expulsion of pregnant school girls from schools.[1585] However, the law has yet to be reviewed. The Tanzanian Government has indicated that it is

1580 *Ibid*, p. 16.

1581 *Ibid*.

1582 Despite the above mentioned guidelines, the State Party is in the process of identifying 8 zonal teacher training colleges which will train pre-primary education teachers. Also there are three Universities which are offering degrees in early child development. In addition the number of trained teachers has been increasing from 2006 – 2011 as shown in the Annexures to this report.

1583 United Republic of Tanzania, 'Tanzania 3rd, 4th and 5th Reports on the Implementation of the Convention on the Rights of the Child (CRC) 2005-2011', op. cit.

1584 *Ibid*.

1585 A constitutional petition has been filed in the High Court of Tanzania challenging the constitutionality of the provisions of Regulation 4 of the Education (Expulsion and Exclusion of Pupils from Schools) Regulations and shall apply to all Primary and Post Primary Schools, G.N. No. 295 of 2002.. The petition is, however, yet to be heard. *See* particularly *Legal and Human Rights Centre and another v A.G.* High Court of Tanzania at Dar es Salaam, Constitutional Petition of 2012.

still debating 'on how to review the above mentioned policy and how to enact a law which will enable the pregnant teenagers to go back to school after [...] delivery.'[1586]

Nonetheless, the Tanzanian Government has continued 'to undertake various interventions including allowing [impregnated] students to go to school through another program called Complementary Basic Education (COBET) for primary school children and also complementary secondary education.'[1587] These programs 'enable children to complete primary and secondary education.'[1588]

In addition, the Tanzanian Government has developed national guidelines 'to allow pregnant girls to continue with their education after giving birth.'[1589] These guidelines 'will be used when the education and training policy which is under review is approved.'[1590] Administratively, since 2009 the Government has allowed primary school pupils, who were pregnant, to sit for their last examination in Standard Seven.[1591] According to the Tanzanian Government, however, this is a temporary measure while waiting for the guidelines to be approved.[1592]

So, as matters stand right now, there is no law in Tanzania Mainland that allows an impregnated school girl back to school after delivering.[1593] The foregoing initiatives can, thus, be termed as 'more of privilege than a right to girls.'[1594] It also does not assist those girls who have already been expelled from schools in the years before this condonation was introduced.[1595]

In addition to this legal problem, there is also another statutory impediment to the realisation of the girl child's right to access education. Section 13 of the Law of Marriage Act (1978)[1596] allows a girl to be married at an apparent age of 14 years. However, the law prohibits boys of the age below 18 to get married, which a discriminatory effect on girls of the same age.[1597] In effect, this means that many girls in Tanzania are being married off under these provisions at an apparent age when they are still at school. This impedes the girl child's right to education, in effect.

(iv) Ensuring Teachers are Adequately Trained and Sufficiently Paid

In ensuring and enhancing the quality of education and teaching, the Tanzanian Government has regularly been reviewing and increasing salaries for teachers every year from 2006 up until now.[1598] However, teachers are still one of the lowly paid civil

1586 United Republic of Tanzania, 'Tanzania 3rd, 4th and 5th Reports on the Implementation of the Convention on the Rights of the Child (CRC) 2005-2011', op. cit, para 218.

1587 *Ibid*.

1588 *Ibid*.

1589 *Ibid*, para 219.

1590 *Ibid*.

1591 *Ibid*.

1592 *Ibid*.

1593 Unlike in Tanzania Mainland, the amendment of Sphincter and Single Parents Act of 1985 in 2005 and the establishment of Alternative Learning Centre enable the girl to continue with studies after delivery.

1594 Machibya, op. cit, p. 240 (note 824).

1595 *Ibid*.

1596 Cap. 29 R.E. 2002.

1597 The provisions of Section 13 of the Law of Marriage Act are a subject matter of a constitutional petition in *National Organisation for Legal Assistance and 8 others v A.G.* High Court of Tanzania at Dar es Salaam, Misc. Civil Cause No. 94 of 2007, which has been awaiting judgment since 2008 when the hearing were finalised.

1598 United Republic of Tanzania, 'Tanzania 3rd, 4th and 5th Reports on the Implementation of the Convention on the Rights of the Child (CRC) 2005-2011', op. cit, para 221.

servants in Tanzania. This has been normally attributed to the poor economic situation prevalent in the country.[1599] However, teachers have always been adamant to accept this version of lame excuse by the Government; consequently, resorting to habitual go-slows and strikes.[1600] In most of these strikes, the Tanzanian Government has been using the powers of the Court to declare the strikes unlawful through the provisions of the existing labour laws.[1601]

(v) Incorporating Human Rights Education in the School Curriculum

The Tanzanian Government has undertaken measures to make sure that human rights education is included in the curriculums for pre-primary, primary, secondary education and Teachers colleges in civics, and general/development studies subjects.[1602] In addition, child rights curriculum for practitioners has been developed and launched in 2010.[1603] Furthermore, the Government has incorporated human rights education in its folk and community development colleges located throughout the country.[1604]

(vi) Alternative Learning

In 2006 the Tanzanian Government, through the Ministry of Education and Vocational Training, established the Department of Alternative Learning, whose aim 'is to give an opportunity for those children who in one way or another dropped from schools before the completion of basic education.'[1605] It also aims at giving 'an education

1599 *Ibid*.

1600 The long-term ramifications of perennial teachers' go-slows and strikes in Tanzania have resulted in the increasingly low morale amongst teachers stemming from chronic maladministration of the education sector. One of the recent negative implications of the teachers' low morale in Tanzania is the unprecedented poor performance of Form Four students in 2012, where during the "first" results released in March 2013, 60% of those who sat for their examinations scored 0%. This resulted in the nullification of the results and the "second" round of results was later released by the Minister for Education and Vocational Training, Dr. Shukuru Kawambwa, late May 2013. In the "second" round, 51% of the students who sat for their Form Four Examinations scored 0%. The "second" round results were an outcome of the "standardisation" of the "first" round results, a practice that attracted a host of criticisms to both the Minister and the Ministry. See particularly Bwahama, J., 'Why Kawambwa should go' *The Citizen On Sunday* newspaper (Dar es Salaam) 2 June 2013.

It is the law in Tanzania that, where an employee or a trade union or an employer or employer's association engages in a lockout or strike that is not in compliance with the law or engages in prohibited conduct, the Labour Court may exclusively deal with such person in a number of manners. In the first place, the Labour Court may issue an injunction restraining any person from participating in an unlawful strike or lockout; or engaging in any prohibited conduct [Section 84(1)(a)(i) and (ii) of the ELRA. See also *Chama cha Walimu Tanzania v The Attorney-General*, [2008] 2 EA 57. The injunction may only be issued after the applicant has served on the respondent a notice within forty-eight hours of the application [*Ibid*, Section 84(2)], unless the Labour Court has allowed the injunction to be made within a shorter period on good cause and only if the respondent is given a reasonable opportunity to be heard [*Ibid*. Section 84(3)]. In addition, Section 27 of the Public Service (Negotiating Machinery) Act also prohibits striking or locking out by public servants in any employment or services rendered to the Central and the Local Government Authorities or any other person that 'causes the interruption or continued interruption which endangers the life, health or personal safety of the whole or part of the population.' The Public Service (Negotiating Machinery) Act further prohibits a person, being a public servant or otherwise, to persuade or to incite any public servant to take part in a strike or lock-out contrary to the provisions of Sections 26 and 27 of this law (See particularly Section 28(1) of the Public Service (Negotiating Machinery) Act).

1601 United Republic of Tanzania, 'Tanzania 3rd, 4th and 5th Reports on the Implementation of the Convention on the Rights of the Child (CRC) 2005-2011', op. cit, para 222.

1602 *Ibid*.

1603 *Ibid*.

1604 *Ibid*.

1605 *Ibid*, para 224.

opportunity for those children who did not enrol to schools during the school age.'[1606] Alternative learning classes have increased up to 49 classes with 1,789 students of whom 277 were girls and 1,512 were boys in 2010.[1607]

(vii) School Dropouts

Like the other three common law East African countries under this study, Tanzania faces a serious problem of School dropouts in its education system. The tables below better illustrate this point.

Table 5: Pupil Dropout by Reason and Grade in Government and Non-Government Primary Schools, 2010

Reasons	Grade							Total
	Std I	Std II	Std III	Std IV	Std V	Std VI	Std VII	
Truancy	3502	6050	7174	9866	7882	10168	8002	**52644**
Pregnancy	0	1	6	41	230	674	816	**1768**
Death	354	434	495	513	367	354	312	**2829**
Unable to meet basic needs	254	375	538	549	468	557	412	**3153**
Illness	67	106	165	225	302	318	270	**1453**
Taking care of ill people	16	41	87	48	103	229	91	**615**
Others	473	599	940	929	1023	1163	949	**6076**
Grand Total	**4666**	**7606**	**9405**	**12171**	**10375**	**13463**	**10852**	**68538**

Source: Best Education Statistics in Tanzania (BEST) 2006-2010: Revised National Data, September 2010, p. 28.

Table 6: Student Dropouts by Reason and Grade in Government and Non-Government Secondary Schools, 2009

Reasons	Grade						Total
	Form I	Form II	Form III	Form IV	Form V	Form VI	
Truancy	1363	3580	3340	2883	64	34	**11264**
Pregnancy	674	1927	1962	1751	17	14	**6346**
Death	264	668	578	494	17	9	**2030**
Unable to meet basic needs	725	1371	1158	1054	21	15	**4344**
Illness	182	502	473	480	20	25	**1682**
Parental Illness	51	86	136	80	10	10	**373**
Others	985	1493	1410	1102	83	30	**5103**
Grand Total	**4244**	**9627**	**9057**	**7844**	**232**	**137**	**31141**

Source: Best Education Statistics in Tanzania (BEST) 2006-2010: Revised National Data, September 2010, p. 68.

1606 *Ibid.*

1607 *Ibid.*

From the recent data generated from the Best Education Statistics in Tanzania (BEST), it is apparent that truancy is the main reason why most pupils drop out of school, followed by pregnancy. For instance, the tables above indicate that in 2009 and 2010 truancy was the leading cause for dropout in primary schools (76.8%) followed by others (8.8%).[1608]

The reasons for truancy are yet to be made official, but Machibya advances several explanations, including the fact that in most parts of the country, particularly in rural areas, schools are located far away from home. This makes it difficult for most children to regularly attend schooling, given the perennial lack of reliable means of transport system in those parts. He also attributes school dropouts in most parts of the country to lack of teachers (and, as such, no close follow up on truant pupils) and abject poverty, 'which causes pupils to be short of school requirements.'[1609]

The child's right to vocational training is guaranteed under Section 87 of the Law of the Child Act, which provides that:

> 'A child shall have a right to acquire vocational skills and training in the form of apprenticeship.' This right is also provided under the Vocational Education and Training Act[1610] and in terms of Section 88 of the Law of the Child Act, which pegs the minimum age for admission to apprenticeship at the child's attaining the age of fourteen years or after completion of primary school education.[1611] The Tanzanian Government has established a department within the Ministry of Education and Vocational Training 'for the purpose of overseeing the vocation training.'[1612] In addition, there are folk development colleges, under the Ministry of Community Development of Gender and Children, which also provide vocational education to children.[1613]

10.8 The Child's Rights to Leisure, Recreation and Cultural Activities in East Africa

The child's rights to leisure, recreation and cultural activities are set out in Article 12 of the ACRWC and Article 31 of the CRC. Interestingly, the two articles contain two sub-articles that are similar in both construction and contents. Sub-articles 1 of the two articles oblige States Parties to 'recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.' Under sub-articles 2 of the two articles, States Parties are obliged to 'respect and promote the right of the child to fully participate in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.'

In fulfilling their obligations under the foregoing provisions of the ACRWC and the CRC, all the three common law East African countries under study in this work have been implementing the child's rights to leisure, recreation and cultural activities.

1608 Ministry of Education and Vocational Training, *Best Education Statistics in Tanzania (BEST) 2006-2010: Revised National Data*, September 2010, p. 28.

1609 Machibya, op. cit, p. 242.

1610 Cap. 82 R.E. 2002. A similar law also is in existence in Zanzibar: Vocational Training Act, No. 8 of 2006.

1611 Section 88 of the LCA explicitly states that: 'The minimum age at which a child may commence an apprenticeship with a craftsman shall be fourteen years or after completion of primary school education.'

1612 United Republic of Tanzania, 'Tanzania 3rd, 4th and 5th Reports on the Implementation of the Convention on the Rights of the Child (CRC) 2005-2011', op. cit, para 217.

1613 *Ibid*.

However, as shall be seen below, the implementation of the foregoing provisions in the three countries differ in nature and content.

10.8.1 Protection of the Child's Right to Culture in Uganda

The need to preserve culture is one of the National Objectives and Directive Principles of State Policy (henceforth, "the National Objectives") enshrined in the Ugandan Constitution (1995). According to paragraph XXIV of these National Objectives (i.e. Cultural Objectives):

> Cultural and customary values which are consistent with fundamental rights and freedoms, human dignity, democracy, and with the Constitution may be developed and incorporated in aspects of Ugandan life. The State shall-
>
> (i) promote and preserve those cultural values and practices which enhance the dignity and well-being of Ugandans;
>
> (ii) encourage the development, preservation and enrichment of all Ugandan languages;
>
> (iii) promote the development of a sign language for the deaf; and
>
> (iv) encourage the development of a national language or languages.

In addition, paragraph XXV of the National Objectives obliges the State and citizens to 'endeavour to preserve and protect and generally promote, the culture of preservation of public property and Uganda's heritage.' In particular, Article 37 of the Ugandan Constitution provides that:

> 37. Every person has a right as applicable, to belong to, enjoy, practise, profess, maintain and promote any culture, cultural institution, language, tradition, creed or religion in community with others.

In extending this constitutional protection of the right to cultural activity for Ugandans (including children), including children, the Ugandan Children Act (1996) protects children from harmful customary practices. It categorically stipulates that: 'It shall be unlawful to subject a child to social or customary practices that are harmful to the child's health.'

10.8.2 Protection of the Child's Right to Culture in Kenya

The child's right to culture is generally guaranteed in Article 11 of the Kenyan Constitution (2010). In terms of sub-article (1) of this Article, the Kenyan Constitution 'recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.' Therefore, the State is obliged to:

(a) promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage;[1614]

(b) recognise the role of science and indigenous technologies in the development of the nation;[1615] and

1614 Article 11(2)(a) of the Kenyan Constitution (2010).

1615 *Ibid*, Article 11(2)(b).

(c) promote the intellectual property rights of the people of Kenya.[1616]

In terms of sub-article (3) of Article 11, the Kenyan Constitution obliges Parliament to enact legislation to:

(a) ensure that communities receive compensation or royalties for the use of their cultures and cultural heritage;[1617] and

(b) recognise and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the communities of Kenya.[1618]

The ramification of the provisions of this article is that children also are entitled to the full realisation of their right to culture alongside adults. In respect of minorities and marginalised groups, including children from such groups, Article 56(d) of the Kenyan Constitution obliges the State to put in place affirmative action programmes designed to ensure that minorities and marginalised groups 'develop their cultural values, languages and practices.'

Interestingly, the child is vested with the duties and responsibilities to, *inter alia*, 'preserve and strengthen the positive cultural values of his community in his relations with other members of that community.'[1619] However, in reckoning the requisite duty and responsibility of any individual child, the Kenyan Children Act requires that: 'due regard shall also be had to the age and ability of such child and to such limitations as are contained in this Act.'[1620]

It should be noted that the child's enjoyment of his or her right to cultural activities is only meaningful if such a child is protected from any form of harmful social and/or cultural practice, as envisaged in Article 21 of the ACRWC.[1621] In its bid to domesticate this principle, Article 53(1)(d) of the Kenyan Constitution guarantees to every child the right to be protected from, *inter alia*, harmful cultural practices. Statutorily, Section 14 of the Kenyan Children Act (2001) protects the child from harmful cultural rites, etc. It expressly provides that:

> No person shall subject a child to female circumcision, early marriage or other cultural rites, customs or traditional practices that are likely to negatively affect the child's life, health, social welfare, dignity or physical or psychological development.

1616 *Ibid*, Article 11(2)(c).

1617 *Ibid*, Article 11(3)(a).

1618 *Ibid*, Article 11(3)(b).

1619 Section 21(e) of the Kenyan Children Act.

1620 *Ibid*.

1621 Article 21 of the ACRWC explicitly provides that:

> '1. States 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:
>
> (a) those customs and practices prejudicial to the health or life of the child; and
>
> (b) those customs and practices discriminatory to the child on the grounds of sex or other status.
>
> 2. 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 18 years and make registration of all marriages in an official registry compulsory.'

In addition, Article 55(d) of the Kenyan Constitution obliges the State to undertake measures, including affirmative action programmes, to ensure that the youth 'develop their cultural values, languages and practices.'[1622]

10.8.3 Protection of the Child's Right to Leisure, Recreation and Cultural Activities in Tanzania

Like its counterparts in East Africa, Tanzania has been undertaking 'some measures on recovering sports ground to enable children to have an access to leisure, recreational and cultural activities.'[1623] Also the Tanzanian Government has developed the curriculum that has included personal development and sports as one of the subjects to be taught in schools.'[1624] Under Section 8(1)(g) of the Law of the Child Act (LCA) a parent, guardian or any other person having custody of a child has the duty to ensure that a child enjoys his or her right to play and leisure. Sub-section (4) of Section 8 of the LCA prohibits a person to 'deprive a child the right to participate in sports, or in positive cultural and artistic activities or other leisure activities.' However, such prohibition is not applicable where, in the opinion of the parent, guardian or relative, such participation or activity 'is not in the best interest of the child.'

In terms of Section 9(2) of the LCA, the child's right to leisure and liberty is to be exercised 'subject to guidance and ability of a parent, guardian or relative.' This is in line with the duty and responsibility imposed on the parent towards his or her child to provide guidance, care, assistance and maintenance for the child and assurance of the child's survival and development.[1625] This parental duty to provide guidance to the child goes hand in hand with the child's duty and responsibility to, *inter alia*, 'preserve and strengthen the positive cultural values of his community and the nation in general in relation to other members of the community or the nation.'[1626] This duty of the child requires them to respect their parents, siblings, relatives, members of the extended family as well as the wider society in which they grow, in turn respecting and preserving positive cultural values pertaining to their respective societies.[1627]

As in the other two common law East African countries considered in this study, the LCA prohibits[1628] a person to 'subject a child to torture, or other cruel,

1622 Under the Definition of the African Youth Charter, a "youth" is a person between the age of 15 and 35. Therefore, the reference to the youth in Article 55 necessarily brings to the fore children aged between 15 and immediately below 18.

1623 United Republic of Tanzania, 'Tanzania 3rd, 4th and 5th Reports on the Implementation of the Convention on the Rights of the Child (CRC) 2005-2011', op. cit, para 223.

1624 *Ibid*.

1625 See particularly Section 9(2)(b) of the LCA.

1626 *Ibid*, Section 15(e). This provision is similar to the provision of Article 31(d) of the ACRWC.

1627 In recognition of the central role that Ubuntu plays in the regulation of matrimonial relations in the African society, the African Charter on the Rights and Welfare of the Child (ACRWC) has codified this value in Article 31. This provision has been adopted in many laws related to children's rights that were enacted in many sub-Saharan African countries after the adoption of the ACRWC (see, for example, Section 21(e) of the Kenyan Children Act).

1628 Section 14 of the LCA provides a general criminal sanction for whoever contravenes the provisions of Part II (Sections 4-16), including this section, which means that non-adherence to this prohibition is an offence under Section 14. In particular, Section 14 provides explicitly that:

'A person who contravenes any provision of this Part, commits an offence and shall on conviction be liable to a fine not exceeding five million shillings or to imprisonment for a term not exceeding six months or to both.

inhuman punishment or degrading treatment[1629] including any cultural practice which dehumanizes or is injurious to the physical and mental well-being of a child.'[1630]

1629 In terms of sub-section (3) of Section 13 of the LCA, the term 'degrading treatment', as used in this section, means 'an act done to a child with the intention of humiliating or lowering his dignity.'

1630 *Ibid*, Section 13(1).

Chapter Eleven

Protecting the Rights of Children with Disabilities

11.0 Introduction

Children with disabilities and their families often experience hurdles to the schooling, enjoyment of their basic human rights and to their inclusion in community or society. Children with disabilities are overlooked, their capabilities are undermined and their demands are given secondary priority. Yet, the hurdles/impediments they face are more frequently as a result of the environment in which they live than as a result of their impairment which they got by birth or later stages because of mishaps/accidents.

While the situation for these children is changing for the better because of the impact of international instruments and human rights groups pressure, still there are severe gaps. On the positive aspect, a tremendous global momentum has been gathering over the past two decades, originating with children with disabilities and increasingly supported by civil society and governments, as well as NGOs. In many countries, small local groups have joined forces to create regional or national organizations that have lobbied for reform and changes to legislation in their respective countries (developed and under developed) Including East Africa. As a result, the impediments to the participation of children with disabilities as full members of their communities are being overcome. Progress is varied, however, both between and within countries. Many countries have enacted protective legislation, but there are still many challenges facing children with disabilities, resulting in continued violation of the rights of children with disabilities.[1631] This chapter examines the protection of the rights of children with disabilities in the three common law East African countries, i.e. Kenya, Tanzania and Uganda.

11.1 Prevalence of Disability in Africa

Today, it is estimated that about 500-650 million people in the world are with disabilities. This accounts for approximately 10% of the total global population.[1632] About 150 million persons with disabilities are children, 80% of whom live in developing countries.[1633] Although developing countries (particularly those in Africa) have one of the largest numbers of children with disabilities in the world,[1634] accurate figures 'on the prevalence of disability are difficult to find for most developing countries, including those in Africa.'[1635] Some empirical studies have indicated the

1631 http://www.un.org/esa/socdev/unyin/documents/children_disability_rights.pdf (Accessed on 29 July 2013).

1632 African Child Policy Forum, *Educating Children with Disabilities in Africa: Towards a Policy of Inclusion* Addis Ababa: The African Child Policy Forum, 2011(a), p. 1.

1633 *Ibid*.

1634 African Child Policy Forum, *Children with Disabilities in Africa: Challenges and Opportunities* Addis Ababa: The African Child Policy Forum, 2011(b), p. iii.

1635 African Child Policy Forum, *Educating Children with Disabilities in Africa: Towards a Policy of Inclusion*, op cit.

lack of accurate figures is partly due to 'the hidden nature of the problem, and partly because of the low levels of attention given to it by actors in various fields.'[1636]

However, from the diminutive available statistical evidence, it is apparent that disability is a problem prevalent in most African countries, including the three common law East African countries considered in this work. According to the World Programme of Action Concerning Persons with Disabilities, in most countries,[1637] at least one person out of ten 'is disabled by physical, mental or sensory impairment, and at least 25 percent of any population is adversely affected by the presence of disability.'[1638] In this regard, half a million children go blind every year, 'of whom 60 percent die in childhood, leaving a total of about 1.5 million, about four-fifths of whom live in the developing world.'[1639]

In terms of factors fuelling disability in Africa, the African Child Policy Forum (ACPF) has pointed out one such factors as the widespread and perennial armed conflicts and the attendant legacies – in the form of uncleared landmines.[1640] The ACPF also singles out household poverty coupled with lack of adequate healthcare services and facilities as amongst the factors accelerating disability in the continent. The ACPF further notes that disability in Africa is attributable to such other factors as the prevalence of unchecked communicable diseases, accidents and inadequate prenatal and neonatal health care services.[1641] It should be noted that in most African countries, as in other developing countries, 'many disabilities can be traced to poverty-induced illness and a lack of resources with which to obtain proper nutrition and preventive and curative healthcare services.'[1642]

The ACPF notes that, in spite of the foregoing huge challenges disability poses to most African countries, 'sufficient attention has not been accorded to the issue, either in research, policy and legislation, or in service programming.'[1643] There are still no adequate national policies and laws that can effectively address the multiple sufferings children with disabilities do face. It should be noted that the World Report on Violence against Children (VAC Study)[1644] has revealed a number of incidences of violence against children with disabilities, who 'face both greater probability of being beaten, bullied or excluded in school and greater risk of sexual abuse than their non-disabled peers.'[1645] In this context, UNICEF estimates that, on average, children with disabilities are 1.7 times more likely to suffer abuse than their non-disabled peers.[1646] According to the ACPF:

1636 *Ibid*.

1637 http://www.un.org/disabilities/default.asp?id=23 (Accessed on 3 June 2013).

1638 African Child Policy Forum, *Educating Children with Disabilities in Africa: Towards a Policy of Inclusion*, op cit.

1639 *Ibid* (quoting data from Mittler, P., 'Childhood Disability: A Global Change', in Mittler, B., et al (Editions), *World Yearbook of Education 193: Special Needs Education* London: Kogan Page, 1993. pp. 3-15.

1640 African Child Policy Forum, *Children with Disabilities in Africa: Challenges and Opportunities*, op. cit, p. iii.

1641 *Ibid*, p. v.

1642 *Ibid*, p. v.

1643 *Ibid*.

1644 United Nations Secretary-General, *Study on Violence against Children* New York: United Nations, 2006 (A/61/299).

1645 African Child Policy Forum, *Violence against Children with Disabilities in Africa: Field Studies from Cameroon, Ethiopia, Senegal, Uganda and Zambia* Addis Ababa: The African Child Policy Forum, 2011(c), p. 1.

1646 Loaiza, E. and C. Cappa, *Measuring Children's Disability via Household Surveys: The MICS Experience* UNICEF: New York, 2005.

> Children with disabilities face increased vulnerability to violence in numerous and diverse ways, much of which is not documented in official legislature, given the marginalised social position that they face. Children with physical disabilities may find it harder to flee from violent situations and those with sensory impairments may be less capable of explaining an attack or describing the perpetrator to those around them. Children with cognitive impairments meanwhile may face difficulties in coherently explaining their ordeal and cultural prejudice that may diminish their prospect of being taken seriously by those they report the abuse to.[1647]

As a result of perpetual apathy and negligence at the state level, negative impact has been created 'upon the level of support provided to children with disabilities and their families.'[1648] This entails lack of financial and medical aid, accessible state facilities and systems and community understanding, which 'decreases the child's chances of equal economic and social participation (in itself a form of emotional violence) and allows negative stigma to persist, putting a child at continued risk of all types of violence from the community at large.'[1649]

11.2 International Protection of the Rights of Children with Disabilities

As a result of the ever-increasing suffering of children with disabilities and as a result of lack of requisite attention from states around the world on the disability problem, the world 'is becoming less tolerant of exclusionary and discriminatory practices, including discrimination against persons with disabilities.'[1650] This is 'due to increasing knowledge as well as growing awareness of universal human rights.'[1651] At the international arena, global accountability and commitment to the rights of persons with disabilities was manifested in the incorporation of specific provisions in the CRC and ACRWC of provisions relating to the protection of children with disabilities and the adoption of an international treaty to protect these persons – i.e. the UN Convention on the Rights of Persons with Disabilities (2006).

11.2.1 The Normative Principles

Historically speaking, the CRC was the first human rights treaty 'that explicitly recognised "disability" as the basis for any type of discrimination.'[1652] In particular, Article 23 of the CRC is more explicit on the rights of children with disabilities. It guarantees the rights of children with mental disabilities to enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.[1653] It also guarantees the right of children with disabilities to special care; and the right to the recognition of the special needs of a child with disabilities, extension of assistance free of charge whenever possible;[1654] and

1647 African Child Policy Forum, *Violence against Children with Disabilities in Africa: Field Studies from Cameroon, Ethiopia, Senegal, Uganda and Zambia,* op. cit.

1648 *Ibid*.

1649 *Ibid*.

1650 Bob Ransom (Executive Director, Ethiopian Centre for Disability and Development), Preface to African Child Policy Forum, *Educating Children with Disabilities in Africa: Towards a Policy of Inclusion* op. cit, p. iii.

1651 *Ibid*.

1652 African Child Policy Forum, *Children with Disabilities in Africa: Challenges and Opportunities*, op. cit, p. 1.

1653 Article 23(1) of the CRC.

1654 *Ibid*, Article 23(2).

the rights to effective access to education, training, healthcare services, rehabilitation services, preparation for employment and recreation opportunities.[1655]

In its General Comment No. 9 on the Rights of Children with Disabilities,[1656] the CROC has given further elaboration of the content of Articles 2 and 23 of the CRC, emphasising the need to entirely appreciate that 'the barrier is not the disability itself but rather the combination of social, cultural, attitudinal and physical obstacles which children with disabilities encounter in their daily life.'[1657]

On its part, the ACRWC is very explicit on the protection of the rights of children with disabilities; beginning with its promulgation of the principle of non-discrimination in Article 3.[1658] In Article 13(1), the ACRWC guarantees to every child, who is mentally or physically disabled, the right to 'special measures of protection in keeping with his physical and moral needs and under conditions which ensure his dignity, [and] promote his self-reliance and active participation in the community.' The ACRWC, thus, obliges States Parties to ensure, "subject to available resources", that a child with disabilities and his or her carers receive requisite assistance that is appropriate to the child's condition. In particular, States Parties are obliged to 'ensure that the disabled child has effective access to training, preparation for employment and recreation opportunities in a manner conducive to achieving the fullest possible social integration, individual development and his cultural and moral development.'[1659]

In a more progressive tone, Article 13(3) of the ACRWC brings a new dimension that is missing in Article 23 of the CRC. It categorically states that States Parties 'shall use their available resources with a view to achieving progressively the full convenience of the mentally and physically disabled persons to movement and access to public highway buildings and other places to which the disabled may legitimately want to have access.' This provision 'aims to guarantee mobility for children with disabilities and their access to public institutions and facilities'[1660] such as public health and school buildings.[1661]

On 13 December 2006, during the sixty-first session of the General Assembly, the UN Convention on the Rights of Persons with Disabilities (the "UN Disability

1655 *Ibid*, Article 23(3).

1656 CROC, General Comment No. 9 'on the Rights of Children with Disabilities' (2006).

1657 *Ibid*, para 2.

1658 Although Article 3 of the ACRWC does not expressly mention "disability" as a ground of non-discrimination against children, this omission should be taken as an unfortunate one. As Gose points out, the first part of this article confers to "every child" the right to non-discrimination. This is further elaborated in Article 13 of the ACRWC, which specifically protects the rights of children with disabilities. *See* Gose, M., *The African Charter on the Rights and Welfare of the Child* Bellville: Community Law Centre (University of Western Cape), 2002, pp. 47 & 48; and Combrinck, H., 'The Hidden Ones: Children with Disabilities and the Right to Education'. In Sloth-Nielsen, J. (Edition), *Children's Rights in Africa: A Legal Perspective* Hampshire: Ashgate Publishing Company, 2008, pp. 299-321, p. 310.

1659 Article 13(2) of the ACRWC.

1660 African Child Policy Forum, *Children with Disabilities in Africa: Challenges and Opportunities* op. cit, p. 3.

1661 Combrinck, H., 'The Hidden Ones: Children with Disabilities and the Right to Education'. In Sloth-Nielsen, J. (Edition), *Children's Rights in Africa: A Legal Perspective* Hampshire: Ashgate Publishing Company, 2008. pp. 299-321, p. 311.

Convention")[1662] was adopted.[1663] The Disability Convention and its Optional Protocol[1664] entered into force on 3 May 2008, after the Convention received its 20th ratification, and the Optional Protocol 10 ratifications. In fact:

> This marked a major milestone in the effort to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms of persons with disabilities, and to promote respect for their inherent dignity.[1665]

The UN Disability Convention has brought about express protection of a number of basic rights and fundamental freedoms of persons with disability, including the rights of children with disabilities. In fact, the UN Disability Convention devotes two articles to dealing expressly with the rights of children with disabilities. In particular, Article 7 of the UN Disability Convention reiterates the provisions of Article 13 of the ACRWC and Article 23 of the CRC, namely:

(i) States Parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children;

(ii) in all actions concerning children with disabilities, the best interests of the child shall be a primary consideration; and

(iii) States Parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children; and to be provided with disability and age-appropriate assistance to realise that right.

11.2.2 The Right of Children with Disabilities to Equality and Non-Discrimination

In order to eliminate discrimination against children with disabilities, the CROC, in its General Comment No. 9,[1666] requires States Parties to take the following measures in ensuring that all forms of discrimination against children with disabilities are prevented and eliminated in their jurisdictions:

1662 As at 26 May 2010 there were 144 signatories to the Convention; 88 signatories to the Optional Protocol; 86 ratifications of the Convention; and 53 ratifications of the Protocol. Tanzania signed the Convention on 30 March 2007; signed the Protocol on 29 September 2008; ratified the Convention and the Protocol on 10 November 2009. A comprehensive list of countries that have signed and ratified the Convention and the Protocol is available at http://www.un.org/disabilities/countries.asp?navid=17&pid=166 (Accessed on 26 May 2010).

1663 UN General Assembly Resolution A/RES/61/106. The Convention is available at http://www.un.org/disabilities/convention/signature.shtml (Accessed on 26 May 2013). The Disability Convention is a major, specific UN human rights instrument that has addressed basic rights and fundamental freedoms of people with disabilities, including the right. In accordance with its Article 42, the Convention and its Optional Protocol opened for signature by all States and by regional integration organizations at United Nations Headquarters in New York on 30 March 2007. The opening began with a solemn ceremony in the United Nations General Assembly hall.

1664 According to Article 1 of the Protocol: 'A State Party to the present Protocol ("State Party") recognizes the competence of the Committee on the Rights of Persons with Disabilities ("the Committee") to receive and consider communications from or on behalf of individuals or groups of individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of the provisions of the Convention.'

1665 Visit http://www.un.org/disabilities/default.asp?id=210 (Accessed on 26 May 2013).

1666 CROC, General Comment No. 9 on the Rights of Children with Disabilities, op. cit.

(a) Include expressly disability as a forbidden ground for discrimination in constitutional provisions on non-discrimination and/or include specific prohibition of discrimination on the ground of disability in specific anti-discrimination laws or legal provisions;

(b) Provide for effective remedies in case of violations of the rights of children with disabilities, and ensure that those remedies are easily accessible to children with disabilities and their parents and/or others caring for the child; and

(c) Conduct awareness-raising and educational campaigns targeting the public at large and specific groups of professionals with a view to preventing and eliminating *de facto* discrimination against children with disabilities.[1667]

In giving further elaboration of the foregoing principles, the UN Disability Convention expressly guarantees the right of persons with disabilities to equality and non-discrimination. In Article 5(1), the Convention obliges States Parties to 'recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.'

In Article 5(2) the Convention obliges States Parties to 'prohibit all discrimination on the basis of disability' and ensure that they 'guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.' Emphatically, sub-article (3) of this Article provides that: 'In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.'

Sub-article (4) of Article 5 of the Convention is even more progressive. It encourages undertaking of specific measures that 'are necessary to accelerate or achieve *de facto* equality of persons with disabilities,' which 'shall not be considered discrimination under the terms of the present Convention.' Therefore, Article 5 of the Convention lays the backbone of the right to equality for persons (including children) with disability.

11.2.3 The Right of Children with Disabilities to Equal Recognition before the Law

Article 12 of the UN Disability Convention extends the principle laid down in Article 5. It categorically provides, in sub-article (1), that States Parties should 'reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.' States Parties are, thus, urged to 'recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.'[1668] The Convention also obliges to 'take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.'[1669] In sub-article (4) of Article 12, the Convention provides that:

> 4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the

1667 *Ibid*, para 9.

1668 Article 12(2) of the UN Disability Convention.

1669 *Ibid*, Article 12(3).

> exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

Therefore, this article strengthens the principle laid down in Article 5 by obliging States Parties to formulate specific measures that ensure that the legal capacity of persons (including children) with disabilities is clearly and effectively protected.

11.3 National Policies and Laws Related to Children with Disabilities in East Africa

Policies and laws play a pivotal role in curing social problems such as stigma against children with disabilities. However, in many African countries, 'the legal provisions related to children with disabilities are often non-existent or rudimentary.'[1670] This means that despite the large number of children with disabilities in Africa, 'these children are absent from, or referred to only marginally in, public law and policy documents, health, education and social development plans, and/or poverty reduction programmes.'[1671]

As the ACPF notes, in many African countries, sometimes National Plans of Action 'make reference to children with disabilities, but suggest little action to meet their needs.'[1672] Accordingly, this situation is said to contribute 'to the neglect of these children's economic, social, cultural, civil and political rights – among which rights education stands out as particularly important.'[1673] In the sections below we, consider the constitutional, policy and statutory provisions guaranteeing the rights of children with disabilities in the three common law East African countries considered in this study. It should be noted that all the three countries have undertaken constitutional, policy and legislative measures to protect the rights of children with disabilities, in one way or another.

11.3.1 Protection of Children with Disabilities in Uganda

As is the case in many Sub-Saharan African countries, the 1995 Ugandan Constitution has specific provisions recognising and protecting the rights and dignity of persons (including children) with disabilities as both part of the Fundamental Objectives and

1670 African Child Policy Forum, *Children with Disabilities in Africa: Challenges and Opportunities,* op. cit, 5.

1671 African Child Policy Forum, *Educating Children with Disabilities in Africa: Towards a Policy of Inclusion*, *op. cit*, p. 3.

1672 *Ibid*. See also Ransom, B., *Missing Voices: Children with Disabilities in Africa* Addis Ababa: The African Child Policy Forum, 2009, p. 10.

1673 *Ibid*.

Directive Principles of State Policy[1674] and as also part of the enforceable fundamental human rights.[1675] In particular, Articles 32 and 35 on fundamental human rights 'directly impact the rights of persons with disabilities.'[1676] Article 35(1) of the Constitution of Uganda is more relevant to the protection of persons with disabilities. It explicitly provides that: 'Persons with disabilities have a right to respect and human dignity and the State and society shall take appropriate measures to ensure that they realise their full mental and physical potential.'

Sub-article (2) of Article 35 of the Ugandan Constitution obliges Parliament to enact legislation appropriate for the protection of persons (including children) with disabilities. In discharging this obligation, in August 2006 Parliament enacted the Persons with Disabilities Act.[1677] This law effectively guarantees to persons (including children) with disabilities in Uganda a number of rights: the right to education;[1678] the right to health;[1679] measures of rehabilitation;[1680] employment-related rights;[1681] the right to accessibility;[1682] the right to privacy;[1683] and family rights.[1684]

Under Article 32, the Ugandan Constitution obliges the Government to undertake affirmative action in favour of groups marginalised on the basis of, *inter alia*, disabilities 'for the purposes of redressing the imbalances which exist against them.'

In addition, the 1996 Ugandan Children Act makes specific provision for the rights of children with disabilities. It also provides a number of guarantees, including the right to equal opportunities to education.[1685] In a progressive tone, Section 9 of the Ugandan Children Act obliges a parent of a child with disabilities and the State "to take appropriate steps" to ensure that children with disabilities are: (a) assessed as early as possible as to the extent and nature of their disabilities; (b) offered appropriate

1674 While 'Fundamental Objectives' refer to the ultimate objectives of the nation which should be pursued by the Government in power, 'Directive Principles' of state policy refer to the paths which should be followed by the Government to achieve the identified objectives. See Juma, I.H., 'Constitution-Making in Tanzania: The Case for a National Conference.' In Oloka-Onyango, J., et al (Editions), *Law and the Struggle for Democracy in East Africa* Claripress Ltd., 1996, p. 413. In addition, as the Nigerian Constitutional Drafting Committee (CDI) said in the 1980s, 'By Fundamental Objectives we refer to the identification of the ultimate objectives of the Nation whilst Directive Principles of State Policy indicate paths which lead to those objectives. Fundamental Objectives are ideals towards which the Nation is expected to strive whilst Directive Principles lay down policies which are expected to be pursued in the efforts of the Nation to reach the national ideals.' Report of the Constitution Drafting Committee, Vol. 1, p. v. quoted in Okere, O., 'Fundamental Objectives and Directive Principles of State Policy under the Nigerian Constitution' *The International and Comparative Law Quarterly* Vol. 32 No. 1, 1983, available at http://www.jstor.org/pss/759474 (Accessed on 19 April 2013). See also Mashamba, C.J., 'Using Directive Principles of State Policy to Interpret Socio-Economic Rights into the Tanzanian Bill of Rights' The Law Reformer Journal Vol. 2 No. 1, 2009.

1675 *See* particularly Articles 32 and 33 of the Ugandan Constitution (1995).

1676 African Child Policy Forum, *Educating Children with Disabilities in Africa: Towards a Policy of Inclusion* op. cit, p.63.

1677 Act No. 20 of 2006.

1678 *Ibid*, Section 5. Article 30 of the Constitution of Uganda guarantees to every person, including a child with disabilities, the right to education.

1679 *Ibid*, Section 7.

1680 *Ibid*, Section 10.

1681 *Ibid*, Part III.

1682 *Ibid*, Part IV.

1683 *Ibid*, Section 35.

1684 *Ibid*, Section 36.

1685 *See* particularly, Sections 5 and 10 of the Ugandan Children Act (1996). *See* also Combrinck, H., 'The Hidden Ones: Children with Disabilities and the Right to Education', op. cit, p. 316; and African Child Policy Forum, *Harmonisation of Children's Laws in Eastern and Southern Africa: Country Briefs* Addis Ababa: African Child Policy Forum, 2012, p. 289.

treatment; and (c) afforded facilities for their rehabilitation and equal opportunities for their rehabilitation.

In particular, Section 5(1) of the Ugandan Children Act (1996) vests the duty to maintain a child (including those with disabilities) on the parent, guardian or any other person having the custody of such child. The duty vested upon a parent, guardian or any other person having the custody of a child gives the child the right to education and guidance;[1686] immunization;[1687] adequate diet;[1688] clothing;[1689] shelter;[1690] and medical attention.[1691] In terms of Section 5(2), any person who has the custody of the child (including the child with disabilities) is obliged to protect such child from discrimination, violence, abuse and neglect.

Section 10(5) of the Ugandan Children Act obliges a local government council to maintain a register of all children with disabilities in its jurisdiction. It also obliges the council to give appropriate assistance to such children whenever possible 'in order to enable those children to grow up with dignity among other children and to develop their potential and self-reliance.' However, as the African Child Policy Forum (ACPF) has pointed out, 'there is no evidence on the ground to show that the local councils have discharged this obligation.'[1692]

11.3.2 Protection of Children with Disabilities in Kenya

In addition to all human rights and fundamental entitlements guaranteed to all Kenyans under the Constitution of Kenya (2010),[1693] the rights of persons (including children) with disabilities are specifically protected in Article 54 of the Constitution. Under sub-article (1) of this Article, a person, including a child, "with any disability" is entitled:

(a) to be treated with dignity and respect and to be addressed and referred to in a manner that is not demeaning;

(b) to access educational institutions and facilities for persons with disabilities that are integrated into society to the extent compatible with the interests of the person;

(c) to reasonable access to all places, public transport and information;

(d) to use Sign language, Braille or other appropriate means of communication; and

(e) to access materials and devices to overcome constraints arising from the person's disability.

1686 Section 5(1)(a) of the Ugandan Children Act (1996).

1687 *Ibid*, Section 5(1)(b).

1688 *Ibid*, Section 5(1)(c).

1689 *Ibid*, Section 5(1)(d).

1690 *Ibid*, Section 5(1)(e).

1691 *Ibid*, Section 5(1)(f).

1692 African Child Policy Forum, H*armonisation of Children's Laws in Eastern and Southern Africa: Country Briefs* op. cit, p. 189.

1693 Dubbed as one of the progressive Bills of Rights, the Bill of Rights in the Kenyan Constitution is enshrined in Chapter 4. It is 'by and large guided by international human rights standards.' *See* Odongo, G., 'Caught between Progress, Stagnation and a Reversal of Some Gains: Reflections on Kenya's Record in Implementing Children's Rights Norms' *African Human Rights Law Journal* Vol. 12 No. 1, 2012, pp. 111-141, p. 116.

In giving the foregoing constitutional provisions specific statutory application, Section 12 of the Kenyan Children Act provides for the rights of the child with disabilities. Using the expression "the disabled child",[1694] this provision guarantees to the child with disability the right 'to be treated with dignity, and to be accorded appropriate medical treatment, special care, education and training free of charge or at a reduced cost whenever possible from harmful cultural rites, etc.'

Further protection to children with disabilities is provided for in the Persons with Disabilities Act (2003), which predates the UN Disability Convention. The objectives of the Persons with Disabilities Act are: (i) to establish the National Council for Persons with Disabilities; (ii) to provide for the rights and rehabilitation of PWDs; and (iii) to deal with matters connected with these two objectives. It provides for the rights, rehabilitation and equal opportunities for persons (including children) with disabilities.

At a policy level, Kenya has adopted the National Policy for Persons with Disabilities. Through this policy, the Kenyan Government 'recognizes that disability cuts across all sectors of development and should be an integral part of planning.'[1695] Viewed in this context, the Kenyan Government, thus, 'continues to create a conducive environment for different players to include disability issues into their policies and programmes.'[1696] It has identified 21 policy targets and adopted five principles to guide its implementation and monitoring; that is:

(a) *Equalization of opportunities* – PWDs should be accorded opportunities on an equal basis through affirmative action.

(b) *Mainstreaming* – PWDs should be fully included in all aspects of life and their special needs should be addressed.

(c) *Accessibility* – Provision of accessibility should be a cross-cutting concern to all underlying consideration in the built environment, information and services.

(d) *Gender* – The policy applies equally to both men and women, boys and girls with disabilities.

(e) *Human Rights approach to disability agenda* – The culture of charity to articulation of human rights and development approach to disability is not acceptable.[1697]

In order to provide further practical guide, the Kenyan Government has also 'developed guidelines for early identification and referral of children with disabilities and special needs, and guidelines for community-based rehabilitation.'[1698]

1694 A proposed amendment to Section 12 of the Kenyan Children Act has proposed to substitute the word "disabled child" with "children with disabilities". See the Children's (Amendment) Act, 2008.

1695 Republic of Kenya, '3rd, 4th and 5th State Party Report to the UNCRC Committee – Geneva 2005-2011', op. cit, para 268.

1696 *Ibid*.

1697 *Ibid*.

1698 *Ibid*, para 269.

11.3.3 Protection of Children with Disabilities in Tanzania

Unlike the Kenyan and Ugandan Constitutions, the current Constitution of Tanzania (1977) does not contain any specific protection to persons/children with disabilities. However, the Draft Constitution of the United Republic of Tanzania, which was unveiled in Dar es Salaam by the Constitutional Review Commission[1699] on 3 June 2013, has incorporated in the Bill of Rights specific rights of persons with disabilities.[1700] In the absence of constitutional protection of persons/children with disabilities, Tanzania has adopted both policy and legislation to protect such category of persons. In the light of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities[1701] and its recommendations adopted at its Day of General Discussion on the rights of children with disabilities,[1702] the CROC has recommended that Tanzania should:

(a) further encourage the integration of children with disabilities into the regular educational system and their inclusion into society;

(b) pay more attention to special training for teachers and making the physical environment, including schools, sports and leisure facilities and all other public areas, accessible for children with disabilities; and

(c) improve and strengthen early detection and treatment services through the health and education sector.

Of late, the Tanzanian Government has undertaken several measures aimed at implementing the foregoing recommendations, including the adoption of the National Policy on Disability and the Persons with Disabilities Act in 2010, which are considered below.

(a) The National Policy on Disability (2004)

Tanzania has adopted the National Policy on Disability (2004). However, at the time the Policy was formulated in 2004, there was no specific international instrument protecting the rights of persons with disabilities, but they were scattered in a number of instruments.[1703] This materialised in 2007 when the UN Disability Convention was adopted. Nonetheless, the Policy does mention the rights of persons with disabilities in an indirect manner. In Clause 2.0, the Policy stipulates that:

> **2.0 Vision and Policy Direction**
>
> Tanzania values human rights and equality of all citizens. Every citizen has the right under the law to participate freely in activities beneficial to himself/herself and the society as a

1699 From April 2012 Tanzania embarked on the review of its current Constitution with a view to adopting a new one as envisaged under the Constitutional Review Act, Cap. 83 R.E. 2012. The constitutional review and re-writing process is overseen by the Constitutional Review Commission established under this law. The Draft Constitution will be reviewed by District Constitutional Councils, established under this law, which will submit their views to the Commission three months from July 2013. A National Constituent Assembly is expected to adopt the new Constitution in November 2013, which will be a subject of a national referendum early next year before the new Constitution is unveiled on the 50th anniversary of Union of Tanganyika and Zanzibar to be celebrated on 26 April 2014.

1700 Article 44 of the Draft Constitution of the United Republic of Tanzania.

1701 General Assembly resolution 48/96.

1702 CRC/C/69, paras. 310-339.

1703 UDHR Article 9; ICESR Article 14; ACHR, Article 24; ECHR Article 2.

> whole. Every citizen, including people with disabilities have an equal right to receive basic needs from the society…

In a more indirect tone, the Policy further stipulates, as one of its aims, that it strives to 'allow the participation of people with disabilities in decision making and implementation of important activities in the society.'[1704] The policy also remotely strives to 'enable families of people with disabilities and the society at large to participate in decisions and implementation of important disability friendly activities.'[1705]

However, one of its progressive elements regarding the promotion of the right of equal participation in political and public life for people with disabilities is its endeavour to ensure that legislation that are not disability-friendly are reviewed, amended or repealed.[1706] Indeed, this is the basis for the enactment of the Persons with Disabilities Act in 2010, which is a subject of discussion in the preceding section of this article.

(b) Persons with Disabilities Act (2010)

In particular, the Persons with Disabilities Act ("the PDA") was enacted by Parliament in April 2010 in order to give legal effect to the National Policy on Disability and the UN Disability Convention. It strives 'to make provisions for the health care, social support, accessibility, rehabilitation, education and vocational training, communication, employment or work, promotion of basic rights for the persons with disabilities and to provide for related matters.'[1707] It contains a number of principles and obligations prerequisite to the realisation of the rights of persons/children with disabilities, as set out below.

(i) Principles and Obligations for the Realisation of the Rights of Persons with Disabilities

As we have seen above, the PDA has been enacted in order to domesticate international standards and principles concerning the realisation of basic rights and fundamental freedoms of persons with disabilities. As such, it contains basic principles and obligation for the realisation of basic rights and fundamental freedoms of persons with disabilities. In Section 4, the PDA sets the basic principles as follows:

(a) *respect for human dignity, individual's freedom to make own choices and independency of persons with disabilities;*

(b) *non-discrimination;*

(c) *full and effective participation and inclusion of persons with disabilities in all aspects in the society;*

(d) *equality of opportunity;*

(e) accessibility; and

(f) equality between men and women with disabilities and recognition of their rights and needs. [Emphasis supplied].

1704 Clause 2.1 of the *National Policy on Disability* (2004).

1705 *Ibid*.

1706 *Ibid*.

1707 *See* the long citation of the PDA.

In a more progressive tone, the PDA imposes an obligation on the Minister responsible for social welfare to 'take appropriate steps to ensure the realisation of all rights and freedoms of persons with disabilities without discrimination.'[1708] In order to achieve this end, the Minister must:

(a) undertake measures to effectively comply with the rights of persons with disabilities as provide for under this Act;

(b) take appropriate steps to ensure the realisation of the rights of persons with disabilities in all national policies, programmes and legislation;

(c) refrain from engaging in any act or practice that is inconsistent with provisions of this Act, and to ensure that public authorities and institutions at all levels act in conformity with this Act;

(d) take all appropriate measures to eliminate discrimination on the basis of disability by any person, private or public;

(e) in collaboration with relevant institutions, undertake and promote researches in relation to disabilities, development, availability and use of:

  (i) universally designed goods, services, equipment and facilities to meet specific needs of persons with disabilities, which should require the minimum possible adaptation and the least cost to meet the specific needs of a person with disability and to promote universal design in the development of standards and guidelines;

  (ii) new technologies, including information and communication technologies, assistive technologies suitable for persons with disabilities, giving priority to technologies at an affordable cost;

(f) provide accessible information to persons with disabilities on technical aids, devices and assistive technologies, including new technologies as well as other forms of assistance, support services and facilities; and

(g) promote the training of professionals and staff who are working with persons with disabilities on their rights, as recognised in this Act so as to provide better assistance and services guaranteed by those rights.[1709]

The Minister is also obliged to 'take appropriate legislative and administrative measures available, with a view to achieving the full realisation of rights of persons with disabilities as set out under the provisions of this Act.'[1710] In furthering these ends, 'and in other processes concerning issues relating to persons with disabilities the Minister shall consult representative organisations and other established mechanisms.'[1711] Interestingly, the PDA progressively states, in Section 5(4), that:

> (4) The standards provided in this Act shall be minimum standards for realisation of rights of persons with disabilities and, without prejudice to their rights, individually or collectively, through their organisations or other legitimate bodies.

1708 *Ibid*, Section 5(1).

1709 *Ibid*, paras (a)-(g).

1710 *Ibid*, Section 5(2).

1711 *Ibid*, Section 5(3).

This means, in effect, that the rights provided for in the PDA set out minimum standards. It is, thus, expected that the realisation of these rights should be above the standards set out in the PDA.

(ii) Equality and Non-Discrimination

As is the case with international standards on the protection of human rights generally and those of persons with disabilities particularly, the PDA contains a very strongly-worded non-discrimination principle in Section 6. It categorically obliges the Government to:

(a) ensure that all persons with disabilities are equal under this Act, and that all persons with disabilities are fully entitled without any discrimination to the equal protection and benefit of this Act;

(b) prohibit all forms of discrimination on the basis of disability and guarantee the persons with disabilities equal and effective legal protection against discrimination on all grounds; and

(c) for purposes of promoting equality and elimination of all forms of discrimination, take all appropriate measures to ensure that reasonable changes is provided to persons with disabilities of all ages and genders.

More particularly, Section 15 of the PDA provides that every person with disability is assisted by his local government authority, relatives, disability organisations, civil society or any other person to live as independently as possible and be integrated in the community. It also provides that a person with disability is not forced to live in an institution or in a particular living arrangement including settlement for persons in need of special protection. This has to include:

(i) Provision of equal opportunity for every person with a disability to choose his place of residence and living arrangements, in accordance with any relevant laws;

(ii) Community services for the general public are available without discrimination to persons with disabilities and are responsive to their basic needs; and

(iii) Accessibility to a wide range of community-based rehabilitation and inclusion services such as in-house, residential and other community support services, including personal assistance, sign language interpretation, necessary to support living and integration in community, access to information about available support services, and to prevent community from disability-based discriminations.

In addition, under Section 27, the PDA provides that persons (including children) with disabilities in all ages and gender have equal rights to education, training in inclusive settings and the benefits of research as other citizens. It also stipulates that every child with a disability has equal rights to be admitted to public or private schools, except where a need for special communication arises. In addition, this section provides that every child with disability shall be provided with appropriate disability-related support services or other necessary learning services from a qualified teacher or a teacher

assigned for that purpose. Under Section 29(3) of this law more emphasis is placed on inclusive education as a way of ensuring that more persons with disabilities have access to education. Under this provision, the Persons with Disabilities Act stipulates that special schools shall be for transitional period towards inclusive schools.

Part Four

Protection of Children Against Violence and Abuse in East Africa

Chapter Twelve

Violence Against Children and Special Protection Measures in East Africa

12.0 Introduction

While it is true that "children are the backbone of future/nation", it is also clear that children are the "present and future". Their growth depends on their healthy development today in respect of their rearing, healthy schooling etc. They are the most vulnerable, the most resilient and the most precious in society in many ways. In the African society, as in many cultures around the world, children are a gift and a means for parents to secure their own future; especially so in pastoral society where they fill the valet of their parents. In traditional African societies, children are to be protected, supported and assisted to reach their full potential to be responsible adults who can later lead the clan and society as a whole.

Despite these ideals and culture, children are often subjected to a number of abuses, exploitation and violence from those who are meant to protect them: the state, their families, their peers; their teachers and their employers. Instead of being treated like a gift, some children are treated like a white elephant to be abused, kicked around and silenced.

Violence against children is a matter of great concern to most people around the world, including in the African continent. However, very little is known about the various forms of violence against children, despite the fact that violence against children occurs in all countries, whether rich or poor, stable or unstable, and that it is extremely difficult to scrap it from the roots overnight. Nonetheless, a number of efforts are being devised and implemented to prevent and combat violence against children in different countries around the world.

The purpose of this Chapter is to provide an extensive and global picture as well as the African aspect on violence against children, and propose clear recommendations for the improvement of legislation, policy and programmes relating to the prevention of and response to violence against children. As a first step, this Chapter will review the international and national frameworks in place to prevent and respond to violence against children based on domestic legislations. Importantly, this Chapter will not undertake any new phenomena, but will assess existing reports, legislation and policies, an examination of which will, it is anticipated, lead to practical solution for effective responses to improve protection of children against violence.[1712]

12.1 International Framework to Protect Children from all Forms of Violence

The protection of children from all forms of violence is enshrined in many international human rights instruments, including the ACRWC and the CRC; thus, it is a human

1712 An Assessment of Violence Against Children in The Eastern and Southern Africa Region-Results of an Initial Desk Review for the UN Secretary General's Study on Violence against Children by Ms. Farhana Zuberi, UNICEF ESARO Consultant, May 2005.

rights imperative.[1713] For example, all the four principles set out in the CRC and the ACRWC[1714] (considered in Chapters Two and Three of this book) 'frame children's protection from violence and harmful practices.'[1715] In particular, Article 1(1) of the ACRWC obliges States Parties thereto to 'recognize the rights, freedoms and duties enshrined in this Charter and shall undertake to the necessary steps, in accordance with their Constitutional processes and with the provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter.' Accordingly, the ACRWC explicitly states that:

> Any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall to the extent of such inconsistency be discouraged.[1716]

From the foregoing core state responsibility that frames the overall prohibition of violence against children through application of inconsistent customary, traditional, cultural or religious practices,[1717] the ACRWC has several specific rights that outlaw violence against children in various settings. For instance, in respect of the child's protection of privacy, he or she is not to be subjected to arbitrary or unlawful interference with his or her privacy, family home or correspondence, or to the attacks upon his or her honour or reputation. The Charter explicitly provides that: 'The child has the right to the protection of the law against such interference or attacks.'[1718] It is to be noted that such attacks to the child amount to psychosocial violence on the child. In respect of the child's enjoyment of his or her right to education, the ACRWC obliges States Parties to 'take all appropriate measures to ensure that a child who is subjected to schools or parental discipline shall be treated with humanity and with respect for the inherent dignity of the child and in conformity with the present Charter.'[1719]

In addition, the ACRWC protects the child's right from 'all forms of economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's physical, mental, spiritual, moral, or social development.'[1720] States Parties thereto are obliged to '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 Organization's instruments relating to children.'[1721] In relation to protection against child abuse and torture, the ACRWC obliges States Parties to 'take

1713 Plan International and Office of the Special Representative of the UN Secretary General on Violence against Children, *Protecting Children from Harmful Practices in Plural Legal Systems: With a Special Emphasis on Africa* New York: Plan and SRGS, 2012, p. 7.

1714 These principles are the right to life, survival and development; non-discrimination; best interests of the child; and respect for the view of the child.

1715 Plan International and Office of the Special Representative of the UN Secretary General on Violence against Children, op. cit, p. 11.

1716 Article 1(3) of the ACRWC.

1717 The Preamble to the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) calls for an end to all forms of gender-based discrimination, including against girl children, and defines all forms of discrimination against women and girls as a form of discrimination. In particular, Article 2(f) of the CEDAW requires States Parties to 'take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against women.'

1718 Article 10 of the ACRWC.

1719 *Ibid*, Article 11(5).

1720 *Ibid*, Article 15(1).

1721 *Ibid*, Article 15(2).

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 the child.'[1722]

In respect of children who are in conflict with the law, the ACRWC requires that:

> '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's respect for human rights and fundamental freedoms of others.'[1723]

In particular, States Parties are obliged to ensure that:

(a) no child who is detained or imprisoned or otherwise deprived of his/her liberty is subjected to torture, inhuman or degrading treatment or punishment;[1724]

(b) ensure that children are separated from adults in their place of detention or imprisonment to avoid them being abused or tortured by adult offenders or contaminated with hard-core criminal behaviours from these offenders;[1725] and

(c) to ensure that such child shall be afforded legal and other appropriate assistance in the preparation and presentation of his defence;[1726] as well as to ensure that such child shall have the matter determined as speedily as possible by an impartial tribunal and if found guilty, be entitled to an appeal by a higher tribunal.[1727]

Moreover, whereas Article 19 of the CRC bans all forms of violence against children, Article 21 of the ACRWC protects the child against harmful social and cultural practices, by particularly obliging States Parties to 'take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child.'[1728] In particular, States Parties are obliged to eliminate (a) those customs and practices prejudicial to the health or life of the child; and (b) those customs and practices discriminatory to the child on the grounds of sex or other status. The Article also obliges States Parties to prohibit child marriage and the betrothal of girls and boys through undertaking "effective action", including legislation 'to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory.'[1729] Besides, Article 24(3) of the CRC explicitly obliges States Parties to 'take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.'

1722 *Ibid*, Article 16(1). Under paragraph (2) of this article, protective measures 'include effective procedures for the establishment of special monitoring units to provide necessary support for the child and for those who have the care of the child, as well as other forms of prevention and for identification, reporting referral investigation, treatment, and follow-up of instances of child abuse and neglect.'

1723 *Ibid*, Article 17(1).

1724 *Ibid*, Article 17(2)(a).

1725 *Ibid*, Article 17(2)(b).

1726 *Ibid*, Article 17(2)(c)(iii).

1727 *Ibid*, Article 17(2)(c)(iv).

1728 *Ibid*, Article 21(1).

1729 *Ibid*, Article 21(2).

In order to give the foregoing provisions for combating violence against children an effective implementation, treaty bodies responsible for monitoring the foregoing international human rights instruments have developed a jurisprudence on this matter. For instance, the CROC requires States Parties to specifically report on the measures (legislative, policy, administrative and others) undertaken by a reporting State Party towards addressing violence against children; and it also provides guidance to States Parties, through its Concluding Observations[1730] as well as General Comments,[1731] on how to achieve this. In General Comment No. 4 (On the Rights of Adolescents to Health and Development),[1732] the CROC has emphasized that:

> States Parties need to ensure that specific legal provisions are guaranteed under domestic law, including with regard to setting a minimum age for sexual consent, marriage and the possibility of medical treatment without parental consent. These minimum ages should be the same for boys and girls (Article 2 of the Convention) and closely reflect the recognition of the status of human beings under 18 years of age as rights holders…[1733]

Under General Comment No. 13 (on the Right of the Child to Freedom from All Forms of Violence),[1734] the CROC has emphasized that legislative measures envisaged under Article 19 of the CRC refer to both legislation, including budgeting, implementing and enforcing such measures. Such measures 'comprise national, provincial and municipal laws and all relevant regulations, which define frameworks, systems, mechanisms and the roles and responsibilities of concerned agencies and competent officers.'[1735]

It is now a mandatory requirement for reporting States Parties to both the CROC and the Committee on the Elimination of all Forms of Discrimination against Women (CEDAW Committee) to indicate measures they have undertaken to combat violence against women and (girl) children.[1736] Consistently, one of the questions raised by the two treaty bodies as well as the ACERWC in relation to violence against women and children is the co-existence and use of discriminatory customary law and practice that contradict laws prohibiting such violence 'in countries where customary law prevails alongside codified law.'[1737]

In its recent Concluding Observations in respect of Tanzania, for instance, the CEDAW Committee was concerned 'at the lack of priority given to comprehensive legal reform to eliminate sex-discriminatory provisions and to close legislative gaps in order to bring the country's legal framework fully into compliance with the provisions of the Convention and to achieve women's *de jure* equality.'[1738] It was also concerned,

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1730 For an overview on this matter, see particularly CROC Concluding Observations in respect of Tanzania available at www.amnestyusa.org › Our Work › Countries › Africa.

1731 *See* particularly General Comments No.'s 3(2003); No. 4 (2003); No. 7(2005); No. 8(2006); No. 11(2009); and No. 13(2001).

1732 CROC General Comment No. 4, 'Adolescent Health and Development in the Context of the Convention on the Rights of the Child' (2003).

1733 *Ibid*, para. 9.

1734 CROC General Comment No. 13 (On the Right of the Child to Freedom from All Forms of Violence)

1735 Plan International and Office of the Special Representative of the UN Secretary General on Violence against Children, *Protecting Children from Harmful Practices in Plural Legal Systems: With a Special Emphasis on Africa*, op. cit, p. 12.

1736 United Nations Department of Economic and Social Affairs (UNDESA), *Handbook for Legislation on Violence against Women* Geneva/New York: UNDESA (Division for the Advancement of Women), 2010. p. 6.

1737 *Ibid*, p. 1.

1738 CEDAW Committee, Concluding Observations: URT (2008), para 111.

in particular, 'about the delay in the passage of the proposed amendments to the Law of Marriage Act of 1971, inheritance laws, as well as the Law on the Custodian of Children.' The Committee was further concerned that 'other legislation and customary laws that discriminate against women and are incompatible with the Convention remain in force, both in the Tanzanian Mainland and in Zanzibar.' Therefore:

> The Committee urges the State Party to place high priority on completing the process of full domestication of the Convention. It calls upon the State Party to accelerate its law review process and to work effectively with Parliament in ensuring that all discriminatory legislation is amended or repealed to bring it into compliance with the Convention and the Committee's general recommendations. It urges the State Party to raise the awareness of legislators about the need to give priority attention to such reforms in order to achieve *de jure* equality for women and compliance with the State Party's international treaty obligations. It encourages the State Party to set a clear time frame for such reforms, including the passage of the proposed amendments to the Marriage Act of 1971, inheritance laws as well as the Law on the Custodian of Children. The Committee recommends that the State Party seek technical support from the international community in this regard.[1739]

In respect of the CROC's recent Concluding Observations in respect of Tanzania regarding this matter, it reiterated its concern that FGM is still widely practiced in the country, urging the State Party to 'strengthen its legislative measures regarding FGM and conduct awareness-raising campaigns to combat and eradicate this and other traditional practices harmful to the health, survival and development of children, especially girls.'[1740] It also recommended that Tanzania should 'introduce sensitization programmes for practitioners and the general public to encourage change in traditional attitudes, and to prohibit harmful practices, engaging with the extended family and the traditional and religious leaders.'[1741] In addition, the CROC urged Tanzania to 'ratify the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.'[1742]

12.2 Global Initiatives to Combat Violence against Children

This part examines global initiatives to prevent and combat violence against children. It looks at the factors for the prevalence and forms of violence against children. It also examines the ramifications of violence against children on the realisation of children's rights as well as the need to protect children from all forms of violence and abuse at the global level and in the African context.

12.2.1 The Prevalence and Forms of Violence against Children

Although enshrined in these international human rights instruments, the child's right to protection against all forms of violence continues to be disregarded in many countries around the world. The recently-conducted UN Study on Violence against Children (henceforth, the VAC Study), which was submitted by the UN Secretary-

1739 *Ibid*, para 112.

1740 CROC, 'Consideration of Reports Submitted by States Parties under Article 44 of the Convention – Concluding Observations: United Republic of Tanzania', 42nd Session, 21 June 2006 (CRC/C/TZA/CO/2), para 51.

1741 *Ibid*.

1742 *Ibid*, para 52.

General to the UN General Assembly in 2006, attests to this assertion.[1743] The VAC Study has revealed that violence against children – in its multiple forms – continues to persistently and widely to be occasioned on children; and it is seen in many societies around the world to be socially and culturally acceptable. In fact, violence against children 'constitutes a harsh reality for millions of children worldwide, including in the form of harmful traditional practices.'[1744]

The VAC Study – the first and most comprehensive global study to research, report, and make recommendations to prevent and respond to violence against children in multiple settings[1745] where they live and survive – reveals highly shocking levels of violence against children, with places previously presumed to be safe for children being found to be unsafe.[1746] The study reported and described disturbing forms of violence against children indicating that children are severely beaten, tortured, sexually assaulted, and even murdered 'by the very adult guardians entrusted with children's daily care.'[1747] In fact, violence against children 'was found to be commonplace and everywhere.'[1748]

(a) Factors for Violence against Children

One of the major contributing factors for the proliferation of violence against children is the fact that children are particularly vulnerable to violence, with high risks being more compounded in the case of girls[1749] and children with disabilities.[1750]

Studies conducted in a number of African countries subsequent to the release of the VAC Study indicate that both girls and children with disabilities face both greater probability of being beaten, bullied or excluded in school and greater risks to sexual abuse than their counterparts – boys and children without disabilities.[1751] It has also been indicated that although some of these forms of violence against children may find no cultural, social or religious justifications in many African societies, they are deeply rooted in gender-based discrimination; and others just reflect 'ill-perceptions or misconceptions, or discriminatory and harmful beliefs towards marginalized children, including children with disabilities, children with albinism, those belonging to a low caste or accused of witchcraft.'[1752]

1743 United Nations Secretary-General, *Study on Violence against Children* New York: United Nations, 2006 (A/61/299).

1744 Plan and Office of the Special Representative of the UN Secretary General on Violence against Children, op. cit, p. 7.

1745 The settings include the home and family, schools, care and justice systems, the workplace and the community.

1746 United Republic of Tanzania, *Violence Against Children in Tanzania: From Commitments to Action – Key Achievements from the Multi-Sectoral 'Priority Responses' to Address Violence against Children (2011-2012) and Priority Activities for 2012-2013* Dar es Salaam: Government of the United Republic of Tanzania, June 2012, p. 1.

1747 *Ibid*.

1748 *Ibid*.

1749 African Child Policy Forum, *Childhood Scars in Africa: A Retrospective Study on Violence against Girls in Burkina Faso, Cameroon, Democratic Republic of Congo, Nigeria and Senegal* Addis Ababa: The African Child Policy Forum, 2011a.

1750 African Child Policy Forum, *Violence against Children with Disabilities in Africa: Field Studies from Cameroon, Ethiopia, Senegal, Uganda and Zambia* Addis Ababa: The African Child Policy Forum, 2011b, p. 1.

1751 *See* particularly African Child Policy Forum (2011a), op. cit, p. (iii); and African Child Policy Forum (2011b), *Ibid*.

1752 Plan and Office of the Special Representative of the UN Secretary General on Violence against Children, op. cit, p. 7.

Moreover, some forms or practices in respect of violence against children, like early and forced marriage, are caused by multiple factors, 'including poverty, the fear of loss of respectability and of shame and stigma, or the search for protection from the risk of rape and insecurity.'[1753] However, the manner through which these practices are executed is associated with strong elements of violence, abuse and exploitation against the child involved.

(b) Ramifications of Violence against Children

The ramifications of violence against children are far-reaching. Whereas some of the forms of violence have short-term implications on the rights and welfare of the child, most of them have long-term effects. In totality, children are subjected to physical, emotional, psychosocial, and sexual violence. Children are also subjected to sexual exploitation and harmful social and cultural practices in the form of child/forced marriages; female genital mutilation/cutting; son preference and infanticide; killing in the name of honour; being used in begging, bonded labour and sexual slavery; stoning; virginity testing; and breast ironing.[1754]

As one of the long-term ramifications of violence against children, the VAC Study states that the child-related Millennium Development Goals (MDGs) may not be achieved unless ending violence against children is prioritised in countries. In particular, the VAC Study points out that Goal 2 of the MDGs (Universal Primary Education) may not be achieved if children are fearful of violence in schools; as well as Goal 6 (controlling the spread of HIV/AIDS) may not be achieved if girls are not adequately protected from sexual violence that can spread the disease.[1755]

According to recent studies[1756] into violence against children, almost all forms of this kind of violence are violent in nature, which just compromise 'the development and education of the child, leave serious and long lasting health and psychosocial consequences, and may result in disability and death.'[1757] In addition, some harmful social and cultural practices, like honour killings and stoning, 'constitute forms of torture often justified by moral or family honour.'[1758]

12.2.2 The Need to Protect Children from all forms of Violence and Abuse

The proliferation of violence against children has resulted in the need for protecting children against all forms of violence, which, for a long time, has been a subject of great concern to the United Nations. This concern has recently culminated in the

1753 *Ibid*.

1754 These forms of violence against children are discussed at length in Plan and Office of the Special Representative of the UN Secretary General on Violence against Children, *Ibid*, pp. 29-38.

1755 For a detailed discussion on the ramifications of violence against children, see particularly African Child Policy Forum (2011b), op. cit; and United Nations Secretary-General, *Study on Violence against Children*, op. cit.

1756 *See* particularly African Child Policy Forum (2011b), *Ibid*; and United Nations Secretary-General, *Study on Violence against Children*, *Ibid*; African Child Policy Forum, *Harmonisation of Children's Laws in Eastern and Southern Africa: Country Briefs* Addis Ababa: African Child Policy Forum, 2012; African Child Policy Forum (2011b), op. cit; Plan and Office of the Special Representative of the UN Secretary General on Violence against Children, *Protecting Children from Harmful Practices in Plural Legal Systems: With a Special Emphasis on Africa*, op. cit; and Africa Wide Movement for Children, An Africa Fit for Children: Progress and Challenges Kampala: Africa Wide Movement for Children, 2012.

1757 Plan and Office of the Special Representative of the UN Secretary General on Violence against Children, *Ibid*, p. 7.

1758 *Ibid*.

action taken by the UN under the VAC Study that, *inter alia*, has recommended for the prevention and protection of children from all forms of violence. More specific to this recommendation, the VAC Study urges States around the world 'to prohibit all forms of violence against children in all settings including all corporal punishment, harmful traditional practices, such as early and forced marriages, female genital mutilation and honour crimes …'[1759] The study also recognises the significance of transforming 'attitudes that condone or normalize violence against children, including […] acceptance of corporal punishment and harmful traditional practices.'[1760]

In order to ensure that the VAC Study is widely disseminated and its recommendations effectively implemented, in 2009 the UN Secretary-General appointed a Special Representative of the Secretary-General on Violence against Children (SRSG), who has identified 'the legal prohibition of all forms of violence, as well as an appropriate legal framework to protect children and prevent and respond to violence as one of her three priority focus areas.'[1761] Following on the implementation of the VAC Study's call for all forms of violence against the child to be prohibited by law, in her initial report submitted to the UN General Assembly in 2010 the SRSG emphasised the importance of legislative reform as a restraint against acts and practices of violence against children.[1762] According to the SRSG:

> Even in countries where harmful practices persist behind deeply entrenched traditions, the legislative process has provided opportunities to involve community and religious leaders, parliamentarians, professional associations, academic institutions and grass-roots organisations, and engage communities concerned.[1763]

All these efforts are geared towards effective prevention and combating of violence against children.

12.3 Initiatives to Combat Violence against Children in an African Context

In order to implement the foregoing global initiatives to combat violence against children in Africa, the SRSG and Plan International – in close collaboration with the ACERWC, the CROC, UNICEF, the Office of Un High Commissioner for Human Rights (OHCHR), UN Women, UNFPA and International NGO Council on Violence against Children – in June 2012 co-hosted an international expert consultation session. Held in Addis Ababa, Ethiopia, the consultation 'considered significant developments where law reform and enforcement, supported by awareness-raising and a widely participatory social mobilization process, has helped to address deeply rooted social conventions and promote the abandonment of harmful practices against children.'[1764]

In addition, the consultation also identified a number of challenges facing global initiatives to combat violence against children in Africa, which include inconsistent

1759 United Nations Secretary-General, *Study on Violence against Children*, op. cit, paras. 25, 98 and 100.

1760 *Ibid*.

1761 *Ibid*.

1762 Special Representative of the Secretary-General on Violence against Children (SRSG), 'Annual Report to the UN General Assembly' (2010) (A/67/230), para 20.

1763 *Ibid*.

1764 Plan and Office of the Special Representative of the UN Secretary General on Violence against Children, op. cit, p. 8.

legal rules, selective implementation and compliance, and lack of awareness on these laws amongst members of the local communities. It also identified other such critical challenges as insufficient resources, prejudices and stereotypes amongst relevant personnel, and weak capacities to address children's rights issues amongst law enforcement officials, the judiciary, traditional leaders and judges in customary and religious courts or tribunals.[1765]

In order to address these challenges, and many others not identified herein above, the consultation presented a number of recommendations aimed at accelerating progress in law reform and enforcement and in support of the abandonment of harmful practices that further violence against children. The engagement of, and support by, concerned communities in the law reform and enforcement process as well as the transformation of attitudes was of critical consideration.[1766]

12.4 The Importance of Legislation in Combating Violence against Children in East Africa

As it has been pointed out in the VAC Study[1767] and in the 2010 initial report of the SRSG to the UN General Assembly,[1768] legislation 'provides a critical foundation to protect children from violence, including harmful practices.'[1769] As the SRSG and Plan International point out:

> [Legislation] is an expression of states' accountability and commitment to the realisation of children's rights, and a decisive contribution to the prevention and abandonment of those practices, to the protection of children concerned and to efforts to fight impunity. In this regard, the explicit prohibition of harmful practices by law provides an indispensable underpinning for other measures required to promote their effective and lasting abandonment.[1770]

In order to enhance effectiveness in the implementation of legislation on violence against children and thereby achieving social change against such practices, however, legislation 'needs in fact to be supported by other efforts such as public information and awareness campaigns, collective discussions involving communities concerned, and capacity building of professionals working with and for children.'[1771] In this context, it can be correctly pointed out that when laws enacted 'to reflect the CRC, the ACRWC and other relevant international standards are not supported by widespread information, education, public debate and social mobilisation initiatives, they may clash with cultural norms and accepted practices and fail to be used and achieve their goal.'[1772]

1765 *Ibid*.

1766 *Ibid*. In fact, the consultation culminated in the preparation of the report entitled: *Protecting Children from Harmful Practices in Plural Legal Systems: With a Special Emphasis on Africa,* released in 2012 by Plan International and the Office of the SRSG.

1767 United Nations Secretary-General, *Study on Violence against Children*, op. cit, paras. 25, 98 and 100 (urging States 'to prohibit by law all forms of violence against children').

1768 Special Representative of the Secretary-General on Violence against Children (SRSG), 'Annual Report to the UN General Assembly', op. cit, para 20.

1769 Plan International and Office of the Special Representative of the UN Secretary General on Violence against Children, op. cit, p. 9.

1770 *Ibid*.

1771 *Ibid*.

1772 *Ibid*.

This is true in countries with plural legal systems, like the three common law East African countries considered in this book, where national legislation co-exists with customary and religious law. In such countries, legal interpretation and implementation 'face greater complexities, tensions and challenges that may seriously compromise children's best interests.'[1773] Although in certain cases formal law and customary or religious law can sometimes be relatively accessible and work in synergy, 'the interplay and tension between them can also compromise the safeguard of the rights of women and children, and perpetuate violence and discrimination based on gender, age or other status.'[1774]

In this context, the VAC Study has noted that, even when protective laws are in place, they 'are not effectively implemented in many places because of the strength of traditional attitudes, and in some cases because of the existence of religious or customary legal systems' that actually support these attitudes.[1775]

It is basing on the foregoing elaboration that all the three common law East African countries considered in this book have put in place both legislation and other measures aimed at combating violence against children in their jurisdictions, as considered in Chapters Thirteen, Fourteen and Fifteen of this book.

1773 *Ibid*. *See* also Special Representative of the Secretary-General on Violence against Children (SRSG), 'Annual Report to the UN General Assembly', op. cit, p. 7.

1774 Plan International and Office of the Special Representative of the UN Secretary General on Violence against Children, *Ibid*.

1775 *Ibid*, p. 74.

Chapter Thirteen

Protection of Children from all forms of Violence and Abuse in Uganda

13.0 Introduction

Like in many Sub-Saharan African countries, in Uganda children are regularly subjected to various forms of violence, abuse and exploitation. In order to prevent and combat violence against children, the Ugandan Government has undertaken several constitutional, policy, legislative and administrative measures in the context of international human rights law and global initiatives considered in Chapter Twelve of this book.

Therefore, this Chapter highlights the priority areas of focus on protection of children from all forms of violence and abuse in Uganda. The Chapter commences with an examination of the constitutional and legislative framework to address the problem of violence against children. It also examines legislative and administrative measures put in place by the Ugandan Government to eliminate violence against children, which is normally manifested in harmful traditional practices, and economic and sexual exploitation.

13.1 Constitutional and Legal Framework

The child's protection from all forms of violence in Uganda is constitutionally and statutorily guaranteed. For instance, Article 34(7) of the Ugandan Constitution provides that: 'The law shall accord special protection to orphans and other vulnerable children.' Implicit in the Ugandan Constitution in respect of constitutional protection of every person (including a child) against violence, is the respect for human dignity and protection from inhuman treatment. This is guaranteed under Article 24, which explicitly provides that: 'No person shall be subjected to any form of torture, cruel, inhuman or degrading treatment or punishment.'

In particular, under Article 34(4) of the Ugandan Constitution, children are entitled to be protected from social or economic exploitation and 'shall not be employed in or required to perform work that is likely to be hazardous or to interfere with their education or to be harmful to their health or physical, mental, spiritual, moral or social development.' In addition, the Constitution categorically stipulates that no person 'shall be held in slavery or servitude';[1776] and further that no person 'shall

1776 Article 25(1) of the Constitution of Uganda.

be required to perform forced labour.'[1777] To give these constitutional guarantees more strength, Article 44 of the Constitution provides that, there shall be no derogation from enjoyment of the following rights and freedoms, *inter alia*, freedom from torture, cruel, inhuman or degrading treatment or punishment;[1778] and freedom from slavery or servitude.[1779]

13.2 Measures to Eliminate Violence against Children in Uganda

The Ugandan Government has undertaken measures to prevent and combat violence against children in terms of the prohibition and elimination of harmful traditional practices in the context of Article 24(3) of the CRC; measures to ensure the protection of children with incarcerated parents and children living in prison with their mothers in light of Article 30 of the ACRWC; and measures to protect children in situation of exploitation, including physical and psychological recovery and social integration. These measures are considered below.

13.2.1 Measures to Prohibit, Prevent and Eliminate Harmful Traditional Practices

Consistent with the provisions of Article 37(a) of the CRC and Article 16 of the ACRWC, Uganda has put in place a legal framework to protect children from torture and inhuman treatment.[1780] In particular, Article 24 of the Ugandan Constitution provides that no person (including a child) shall be subjected to any form of torture, cruel, inhuman or degrading treatment or punishment. Section 7 of the Children Act also provides for the protection of children from violence and abuse, particularly harmful customary practices. It provides explicitly that: 'It shall be unlawful to subject a child to social or customary practices that are harmful to the child's health.'

(a) Prevention and Prohibition of Domestic Violence

As a response to the increasing number of cases of children in Uganda who have been tortured and subjected to inhuman treatment,[1781] particularly in the domestic setting,

1777 *Ibid*, Article 25(2). Under Article 25(3), it is provided that for the purposes of this article, 'forced labour' does not include:

'(a) any labour required in consequence of the sentence or order of a court;

(b) any labour required of any person while that person is lawfully detained which, though not required in consequence of the sentence or order of a court, is reasonably necessary in the interests of hygiene or for the maintenance of the place at which the person is detained;

(c) any labour required of a member of a disciplined force as part of that member's duties as such or, in the case of a person who has conscientious objections to service as a member of a naval, military or air force; any labour which that person is required by law to perform in place of that service;

(d) any labour required during any period when Uganda is at war or in case of any emergency or calamity which threatens the life and well-being of the community, to the extent that the requiring of the labour is reasonably justifiable in the circumstances of any situation arising or existing during the period or as a result of the emergency or calamity, for the purpose of dealing with that situation; or

(e) any labour reasonably required as part of reasonable and normal communal or other civic obligations.'

1778 *Ibid*, Article 44(a).

1779 *Ibid*, Article 44(b).

1780 Republic of Uganda, 'Second Periodic Report of States Parties Due in 1997: Uganda', 5 November 2004 (CRC/C/65/Add.33), para 108.

1781 *Ibid*, para 110.

in 2010 Parliament enacted the Domestic Violence Act (the DVA).[1782] This law "has a wide scope of application",[1783] which can be discerned from its definition of the term "domestic relations" defined as a family relationship, a relation similar to a family relationship or a relationship in a domestic setting that exists or existed between a victim and a perpetrator. Such domestic relationship, as elaborated in Section 3 of the DVA, encompasses a relationship where:

(a) the victim is or has been married to the perpetrator;

(b) the perpetrator and the victim are family members related by consanguinity, affinity or kinship;

(c) the perpetrator and the victim share or shared the same residence;

(d) the victim is employed by the perpetrator as a domestic worker or house servant and the victim does or does not reside with the perpetrator;

(e) the victim is an employer of the perpetrator and does or does not reside with the victim; or

(f) the victim is or was in a relationship determined by the court as domestic relationship.

From the foregoing elaboration of the definition of domestic relations, it is obvious that the scope of the definition covers children as well; and, as such, children are entitled to all the protections guaranteed in the DVA. In order to ensure effective implementation of this law, a police officer is obliged to provide a set of assistance to the victim of domestic violence once such a case is reported to the officer. The assistance required includes:

(a) providing assistance or shelter to the victim;

(b) where signs of physical or sexual abuse are manifest, ensuring that the victim undergoes medical examination and receives requisite medical treatment;

(c) advising the victim of the right to apply for relief under the Act and the right to lodge a criminal complaint; and

(d) offering procedural guidance and any assistance as may be necessary to ensure the well being of the victim, the victim's representative and other witnesses.[1784]

(b) Prohibition and Prevention of Traffic in Children

The Prevention of Trafficking in Persons Act (2009)[1785] has been enacted for the purpose of preventing, prohibiting, creating offences relating to, and prosecuting offenders who commit traffic in persons, including children. It also strives to protect

1782 Act No. 3 of 2010.

1783 African Child Policy Forum, *Harmonisation of Children's Laws in Eastern and Southern Africa: Country Briefs*, op. cit, p. 190.

1784 Section 7(2) of the DVA.

1785 Act No. 7 of 2009.

victims of traffic in persons.[1786] This law sets out stringent punishment, whereby the maximum is death sentence.[1787] According to Section 5, a person who:

(a) does any act referred to under Section 3 in relation to a child;

(b) uses a child in any armed conflict;

(c) removes any part, organ or tissue from the body of a child for purposes of human sacrifice;

(d) uses a child in the commission of a crime;

(e) abandons a child outside the country;

(f) uses a child or any body part of a child in witchcraft, rituals and related practices, commits an offence of aggravated trafficking in children and may be liable to death.

In fact, this law was enacted as a response by the Government of Uganda against the proliferation of incidents of sale of children; trafficking in children; child prostitution and child pornography,[1788] which have been regularly condemned by the CROC in its Concluding Observations.[1789]

(c) Prohibition and Combating of Female Genital Mutilation

In Uganda there are also 'negative cultural practices which violate women's rights and impair their physical and mental health.'[1790] One such negative cultural practices is female genital mutilation (FGM), which is not as widespread as is in Kenya and Tanzania. In Uganda, FGM is practised in few communities, of particular note being the Sebei (Kupsabiny) community in the southern slopes of Mt. Elgon in Kapchorwa District, eastern Uganda.[1791]

Although it is inconsistent with Article 33(6) of the Constitution of Uganda,[1792] this practice has been ongoing for a very long time and 'involves the removal of parts of or the whole external genitalia.'[1793] According to official information by the Ugandan Government, FGM has several health problems to the victim:

> […] including pain, hemorrhages, shock, delayed wound healing, prolonged and abstracted labour, difficulties and pain in sexual intercourse and depression and frustration in later life. Women who have already become victims may become stigmatized and may not seek timely medical treatment and advice when in labour or when sick.[1794]

1786 *Ibid*, long title of the Act.

1787 *Ibid*, Section 5.

1788 African Child Policy *Forum, Harmonisation of Children's Laws in Eastern and Southern Africa: Country Briefs*, op. cit, p. 191.

1789 *See*, for instance, CROC, 'Concluding Observations on Uganda's Second Periodic Report', paras 9 & 10.

1790 Republic of Uganda, 'Consideration of Reports Submitted by States Parties under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women: Uganda', Third Periodic Report of State Parties, 3 July 2000 (CEDAW/C/UGA/3), p. 49.

1791 *Ibid*.

1792 Article 33(6) of the Constitution of Uganda provides: 'Laws, cultures, customs or traditions which are against the dignity, welfare or interest of women, or which undermine their status, are prohibited by this Constitution.'

1793 Republic of Uganda, 'Consideration of Reports Submitted by States Parties under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women: Uganda', Third Periodic Report of State Parties, 3 July 2000 (CEDAW/C/UGA/3), p. 49.

1794 *Ibid*.

As a response to the problem of FGM, Uganda has enacted the Prohibition of Female Genital Mutilation (2010) (the FGM law). As expressly elaborated in its long title, the PFGM aims at outlawing the FGM practice, creating offences in relation to FGM, prosecuting and punishing offenders and protecting victims as well as girls and women under the threat of FGM. In a very progressive note, the FGM law creates an offence in a situation where a person carries out FGM on herself.[1795]

As the Ugandan Government has conceded, despite the foregoing constitutional and legislative measures, what remains to be done is to translate these measures into practice.[1796] At present, the Government has put in place programmes to sensitize people on harmful cultural practices which affect women's and girls' health status upon undergoing female genital mutilation.[1797] For example, awareness campaigns have been undertaken in the media to advocate against physical violence against children, including FGM.[1798] In addition, measures have been developed 'to assist the physical and psychological recovery and reintegration of children who have been tortured. There are psychosocial services, which are provided by hospitals and community workers. Tortured children also receive medical treatment from the hospitals to help them recover physically.'[1799]

13.2.2 Measures to Protect Children in Situations of Exploitation

In practice, children in Uganda are involved in situations of violence and abuse in the forms of economic and sexual exploitation as examined below.

(a) Child Labour

As in many Sub-Saharan African countries,[1800] children in Uganda are involved in employment at an age which does not fall within the allowed minimum age bracket. According to the 2009/2010 Uganda National Household Surveys Report,[1801] more than half of the children aged between 5 and 17 years in Uganda were found to be working as paid employees, self-employed or as unpaid family workers. Across all regions of Uganda, more males (52%) than females (49%) were found to be working.[1802] As set out in the ILO Convention on Minimum Age of Employment,[1803] children may *only* work, in the sense of economic activity, if: they are above the minimum age of entry into the labour force; the work done is non-hazardous; and it falls out of the worst forms of child labour.

1795 Section 4 of the Prohibition of Female Genital Mutilation Act.

1796 Republic of Uganda, 'Consideration of Reports Submitted by States Parties under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women: Uganda', Third Periodic Report of State Parties, 3 July 2000 (CEDAW/C/UGA/3), p. 50.

1797 *Ibid*.

1798 Republic of Uganda, 'Second Periodic Report of States Parties Due in 1997: Uganda', op. cit, para 109.

1799 *Ibid*, para 111.

1800 It is estimated that Sub-Saharan Africa is second to Asia-Pacific in respect of having the largest number of child workers with 48 million. See Nalule, V., 'Challenges of Child Labour in Uganda: A Case Study of the Urban Informal Sector in Kampala City'. M.A. Dissertation, Makerere University, 2011, p. 16.

1801 Uganda Bureau of Statistics, *2009/2010 Uganda National Household Surveys Report*. Available at www.ubos.org/UNHS0910/chapter11_woeking%20children.html (Accessed on 12 August 2013).

1802 *Ibid*.

1803 ILO Minimum Age for Employment Convention, 1973 (No. 138).

However, the proliferation of child labour in Uganda has come contrary to the provisions of the Constitution of Uganda (1995) which prohibits any work that is harmful to children and work that will prohibit their education.[1804] This constitutional prohibition is also reinforced by Section 8 of the Ugandan Children Act, which prohibits the employment of children in work that may be harmful to their health, education, mental and moral development. This constitutional and legislative framework is premised in the international child rights treaties to which Uganda is a party.[1805]

Despite the ratification and domestication of international standards to prohibit and eliminate child labour, 'the enacted policies, legislation and programmes in a bid to end child labour have registered few successes.'[1806] The increasing number of children involved in child labour suggests that this problem is still persistent. This has prompted the indulgence of the CROC. In respect of protecting children in situations of exploitation, particularly in preventing and combating child labour, the CROC has recommended (in its previous Concluding Observations) that:

(a) Specific attention should be given to monitoring the full implementation of labour laws in order to protect children from being economically exploited. Authorities should adopt explicit legislation and measures to protect children from economic exploitation through employment as domestic servants and in other informal sectors, engage in research and collection of data, and promote integration and vocational training programmes; and

(b) The State party should consider ratifying the ILO Minimum Age for Employment Convention, 1973 (No. 138).

The Government of Uganda has of late undertaken a comprehensive study to establish the number of working children in Uganda. As indicated above, in 2009/2010 the Uganda National Household Surveys undertook a survey and released its report,[1807] which reveals that more than half of the children aged between 5 and 17 years in Uganda were working as paid employees, self-employed or as unpaid family workers, with more males (52%) than females (49%) found to be working.[1808]

However, it is 'still widely believed that a large number of children are subjected to hazardous work. They carry loads that are too heavy for their age.'[1809] Many children 'are still employed in large agricultural farms to minimize costs, in households as domestic servants, on commercial farms, fishing and herding where they are subjected to abuse and exploitation'.[1810] Although the minimum age for employment is 16, 'this is not strictly followed.'[1811]

1804 *See* Article 34(4) of the Constitution of Uganda. See also Nalule, op. cit.

1805 Amongst other treaties, Uganda has ratified the ACRWC, the CRC and the ILO Convention 182 on the Worst Forms of Child Labour, which urges States Parties to take immediate and effective measures to secure the prohibition and elimination of worst forms of child labour as a matter of urgency (Article 1).

1806 Nalule, op. cit, p. 20.

1807 Uganda Bureau of Statistics, *2009/2010 Uganda National Household Surveys Report*. Available at www.ubos.org/UNHS0910/chapter11_woeking%20children.html (Accessed on 12 August 2013).

1808 *Ibid*.

1809 Republic of Uganda, 'Second Periodic Report of States Parties Due in 1997: Uganda', op. cit.

1810 *Ibid*.

1811 *Ibid*.

In compliance with the foregoing recommendations made by the CROC, Uganda has put in place a number of measures to prevent and combat child labour, including ratification of ILO Convention No. 138. Although Uganda generally concurs with the definitions of child labour as stated in Convention No. 138 and the Worst Forms of Child Labour Convention, 1999 (No. 182), it maintains a position that:

> […] the definition should precisely identify which harmful, exploitative and hazardous work activities involving children constitute child labour. The view of Government is that the definition of child labour should include the following characteristics: work that involves children in tasks which extend beyond the normal roles of their own contribution to their own, their families' and the communities' well-being and development; work that is assigned to children without due consideration of their age, gender and abilities; work that deprives children under 16 of their rights to health care, education, skills training, and proper physical and social well-being; and work that involves the performance of tasks under difficult and dangerous circumstances without proper protective facilities and measures, without adequate remuneration and/or involving too much time or excessive movement with inadequate rest/recreation.[1812]

Other measures undertaken so far by the Ugandan Government to tackle the problem of child labour include: a review of the labour laws 'to ensure legal protection of the children involved in formal and informal employment'.[1813] This review has resulted in the enactment of the Employment Act (2006), under which a person under the age of twelve years is not to be employed 'in any business, undertaking or workplace.'[1814] In terms of Section 32(2) of the Ugandan Employment Act, a child under the age of fourteen 'shall not be employed in any business, undertaking or workplace, except for light work carried out under supervision of an adult aged over eighteen years, and which does not affect the child's education.' An employer should not continue to employ a child under the age of fourteen years after being notified in writing by a labour officer that the employment or work is not light work in the context of criteria set out in Section 32(2) of the Employment Act.[1815]

In addition, Section 32(4) of the Employment Act prohibits the employment of a child in any employment or work 'which is injurious to his or her health, dangerous or hazardous or otherwise unsuitable and an employer shall not continue to employ a child after being notified in writing by a labour officer that the employment or work is injurious to health, dangerous or otherwise unsuitable for the child.'

The Ugandan Employment Act provides certain safeguards to the child who is engaged in lawful employment or work in terms of working hours. In Section 32(5), this law requires that a child should not work between 7p.m. and 7a.m. It also empowers any person, including a labour union or employers' association, to complain to a labour officer if he or she considers that a child is being employed in breach of the provisions of Section 32 of this law.[1816] Where a person is aggrieved by a decision of the labour officer under Section 32, he may appeal to the Industrial Court.[1817]

1812 *Ibid*, para 50. See also Uganda's Report on Position and Child Labour (1998).

1813 *Ibid*, para 51.

1814 Section 32(1) of the Employment Act.

1815 *Ibid*, Section 32(3).

1816 *Ibid*, Section 32(6).

1817 *Ibid*, Section 32(7).

The Ugandan Government has also developed the PEAP 'to eliminate the mass poverty that perpetuates child labour; the introduction of UPE to achieve mechanization and social transformation; and ensuring continuous dialogue between Government and stakeholders involved in the fight against child labour.'[1818]

Following the signing of a memorandum of understanding between the Government of Uganda and the ILO in November 1998 to address child labour, Uganda implemented a three-year National Programme of Action to Eliminate Child Labour. The programme was 'a step-by-step approach to withdrawing about 3,000 children caught up in the worst forms of labour such as domestic service, street work, prostitution, commercial farming, the informal sector, etc. It will involve workers, employers and NGOs in its implementation.'[1819] Action programmes were developed as follows:

(i) employers to address child labour issues in sugar and tea estates and commercial farms;

(ii) the National Organization of Trade Unions to prevent child labour in sugar plantations;

(iii) the NGOs Slum Aid and Uganda Youth Development Link to prevent and rehabilitate children involved in prostitution; and

(iv) the Child Labour Unit to develop policies, conduct partner training and coordinate implementation of the programme.[1820]

It should be noted that this programme required the Government of Uganda to develop 15 action programmes as its targets.[1821]

(b) Preventing and Combating Sexual Exploitation

In relation to preventing and combating sexual exploitation against children in Uganda, the CROC urged the Ugandan Government to undertake the following measures:

(a) Special attention should be given to the problems of ill-treatment and abuse, including sexual abuse of children within the family and corporal punishment in schools; and

(b) Comprehensive studies on these problems should be initiated in order to understand them better and to facilitate the elaboration of policies and programmes to combat them effectively, including rehabilitation programmes.

In its second periodic report submitted to the CROC in 2003, the Government of Uganda reported that: 'Few studies have been conducted on the sexual abuse and exploitation of children in Uganda especially in Kampala, Mukono, Masaka, Mpigi and Lira districts. Although no national statistics exist, the phenomenon is beginning

1818 Republic of Uganda, 'Second Periodic Report of States Parties Due in 1997: Uganda', op. cit, para 51.

1819 *Ibid*, para 52.

1820 *Ibid*.

1821 A new sub-regional pilot programme covering seven African countries, namely Kenya, Tanzania, South Africa, Malawi, Zambia, Zimbabwe and Uganda, was developed. The focus of this programme would be 'to target child labour in commercial farms in 10 districts of Arua, Bushenyi, Kabarole, Masaka, Rukungiri, Iganga, Mukono, Mpigi, Mubende and Hoima. Farms growing tobacco, coffee and tea are targeted.' *Ibid*, para 53.

to raise concern with Government and NGOs.'[1822] It noted that according to the Uganda Demographic and Health Survey 1995, '30.4 per cent of women (20-49 years) had their first sexual intercourse by the age of 15. The median age at first marriage for women (20-49 years) in Uganda is 17.5 years, while the median age at first intercourse is 16.1 years (UDHS, 1995).'[1823] According to 2011 UDHS, nearly 6 in 10 girls (58%) (as opposed to nearly half of young men (47%)) had had sex before they reached 18 years.

It conceded that the main sources of information 'have been the mass media, probation and welfare officers and the police.'[1824] According to the Ugandan Government:

> Sexual abuse has been reported from all districts in Uganda. Although children of all ages are abused, most reports cite younger children (4-15 years). A number of defilement cases go unreported or are not concluded (withdrawn or mishandled). According to a survey conducted by FIDA in eight primary and eight secondary schools covering four districts in 1997, 67 per cent and 54 per cent of girls in primary and secondary schools said they had never had sex. About two thirds (63 per cent) of the students who had sex (with or without their consent) said they kept quiet about it. Reasons for not reporting include fear, shame, and relationship to offender. Primary school respondents were pupils from primary 4 to 7, with an age range of 8 to 16, while the secondary respondents were girls in senior 1 to 6, with an age range of 11 to 20. Categories of children most at risk are children dwelling in slums, children living in armed conflict areas, children from poor families and street children.[1825]

The second periodic report noted that the common places where children are sexually abused 'include homes (of abuser or child), neighbourhoods, schools, places of entertainment, war/conflict zones, ceremonies, and places of custody.'[1826] Abusers of children are adults of all ages (19-85 years), 'with the highest proportion being youths aged 18-30.'[1827] Children too defile fellow children. The abusers 'are mainly people known to the child, such as relatives, neighbours/friends, teachers and doctors.'[1828] Other categories of abusers 'include strangers, particularly abductors, clients of child prostitutes, bar/hotel owners, alcohol brewers/sellers.'[1829] As in the other two common law East African countries discussed in this book, in Uganda:

> Quite a high percentage of girls were defiled not only by people they trust by reason of closeness and blood ties, but even those with whom they enjoy a relationship of trust. Offenders include boyfriends, stepfathers, uncles, brothers, stepbrothers, teachers, neighbours, houseboys, cousins, gatekeepers, schoolmates, strangers, best friends, fathers, brothers-in-law and doctors (FIDA, 1997).[1830]

In Uganda, the main factors contributing to child sexual abuse are: child left alone with abuser; child sent on errand; child in care of child-minder or teacher; children

1822 *Ibid*, para 202.
1823 *Ibid*.
1824 *Ibid*.
1825 *Ibid*, para 203.
1826 *Ibid*, para 204.
1827 *Ibid*.
1828 *Ibid*.
1829 *Ibid*.
1830 *Ibid*, para 205.

found in risky environment such as streets, river paths, brewing/selling alcohol and in entertainment spots. Armed conflict and the HIV/AIDS scourge have of late been blamed for the increased rate of defilement. Other causes of child sexual abuse include early marriages, poor enforcement of the laws on sexual offences, experiments in sex by children, and orphanhood.[1831]

In its endeavour to prevent and combat sexual exploitation against children, the Ugandan Government, in collaboration with NGOs and other partners, has undertaken various measures to prevent sexual exploitation and promote the recovery of those who have been abused. They include amendment of the Penal Code (to introduce the law on defilement)[1832] and law reform to bring the relevant laws in line with the Constitution, CRC, ACRWC and the Children Act. Under the Penal Code (Amendment) Act (2007), the Penal Code has been amended by substituting for Section 129 new provisions on "defilement of persons under eighteen years of age".

In particular, the new Section 129(1) of the Penal Code (Amendment) Act (2007) provides that any person 'who performs sexual act with another person who is below the age of eighteen years commits an offence and is on conviction, liable to imprisonment not exceeding eighteen years.' Besides, under Section 129(2), any person who performs a sexual act with another person who is, *inter alia*, below the age of fourteen years[1833] commits a felony called aggravated defilement and is, on conviction by the High Court, liable to suffer death.

In addition, a number of NGOs 'have undertaken advocacy, sensitization and counselling on the problem of sexual abuse and exploitation.'[1834] Other interventions undertaken include providing vocational training and life skills, health service provision and creation of a child labour unit in the ministry responsible for labour.[1835] In a nutshell, these efforts have resulted in 'increased awareness by the community of the problem and as a result more crimes are now being reported to the police and LCs; more arrests of violators; children and families becoming more aware of the dangers of child sexual abuse; reporting of early marriages (sometimes by children themselves); and a successful network and collaboration between NGOs and Government.'[1836]

1831 *Ibid*, para 206.

1832 *See* particularly the Penal Code (Amendment) Act, No. 8 of 2007.

1833 Section 129(4) of the Penal Code (Amendment) Act enlists other circumstances which may warrant the High Court to sentence a person to suffer death upon conviction to include: where the offender is infected with HIV/AIDS, where the offender is a parent or guardian or a person in authority over the person against whom the offence is committed; where the victim is a person with disability; or where the offender is a serial offender.

1834 Republic of Uganda, 'Second Periodic Report of States Parties Due in 1997: Uganda', op. cit, para 207.

1835 *Ibid*.

1836 *Ibid*, para 208.

Chapter Fourteen

Protection of Children from all forms of Violence and Abuse in Kenya

14.0 Introduction

Like its East African counterparts, the Kenyan Government has undertaken measures (i.e., constitutional, legislative, policy and administrative) to prevent and combat violence against children in terms of the prohibition and elimination of harmful traditional practices in the context of Article 24(3) of the CRC; measures to protect children from physical and psychosocial abuse and neglect; and measures to protect children in situation of exploitation, including physical and psychological recovery and social integration. These measures have been adopted and implemented partly as fulfilment of Kenya's obligation under the ACRWC and the CRC and partly as its response to the CROC's previous Concluding Observations.

In its previous Concluding Observations, with reference to the United Nations Secretary-General's Study on Violence against Children, the CROC recommended that the Kenyan Government should:

(a) take all necessary measures for the implementation of the overarching and setting specific recommendations contained in the report of the independent expert for the United Nations Study on Violence against Children (A/61/299) while taking into account the outcome and recommendations of the Regional Consultations for Eastern and Southern Africa (South Africa, 18-20 July 2005);

(b) use these recommendations as a tool for action in partnership with civil society and in particular with the involvement of children to ensure that every child is protected from all forms of physical, sexual and mental violence and to gain momentum for concrete and, where appropriate, time-bound actions to prevent and respond to such violence and abuse; and

(c) seek technical assistance for the above-mentioned purposes from UNICEF, the Office of the High Commissioner for Human Rights (HCHR) and the World Health Organization (WHO).

The Kenyan Government has undertaken several measures in response to the foregoing and other recommendations as considered below.

14.1 Measures to Prohibit, Prevent and Eliminate Harmful Traditional Practices

In respect of ensuring that children are adequately protected from abuse, neglect and abuse or ill-treatment, the CROC has recommended that the Kenyan Government should:

(a) strengthen its existing measures to prevent child abuse and neglect;

(b) strengthen capacity, *inter alia*, by systematic training of the children's officers, volunteer children's officers and other law-enforcement agencies such as

the police within the Provincial Administration to investigate, review and respond to child-rights complaints;

(c) provide support for the operation of a 24-hour three-digit toll-free nationwide telephone helpline for children, resourced with well-trained professionals and volunteers;

(d) stimulate the creation of networks and partnerships, with the involvement of local advisory councils, aimed at eliminating violence against children; and

(e) consider establishing a centralized system of gathering data, documenting, coordinating, investigating, responding to and following up on cases of child abuse in its various forms.

In response to the foregoing recommendations made by the CROC, the Kenyan Government has undertaken a number of measures, including establishing offices in 154 out of 288 districts where Children's Officers and AACs are actively handling child protection matters.[1837] It has also set up a number of institutional mechanisms designed to ensure that children who interact with the justice system are protected accordingly. These include; children courts; child protection units at police stations; and progressive gazettment of children's magistrates. Furthermore, the government has set up a child helpline number 116 'for enhancing quick responses to children in distress and in need of assistance.'[1838]

Community policing to enhance quick responses to children in distress as a result of abuse or neglect has been introduced, together with the appointment of women police officers 'to respond to girl child-related children cases reported at police stations.'[1839] In essence, these measures 'are assisting to curb cases relating to physical, emotional and sexual abuse; exploitation and neglect.'[1840] The Government of Kenya has conceded that: 'Despite all these measures the State Party acknowledges that the problems relating to child abuse are far from being solved.'[1841]

14.2 Measures to Protect Children from Physical and Psychosocial Abuse and Neglect

In its previous Concluding Observations in relation to Kenya, the CROC urged Kenya to:

(a) review its legislation and ensure its effective implementation in order to provide children with better protection against torture and ill-treatment;

(b) investigate and prosecute all cases of torture and ill-treatment of children, ensuring that the abused child is not victimized in legal proceedings and that the child's privacy is protected;

1837 Republic of Kenya, '3rd, 4th and 5th State Party Report to the UNCRC Committee – Geneva 2005-2011', op. cit, para 176.

1838 *Ibid*, para 177.

1839 *Ibid*.

1840 *Ibid*.

1841 *Ibid*.

(c) ensure that child victims are provided with appropriate services for care, recovery and reintegration, including psychosocial support for those affected by torture and other cruel, inhuman and degrading experiences, and provide them with adequate legal assistance in this regard; and

(d) continue its efforts to train professionals working with and for children, including teachers, law-enforcement officials, social workers, judges, magistrates and health personnel in the identification, reporting and management of cases of ill-treatment.

The Kenyan Government has implemented the foregoing recommendations by undertaking a number of actions, including instituting comprehensive reforms in the Police Service under the ongoing police service reforms. In particular, the term "police force" has been changed to "police service" to reflect the new thinking.[1842] The National Police Service Act, 2011(Article 95(1), among other things, provides that no person shall be subjected to torture or other cruel and degrading treatment. In Article 10(1) paragraph (o), the Act provides for an independent complaints mechanism where one feels aggrieved by the force.

Kenya has also ratified the UN Convention against Torture (CAT), whereby in 2008 it submitted an Initial State Party Report under the Convention to the UN Committee against Torture.[1843] The report acknowledged that torture, cruel and degrading punishment is still applied to children at home and in institutions, but also detailed measures taken to address this as follows:

(a) The Government has drafted a Family Protection Bill, 2012[1844] to curb domestic-related violence which is undergoing internal review and stakeholder consultations. In addition, Article 29(e) and (f) of the Constitution of Kenya prohibits corporal punishment and cruel, inhuman or degrading treatment;

(b) The Government has established toll free hotline 999/112 to police stations and several other mobile hotlines to every police division including the headquarters for all people. There is also a toll free child help line 116 for children in distress and in need of immediate help. The line operates everyday for twenty four hours and is managed by officers' who have been trained on child rights. Measures are being taken to improve the efficiency as well as expand these services to reach all vulnerable children and other groups;

(c) The Government has established children's/gender desks in all police stations. There are Child Protection Units (CPUs) in police stations serving children in need of protection. These units increased from four in 2004 to fourteen in 2011; and

1842 *Ibid*, para 130.

1843 *Ibid*, para 131.

1844 Ever since, the Family Protection Bill has been split into three Bills – Marriage Bill; Matrimonial Property Bill; and Protection Against Domestic Violence Bill – which are scheduled for enactment within five years of the promulgation of the Kenyan Constitution. For further details about the progress on these Bills visit the official website of the Kenya Commission for the Implementation of the Constitution (CIC): www.cickenya.org/cicoldsite/news

(d) From 2008 – 2011 the State Party initiated and piloted a legal aid and awareness programme. The programme includes provision of legal aid for child offenders and children in need of care and protection. From the lessons learnt, a National Legal Aid Bill and Policy have been prepared and it is at an expert review level. In addition, Article 48 of the Constitution mandates the State to facilitate access to justice for all persons.[1845]

In respect of corporal punishment to children, the CROC has urged Kenya, taking into account General Comment No. 8[1846] on the right of the child to protection from corporal punishment and other cruel or degrading forms of punishment, to undertake the following measures:

(a) Introduce legislation explicitly prohibiting corporal punishment in the home and in all public and private alternative care and employment settings;

(b) Conduct public education and awareness raising campaigns on children's rights to protection from all forms of violence and promotion of alternative, participatory, non-violent forms of discipline; and

(c) Improve the effectiveness of the monitoring system in order to ensure that abuse of power by teachers or other professionals working with and for children does not take place in schools and other institutions.

As follow up actions, the Kenyan Government has undertaken a number of legislative and administrative measures, including adopting the National Children's Policy (NCP) in 2008, which prohibits corporal punishment for children in all settings.[1847] Corporal punishment on children has been absolutely outlawed in all settings (including in homes and schools) under Article 29(e) and (f) of the Constitution of Kenya, which prohibits corporal punishment and cruel, inhuman or degrading treatment; as well as under Section 18(1) of the Children Act, which provides that: 'No child shall be subjected to torture, or cruel treatment or punishment, unlawful arrest, deprivation of liberty.' In particular, Article 53(1)(d) of the Kenyan Constitution guarantees the child's right 'to be protected from all forms of violence, inhuman treatment and punishment and hazardous or exploitative labour.'

In respect of the administration of school discipline, corporal punishment in schools has been outlawed through a legal notice/circular issued by Ministry of Education (MoE).[1848] In respect of the administration of juvenile justice, Section 191(2) of the Kenyan Children Act explicitly prohibits corporal punishment on child offenders.[1849] In a similar tone, the 2003 amendment to the Kenyan Penal Code abolished corporal punishment in the criminal justice system for both children and adults.[1850]

Besides, the Kenya Law Reform Commission has prepared 'proposals to amend Section 18 of the Children Act, 2001 which will prohibit the administration of unreasonable punishment at home and in institutions offering alternative care and

1845 *Ibid*.

1846 CROC, General Comment No. 8 ('On the Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment', (CRC/C/GC/8).

1847 Clause 53(1) of the National Children's Policy (2008).

1848 *See* the Education (School Discipline) Regulations, Legal Notice No. 56 of 2001.

1849 Section 18(2) of the Kenyan Children Act provides that: 'Notwithstanding the provisions of any other law, no child shall be subjected to capital punishment or to life imprisonment.'

1850 *See* Criminal Law (Amendment) Act, No. 5 of 2003.

align it with the provisions in the NCP, 2008.'[1851] Moreover, the Government has established the Framework for the National Child Protection System for Kenya under which a National Child Protection Committee has been established 'to look into ways of eradicating corporal punishment in Kenya.'[1852]

In addition, the Kenyan Government, through the public private-partnership collaboration, has recognised that 'there has been intensive awareness campaign on corporal punishment by non-state actors.'[1853] Indeed, this has been possible 'through publications addressing corporal punishment such as booklets, posters and stickers which have been distributed through schools and public chiefs' forums among others.'[1854]

14.3 Measures to Protect Children from Harmful Traditional Practices

In respect of protection of children from harmful traditional practices in the context of Article 21 of the ACRWC[1855] and 24(3) of the CRC, the CROC has urged the Kenyan Government to:

(a) Strengthen its measures regarding female genital mutilation and early marriages and ensure that the prohibition is strictly enforced;

(b) Conduct awareness-raising campaigns to combat and eradicate this and other traditional practices harmful to the health, survival and development of children, especially girls; and

(c) Introduce sensitization programmes for practitioners and the general public to encourage change in traditional attitudes, and engage the extended family and the traditional and religious leaders in these actions.

(a) Constitutional and Legislative Measures

As part of follow up actions, the Kenyan Government has undertaken a number of constitutional, legislative and administrative measures to prevent and eliminate harmful cultural and traditional practices against children. In particular, Article 44(3) of the Constitution of Kenya prohibits harmful cultural practices. It explicitly provides that a person shall not compel another person to perform, observe or undergo any cultural practice or rite. At a policy level, the Kenyan Government has adopted the National School Health Policy (2009), which addresses issues relating to FGM and early/forced marriages to students in schools.[1856] Section 14 of the Kenyan Children Act, which has been repealed by a specific law (i.e. the Prohibition of Female Genital Mutilation Act, 2011) protects children from harmful cultural rites, etc. It explicitly provides that:

1851 Republic of Kenya, '3rd, 4th and 5th State Party Report to the UNCRC Committee – Geneva 2005-2011', op. cit, para 133.

1852 *Ibid*, para 134.

1853 *Ibid*, para 135.

1854 *Ibid*.

1855 Article 21(1) of the ACRWC provides explicitly that: 'States 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:

(a) those customs and practices prejudicial to the health or life of the child; and

(b) those customs and practices discriminatory to the child on the grounds of sex or other status.'

1856 *Ibid*, para 256.

> No person shall subject a child to female circumcision, early marriage or other cultural rites, customs or traditional practices that are likely to negatively affect the child's life, health, social welfare, dignity or physical or psychological development.

In principle, the Prohibition of Female Genital Mutilation Act (2011) (the PFGM), which serves as 'the first comprehensive attempt to address the problem of genital cutting',[1857] provides 'new opportunities for eradication of FGM.'[1858] In particular, it empowers chiefs and Children's Officers to enter into places without warrant to ascertain whether such a crime has been or is about to be committed. It also states that culture and religion cannot be used as an excuse to perform the procedure. It further 'distinguishes FGM from medical, surgical procures connected to child birth, and surgery that is essential for the physical or mental health of a woman as well as surgical procedures performed for therapeutic purposes.'[1859] The PFGM criminalises the following acts:

(a) aiding and abetting the circumcision of women and girls and procuring of a person to perform the cut;

(b) taking a Kenyan to another country for and bringing another person to Kenya for circumcision;

(c) allowing premises for which you are responsible to be used for circumcision;

(d) being found in possession of tools or equipment for the cut;

(e) knowing that someone has the intention of performing the cut and failing to report to the authorities; and

(f) any Kenya citizen who undergoes FGM outside the country is also liable for prosecution.

This law provides a wider definition of "law enforcers" in relation to FGM (including the police and other government officers – children's officers, members of the provincial administration and probation officers) and it also imposes a life imprisonment term where FGM leads to the death of the victim. Where the FGM offence is committed outside Kenya by a Kenyan citizen or resident, the law provides for an extra-territorial application.[1860]

(b) Administrative Measures

The foregoing constitutional, policy and legislative measures have been complemented by several administrative measures, including conducting public awareness forums as well as facilitating community dialogue on FGM in five pilot districts where the practice is rampant.[1861] In addition, the Kenyan Government has conducted training for district gender and social development committee members on gender-based

1857 African Child Policy Forum, *Harmonisation of Children's Laws in Eastern and Southern Africa: Country Briefs,* op. cit, p. 73.

1858 Republic of Kenya, '3rd, 4th and 5th State Party Report to the UNCRC Committee – Geneva 2005-2011', op. cit, para 252.

1859 *Ibid*, para 254.

1860 African Child Policy Forum, *Harmonisation of Children's Laws in Eastern and Southern Africa: Country Briefs,* op. cit, p. 73.

1861 *Ibid*, para 258. These campaigns are conducted through the Ministry of Gender, Children and Social Development.

violence and other harmful cultural practices.[1862] Through the National Council for Children's Services, the Government in 2010 also undertook a study on child marriage in two communities 'where the practice is prevalent. The findings will inform future planning of programmes and interventions.'[1863] In addition, UN agencies and development partners in Kenya 'have supported advocacy campaigns against FGM among 33 tribes which practice this culture.[1864] Through these campaign initiatives, the practice is slowly lessening.'[1865]

Despite the criminalization of FGM and the foregoing policy and administrative measures undertaken by the Kenyan Government, 'it remains steadily practised within some communities despite its damaging impacts to the dignity, health and lives of affected women and children.'[1866] The Kenyan Government has conceded that it 'must be noted that deep rooted cultural practices take long time to eradicate.'[1867]

14.4 Measures to Protect Children in Situations of Exploitation

(a) Child Labour

Consistent with the provisions of Article 15 of the ACRWC[1868] and Article 32 of the CRC,[1869] Article 53(1)(d) of the Kenyan Constitution guarantees the child's right to be protected from all forms of violence, including hazardous or exploitative labour. In

1862 *Ibid*.

1863 *Ibid*, para 259.

1864 For instance, Faith Based Organizations in Kenya 'have continued to conduct Alternative Rites of Passage for girls in place of FGM.' *Ibid*, para 261.

1865 *Ibid*, para 260.

1866 African Child Policy Forum, *Harmonisation of Children's Laws in Eastern and Southern Africa: Country Briefs*, op. cit, p. 73.

1867 Republic of Kenya, '3rd, 4th and 5th State Party Report to the UNCRC Committee – Geneva 2005-2011', op. cit, para 260.

1868 Article 15 of the ACRWC provides categorically that:

'1. Every child shall be protected from all forms of economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's physical, mental, spiritual, moral, or social development.

2. States Parties to the present Charter 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 Organization's instruments relating to children. States Parties shall in particular:

(a) provide through legislation, minimum wages for admission to every employment;

(b) provide for appropriate regulation of hours and conditions of employment;

(c) provide for appropriate penalties or other sanctions to ensure the effective enforcement of this Article;

(d) promote the dissemination of information on the hazards of child labour to all sectors of the community.'

1869 Article 32 of CRC explicitly provides that:

'1. States Parties recognize 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.

2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present Article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:

(a) Provide for a minimum age or minimum ages for admission to employment;

(b) Provide for appropriate regulation of the hours and conditions of employment;

(c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present Article.'

a similar tone to Article 15(1) of the ACRWC and Article 32(1) of the CRC, Section 10(1) of the Kenyan Children Act provides expressly that:

> (1) Every child shall be protected from economic exploitation and 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 Employment Act (2007) 'is more detailed as regards the regulation of children in employment than the Children's Act.'[1870] The Employment Act sets out the minimum age of employment at 13 years, below which a child cannot be engaged in labour or employment.[1871] It states that children between thirteen and sixteen years of age can only engage in light work, which is not harmful to their health, development, or education, unless their work is part of a vocational training program.[1872] In principle, '[c]hildren between the ages of 16 and 18 are employable, although the Act does not clearly define the parameters for the employment of this category of children.'[1873]

The Employment Act (2007) defines the worst forms of child labour as 'slavery, child prostitution, illicit activities or work likely to injure the health of a child.'[1874] However, it 'fails to define "light work" for which children between the ages of 13 and 16 are deemed eligible and does not provide protections for children in such employment.'[1875] This law also prohibits children from engaging in night work between 6:30 p.m. and 6:30 a.m. It also gives the Minister for Labour power to declare that work, activity or contract of service that is harmful to the health, safety or morals of a child constitute a worst form of child labour.[1876]

The Employment Act provides for penalties of up to one year imprisonment for employers found employing a child in any of the activities prohibited by the Act; these penalties increase in cases where children are injured or killed while performing one of the prohibited activities, with the law stipulating that a portion of the fines are to be used to benefit the child and/or their immediate family.[1877]

These constitutional and legislative measures are complemented by several administrative measures, including the launching and operationalization of a 24-hour toll free line known as Child Helpline 116 in 2008, 'which children and adults can use to report cases of the worst forms of child labour, abuse, including trafficking, and receive counselling and referrals from relevant agencies.'[1878] The Child Helpline is carried out through the Ministry of Gender, Children and Social Development and the Communications Commission of Kenya (CCK), with NGO support.[1879] In addition to the Child Helpline, Kenya has participated in the Community Based

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1870 African Child Policy Forum, *Harmonisation of Children's Laws in Eastern and Southern Africa: Country Briefs*, op. cit, p. 73.

1871 Section 56(1) of the Employment Act (2007).

1872 *Ibid*, Section 56(2).

1873 African Child Policy Forum, *Harmonisation of Children's Laws in Eastern and Southern Africa: Country Briefs*, op. cit, p. 74.

1874 Kenyan Employment Act, 2007 Part - VI deals with Protection of Children.

1875 African Child Policy Forum, *Harmonisation of Children's Laws in Eastern and Southern Africa: Country Briefs*, op. cit.

1876 Section 53 of the Employment Act (2007).

1877 Republic of Kenya, '3rd, 4th and 5th State Party Report to the UNCRC Committee – Geneva 2005-2011', op. cit, para 436.

1878 *Ibid*, para 437.

1879 *Ibid*.

Innovations to Reduce Child Labour through Education (CIRCLE) global project, which is funded by USAID and implemented by Winrock International and various community-based organizations.[1880]

Like the other two common law East African countries considered in this book, Kenya has, in partnership with ILO/IPEC, implemented programmes on the elimination of child labour, especially its worst forms. Between 2005 and 2009, the Time Bound Programme (TBP) on the elimination of the worst forms of child labour was implemented. Under financial support of the United States Department of Labour, the project has supported a total of 25,136 (11,102 boys and 14,034 girls) through the Time Bound Programme, whereby '14,601 children (6,768 boys and 7,833 girls) were withdrawn from worst forms of child labour, while another 10,535 children (4,334 boys and 6,201 girls) were prevented from going into child labour.'[1881] According to the Kenyan Government:

> All of the targeted children were supported to access education and skills training opportunities. In July 2008, the State Party signed a partnership protocol with ILO and the European Union on implementation of the programme on tackling child labour through education. Approximately USD 1.5 million was earmarked for Kenya.[1882]

However, as in the other two common law East African countries under study, in practice 'there remain considerable gaps in enforcing the existing domestic legal provisions on the protection of children from harmful child labour' in Kenya.[1883] In recognition of this anomaly, the CROC has urged the Kenyan Government to undertake measures to:

(a) develop and enact legislation, as well as policies, to protect children from the worst forms of child labour, including measures to address the root causes of this problem;

(b) strengthen the capacity of the institutions responsible for the control and protection of child labour;

(c) seek the support and technical assistance of the International Labour Organization (ILO), UNICEF and national and international non-governmental organizations (NGOs), in order to develop a comprehensive programme to prevent and combat child labour, in full compliance with ILO Convention No. 182 (1999) concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour and ILO Convention No. 138 (1973) concerning Minimum Age for Admission to Employment, which the State Party has ratified; and

(d) seek further technical assistance from among others, UNICEF and ILO-IPEC (International Programme for the Elimination of Child Labour).

In response to the foregoing recommendations made by the CROC, the Kenyan Government has undertaken several constitutional, policy, legislative and administrative

1880 *Ibid*, para 438.

1881 *Ibid*, para 439.

1882 *Ibid*.

1883 African Child Policy Forum, *Harmonisation of Children's Laws in Eastern and Southern Africa: Country Briefs*, op. cit.

measures to prevent and eliminate economic exploitation of children as considered above.

(b) Sexual Exploitation

(i) Sexual Exploitation and Trafficking of Children

In relation to preventing and combating sexual exploitation and trafficking in children, the CROC has urged the Government of Kenya to undertake measures aimed at:

(a) strengthening its legislative measures and develop an effective and comprehensive policy that addresses the sexual exploitation of children, including the factors that place children at risk of such exploitation, and that address areas where such exploitation has been identified as most prevalent;

(b) preventing the criminalization of child victims of sexual exploitation;

(c) implementing appropriate policies and programmes for the prevention, recovery and reintegration of child victims, in accordance with the Declaration and Agenda for Action and the Global Commitment adopted at the 1996 and 2001 World Congress Against Commercial Sexual Exploitation of Children.

In response to the foregoing recommendations, the Kenyan Government has undertaken several measures to prevent and combat sexual exploitation and trafficking in children, including the enactment and implementation of the Sexual Offences Act (2006). This law provides 'a legal framework for the criminalization of sexual offences in Kenya'[1884] by making provision on sexual offences, their definition, prevention and the protection of all persons from harm of unlawful sexual acts, and for connected purposes. In principle:

> The law is general in scope covering the issue of sexual offences against adults and children. It consolidates previous laws on sexual offences in Kenya. It makes provisions for new forms of sexual offence[s], including sexual violence against men and boys.[1885]

It provides that a child is incapable of giving sexual consent; and sets out offences that are specific to children, including sexual offences 'committed within the view of children';[1886] defilement;[1887] attempted defilement;[1888] indecent act with a child;[1889]

1884 *Ibid*, p. 72.

1885 *Ibid*. *See* also Federation of Women Lawyers in Kenya (FIDA-K), *Implementation of the Sexual Offences Act – A Research* Report, 2009, pp. 7 & 8 (note 12).

1886 Section 7 of the Sexual Offences Act (2006).

1887 *Ibid*, Section 8.

1888 *Ibid*, Section 9.

1889 *Ibid*, Section 11.

child trafficking;[1890] child sexual tourism;[1891] and child prostitution.[1892] Since this law was enacted in 2006, numerous prosecutions of child sexual abuse cases have been conducted in the country.[1893]

Administratively, the Kenyan Government, together with other stakeholders in the children's rights sector, has 'continued raising awareness on prevention of criminalization of child victims of sexual exploitation.'[1894] In addition, the National Plan of Action for Children (2008-2012) 'has addressed issues emanating from the World Congress against Commercial Sexual Exploitation of Children.'[1895] However, the Kenyan Government admits that 'issues relating to commercial sexual exploitation are interlinked to poverty, ignorance of parents and complications related to tracking perpetrators of child trafficking beyond the Kenyan borders.'[1896] It has also introduced a Code of Conduct for teachers, 'which ensures that stringent measures are in place to protect children against sexual exploitation.'[1897] The Kenyan Government also has actively participated in the development of a Protocol of the East African Community on Peace and Security, 'in which trafficking issues within the region will be addressed';[1898] as well as it 'has concluded MOUs with neighbouring countries on trafficking in persons across borders.'[1899]

(ii) Commercial Sexual Exploitation of Children

Increasingly, the involvement of children in commercial sex is becoming common not only in Kenya but also in all other African countries. In recognition of this problem, the CROC has urged the Kenyan Government to undertake a number of measures, including:

(a) ratifying the Optional Protocol on the sale of children, child prostitution and child pornography;

(b) providing the Committee with further information on efforts to address child pornography;

(c) enacting the "counter-trafficking in persons" bill, taking into account international legal obligations;

1890 *Ibid*, Section 13. The Counter Trafficking in Persons Act (2010) has broadened the definition of child trafficking to include other purposes beyond the 'purpose of committing sexual offences', which is a specific ingredient element under the Sexual Offences Act. It should be noted that one of the main objectives of this law is 'to implement Kenya's obligations under the UN Conventions against Transnational Organised Crime including the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and children and all other relevant international conventions (as well as the CRC and ACRWC) to which Kenya is party.' African Child Policy Forum, *Harmonisation of Children's Laws in Eastern and Southern Africa: Country Briefs*, op. cit, p. 73.

1891 Section 14 of the Sexual Offences Act (2006).

1892 *Ibid*, Section 15.

1893 Republic of Kenya, '3rd, 4th and 5th State Party Report to the UNCRC Committee – Geneva 2005-2011', op. cit, para 433.

1894 *Ibid*, para 434.

1895 *Ibid*, para 435.

1896 *Ibid*.

1897 *Ibid*, para 436.

1898 *Ibid*, para 437.

1899 *Ibid*, para 438.

(d) dedicating further resources to prevention and awareness-raising, paying particular attention to the tourism sector; and

(e) training law-enforcement officials, social workers and prosecutors on how to receive, monitor, investigate and prosecute cases, in a child-sensitive manner that respects the privacy of the victim.

Legislatively, the Kenyan Penal Code criminalises the sale of children, child prostitution and child pornography.[1900] In addition, the Sexual Offences Act, 2006 criminalises sexual exploitation of children.[1901] On its part, the Alcoholic Drinks Control Act (2010) prohibits the sale of alcohol to minors, makes it an offence for adults to take children to premises where alcohol is sold and prohibits children frequenting such establishments.[1902] The Counter-Trafficking in Persons Act (2010) also provides for the prevention and suppression of trafficking in persons as well as punishment for, trafficking of persons, especially women and children.

Administratively, the Kenyan Government 'works closely with INTERPOL to support investigations into acts of child sex tourism perpetrated by foreigners in Kenya.'[1903] In 2006, a study was undertaken by the government and UNICEF on the extent and effect of child sex tourism on the Kenyan coast. As follow up on the study, 'by end of August 2009, about 20 hotels and tour companies had signed the International Code of Conduct targeting elimination of sexual exploitation of children in the tourism industry. Secondly, the Ministry of Tourism, MGC&SD, Ministry of Labour, and UNICEF are in the process of domesticating this international code of conduct into a national code of conduct targeting domestic tourism in all major towns in Kenya.'[1904] Besides:

> In response to the 2006 joint Government/UNICEF study on commercial sexual exploitation and child sex tourism, [the government], through the Department of Children's Services, worked with NGOs to host several workshops in 2007 to encourage local government officials and stakeholders in the tourism industry to implement the End Child Prostitution and Trafficking (ECPAT) Code of Conduct.[1905]

In its bid to prevent and combat child pornography, the Kenyan Government has enacted the Kenya Communications Act (1998) which mandates the Communications Commission of Kenya (CCK) to regulate media activities. The CCK 'is responsible for providing broadcasting licenses and frequency spectrum.'[1906] In particular, Section 20 of the Communications Act provides for the protection of children in the following regards:

> […] a licensee shall ensure due care is exercised in order to avoid content that may disturb or be harmful to children, that has offensive language, explicit sexual or violent material, music with sexually explicit lyrics or lyrics which depict violence, request for permission

1900 In other words indecent assault for boys under Section 164 and Prostitution which Includes child of Kenyan Penal Code.

1901 Section 11 – 16 says about Child sexual exploitation of the Kenyan Sexual offices Act, No.3 of 2006. RE 2009.

1902 Republic of Kenya, '3rd, 4th and 5th State Party Report to the UNCRC Committee – Geneva 2005-2011', op. cit, para 390.

1903 *Ibid*, para 391.

1904 *Ibid*, para 392.

1905 *Ibid*, 440.

1906 *Ibid*, para 393.

to conduct interview with a minor from the minor's parents or guardian before conducting an interview with a minor.

The Act further provides for setting of watershed times when certain programmes can be aired, in coordination with the Kenya Film Classification Board (KFCB).[1907]

(c) Sale, Trafficking and Abduction of Children

Consistent with Article 35 of the CRC, which obliges States Parties to 'take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form', Kenya has ratified and domesticated the UN Conventions against Transnational Organised Crime including the Protocol to Prevent, Suppress and Punish Trafficking in Persons through the enactment of various laws. These laws include the Counter Trafficking in Persons Act (2010), the Sexual Offences Act (2006), the Children Act (2001) and the Penal Code all of which criminalise sale, trafficking and abduction of children. These laws are reinforced by several provisions in the Constitution of Kenya that deal with impunity issues related to child trafficking.[1908] It also adopted Adoption Regulations in 2005 to regulate national and international adoption and to counter illegal adoption and child trafficking.

Administratively, the Kenyan Government 'has established a National Steering Committee to Combat Human Trafficking in Persons and has developed a National Plan of Action to Combat Trafficking in Persons.'[1909] It has also been actively participating in an East Africa regional anti-trafficking project being implemented by UNODC/ INTERPOL that 'aims to develop a regional anti-trafficking strategy; bring national trafficking legislation in line with the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, especially Women and Children; establish offices to combat trafficking; and develop training materials for the police force and prosecutors.'[1910]

Although the Kenyan Government has arrested, prosecuted and sentenced perpetrators of acts of sexual abuse against girls and women, 'the magnitude of the problem, however, is still enormous.'[1911]

1907 *Ibid*, para 394.

1908 Child abuse in the Kenyan Constitution is under Article 51(1)(d). But in the Sexual Offence Act, No. 3 of 2006, Sections 11-16 deal with Child Trafficking, Child Prostitution, Child Pornography etc.

1909 Republic of Kenya, '3rd, 4th and 5th State Party Report to the UNCRC Committee – Geneva 2005-2011', op. cit, para 445.

1910 *Ibid*, para 446.

1911 *Ibid*, para 449.

Chapter Fifteen

Protection of Children from all forms of Violence and Abuse in Tanzania

15.0 General Overview

In its bid to implement the findings and recommendations of the VAC Study as well as Concluding Observations made by the CROC,[1912] the ACERWC and the CEDAW[1913] Committee to eliminate violence against children in its jurisdiction, Tanzania has undertaken a National Study on Violence against Children, becoming one of the first few countries in Africa to do so.[1914] It should be recalled that the VAC Study developed over-arching and context-specific recommendations, 'which outline broad actions that all States must [under]take to prevent violence against children and to respond to it effectively if it occurs.'[1915] In particular, the VAC Study emphasized the urgency of country-level action and set two key targets for Governments to meet: first, the integration of measures 'to prevent and respond to violence against children in national planning processes, which should include the identification of a focal point, preferably at Ministerial level';[1916] and, second, prohibiting all forms of violence against children 'by law and initiating a process to develop reliable national data collection systems.'[1917]

Therefore, the Government of Tanzania urgently responded to this call and became the first country in Africa to undertake a *National Study on Violence against Children* (Tanzania VAC Study).[1918] This study, which was conducted through a population-based survey, measures sexual, physical and emotional violence against children (both boys and girls).[1919] Findings from this study were released in 2011 and indicate that nearly one out of three female children and one out of six male children experience sexual abuse prior to attaining the age of 18 years. Briefly, the findings of this study indicate that:

1912 CROC, 'Consideration of Reports Submitted by States Parties under Article 44 of the Convention – Concluding Observations: United Republic of Tanzania', 42nd Session, 21 June 2006 (CRC/C/TZA/CO/2), paras 51 & 52.

1913 CEDAW Committee, Concluding Observations: URT (2008), paras 111 & 112.

1914 African Child Policy Forum, *Harmonisation of Children's Laws in Eastern and Southern Africa: Country Briefs*, op. cit, p. 175.

1915 United Republic of Tanzania, *Violence Against Children in Tanzania: From Commitments to Action – Key Achievements from the Multi-Sectoral 'Priority Responses' to Address Violence against Children (2011-2012) and Priority Activities for 2012-2013*, op. cit, p. 1.

1916 *Ibid*.

1917 *Ibid*.

1918 United Republic of Tanzania, *Violence Against Children in Tanzania: Findings from a National Survey 2009* Dar es Salaam: UNICEF/US Centre for Disease Control and Prevention/Muhimbili University of Health and Allied Sciences, August 2011. The study was launched in August 2011 under the auspices of the Ministry of Community Development, Gender and Children (MCDGC) at a high profile meeting involving UN Agencies, members of the diplomatic corps, line ministries and representatives of international and local NGOs and officiated by the then UN Deputy Secretary-General, Dr. Asha-Rose Migiro.

1919 United Republic of Tanzania, *Violence Against Children in Tanzania: From Commitments to Action – Key Achievements from the Multi-Sectoral 'Priority Responses' to Address Violence against Children (2011-2012) and Priority Activities for 2012-2013*, op. cit, p. 1.

- In regard to sexual violence, the survey indicate that nearly 3 out of every 10 females and one out of every 7 males reported at least one experience of sexual violence prior to the age of 18;
- Nearly 6% of females have been physically forced to have sexual intercourse before the age of 18;
- Almost three quarters of the children both male and female experienced physical violence prior to age 18; and
- Approximately one quarter of children both male and female experienced emotional violence prior to age 18.

A similar report was launched in Zanzibar covering similar trends specific for Zanzibar. This report found that:

- More than 1 in 20 females and about 1 in 10 males aged 13 to 24 from Zanzibar reported experiencing at least one incident of sexual violence before the age of 18;
- About 6 in 10 females and 7 in 10 males reported experiencing physical violence prior to the age of 18;
- Almost 1 out of 2 females and more than 4 in 10 males 13 to 17 years old reported that they experienced physical violence in the past 12 months by either a relative, authority figure (such as teachers) or an intimate partner; and
- About 1 in 7 females 13 to 24 years of age and 1 in 5 males reported experiences of emotional violence prior to turning age 18.

As a response to addressing the challenges uncovered in the Tanzania VAC Study, both Tanzania Mainland and Zanzibar prepared their respective National Plans to Prevent and Respond to Violence against Children.[1920] This move was seen as translating research findings into action on the tone made by the Minister for Community Development, Gender and Children, Hon. Sophia Simba, who wrote in the Preface to the Tanzania VAC Study that the survey findings were particularly significant in combating violence against children. But the 'most important challenge lies ahead: how to translate the findings of the Study into responses that will reduce the prevalence of violence against children.'[1921] It was also inspired by the fact that the methodology through which the study was conducted necessitated the participation of all key ministries, which actively participated at the launch of the study. As the Government of Tanzania later recognised: 'This was a landmark event: for the first time all key Ministries publicly acknowledged the extent of child protection concerns in Tanzania and, crucially, made concrete commitments to tackle the problem.'[1922]

It is to be noted that the coordination of the study was conducted by the Multi-Sector Task Force, which also prepared key "Priority Responses" across a number of

1920 *See* the Zanzibar National Plan to Respond to Violence against Children (2011-2015) and the Tanzania Mainland's National Plan of Action to Prevent and Respond to Violence against Children (2012-2015).

1921 United Republic of Tanzania, *Violence Against Children in Tanzania: Findings from a National Survey* 2009, op. cit.

1922 United Republic of Tanzania, *Violence Against Children in Tanzania: From Commitments to Action – Key Achievements from the Multi-Sectoral 'Priority Responses' to Address Violence against Children (2011-2012) and Priority Activities for 2012-2013*, op. cit, p. 1.

key sectors: justice, the police, social welfare, health, community development, civil society, religious communities, HIV and AIDS, and local government authorities. Basing on the agreed upon "Priority Responses" the Task Force has prepared the *National Plan of Action to Prevent and Respond to Violence against Children (2012-2015)*, whose objectives and specific targets 'support and expand upon existing national efforts to prevent and respond to violence against children through building a national child protection system.'[1923]

15.1 Measures in Place to Prevent and Respond to Violence against Children in Tanzania

In order to get a clear picture of the measures Tanzania has put in place to prevent and respond to violence against children in the context of the VAC Study and Tanzania VAC Study and the resultant "Priority Responses" embedded in the *National Plan of Action to Prevent and Respond to Violence against Children (2012-2015)*, one has to look at the responses made by Tanzania in its report to the CROC submitted on 9 January 2012.[1924] These measures are clustered as those relating to the prohibition and elimination of harmful traditional practices in the context of Article 24(3) of the CRC; measures to ensure the protection of children with incarcerated parents and children living in prison with their mothers; and measures to protect children in situation of exploitation, including physical and psychological recovery and social integration.[1925] These measures are considered below.

15.2 Measures to Prohibit and Eliminate Harmful Traditional Practices

In its previous Concluding Observations, the CROC recommended that Tanzania should strengthen its legislative measures regarding FGM and conduct awareness-raising campaigns to combat and eradicate this and other traditional practices harmful to the health, survival and development of children, especially girls in the context of Article 24(3) of the CRC. The CROC also recommended that Tanzania introduce sensitization programmes for practitioners and the general public to encourage change in traditional attitudes, and to prohibit harmful practices, engaging with the extended family and the traditional and religious leaders. The Committee further recommended

1923 *Ibid*.

1924 United Republic of Tanzania, 'Tanzania 3rd, 4th and 5th Reports on the Implementation of the Convention on the Rights of the Child (CRC) 2005-2011', submitted to the CROC by the Ministry of Community Development, Gender and Children (Tanzania Mainland) and the Ministry of Social Welfare, Youth, Women and Children Development (Zanzibar), 9 January 2012. It should be noted that in its previous Concluding Observations, the CROC invited Tanzania to submit a consolidated third, fourth and fifth report by 9 January 2012 (that is, 18 months before the due date of the fifth report). According to the CROC, this was 'an exceptional measure due to the large number of reports received by the Committee every year and the consequent delay between the date of submission of a State Party's report and its consideration by the Committee. This report should not exceed 120 pages (see CRC/C/118). The Committee expects the State Party to report every five years thereafter, as foreseen by the Convention.' See CROC, 'Consideration of Reports Submitted by States Parties under Article 44 of the Convention – Concluding Observations: United Republic of Tanzania', 42nd Session, 21 June 2006 (CRC/C/TZA/CO/2), para 74.

1925 They include (a) economic exploitation including child labour, with specific reference to applicable minimum ages (Article 32 of the CRC); and (b) sexual exploitation and sexual abuse (Article 34 of the CRC).

that Tanzania ratify the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[1926]

In implementing Article 24(3) of the CRC and in the context of the CROC's and CEDAW Committee's recommendations, Tanzania has strengthened its legislative measures regarding Female Genital Mutilation (FGM), which includes the Sexual Offences Special Provisions Act (1998) that prohibits FGM of girls under the age of 18 years, the Law of the Child Act and the Zanzibar Children's Act that both prohibit harmful traditional practices to children.[1927] Tanzania has also conducted awareness raising campaigns to combat and eradicate FGM and other traditional practices harmful to the health, survival and development of children, especially girls. This is being implemented through dialogues aiming at encouraging community-wide renouncement of the practice.[1928]

In order to strengthen the enforcement of legislation against FGM, Tanzania has undertaken more coordinated approaches to addressing FGM issues by forming a National Secretariat on elimination of FGM which is comprised of government institutions, NGOs, FBOs and Media. The Secretariat is coordinated by the Ministry of Community Development, Gender and Children.[1929] The Anti-FGM Coalition has also been formed by CSOs to accelerate the elimination of FGM where programmes have been implemented in raising awareness by engaging community members, girls at risk and other children, women and men, clan elders, leaders of women groups, practitioners (*Ngariba's*), teachers, social workers, nurses, religious leaders, politicians (Members of Parliament and Councillors).[1930]

As a result of the foregoing measures to prevent and eliminate FGM in Tanzania, a recent Tanzania Demographic and Health Survey (TDHS) 2010 shows that the prevalence of FGM in the country appears to have dropped slightly, from 18 percent in the 1996 TDHS to 15 percent in the 2010 TDHS. This is 'because of widespread of infrastructures including communication and information infrastructures such as TV and Radio broadcasting which give room for rural population to access information. At the same time, success in works of campaigners and activists is too easy to cross into

1926 CROC, 'Consideration of Reports Submitted by States Parties under Article 44 of the Convention – Concluding Observations: United Republic of Tanzania', op. cit, paras 50-52. Similarly, in its 2008 Concluding Observations in respect of Tanzania, the CEDAW Committee also had this to say:

> 'The Committee urges the State party to implement existing legislation prohibiting the practice of female genital mutilation and to adopt new legislation, as necessary, to eliminate this and other harmful traditional practices affecting all women. The State party should prohibit female genital mutilation in all instances, including in respect of women over 18 years of age, address the recent practice of female genital mutilation being performed on newborn baby girls, and strengthen the enforcement of the 1998 Act to ensure that offenders are prosecuted and adequately punished. The Committee urges the State party to strengthen its awareness-raising and educational efforts, targeted at both women and men, with the support of civil society, to eliminate the practice of female genital mutilation and its underlying cultural justifications. It also encourages the State party to devise programmes for alternate sources of income for those who perform female genital mutilation as a means of livelihood.' See CEDAW Committee, 'Combined Fourth, Fifth and Sixth Periodic Report: United Republic of Tanzania', 2008 (A/63/38), para 122.

1927 Section 13(1) of the Law of the Child Act; and Section 14(1) of the Zanzibar Children's Act.

1928 United Republic of Tanzania, 'Tanzania 3rd, 4th and 5th Reports on the Implementation of the Convention on the Rights of the Child (CRC) 2005-2011', op. cit, para 194.

1929 *Ibid*, para 196.

1930 *Ibid*, para. 197.

remote areas, thus making rural women and community in general knowledgeable enough regarding the impact of FGM.'[1931]

15.3 Measures to Prevent and Eliminate Child Exploitation

Child exploitation constitutes one of the worst forms of violation of children's rights. It takes various forms, but the severely prohibited ones are children's economic exploitation, including child labour;[1932] and children's sexual exploitation and sexual abuse,[1933] as considered in the sections below.

(a) Economic Exploitation

(i) Child Labour (With Specific Reference to Applicable Minimum Age)

In its previous Concluding Observations, the CROC urged Tanzania to strengthen the capacity of the institutions responsible for the control and protection of child labour. It further recommended that Tanzania, with the support of the ILO, UNICEF, and national and international NGOs, should develop a comprehensive programme to prevent and combat child labour, in full compliance with ILO Convention No. 182 (1999) concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour and ILO Convention No. 138 (1973) concerning Minimum Age for Admission to Employment.[1934]

In compliance with these recommendations and honouring its obligation under Article 32 of the CRC and Article 15 of the ACRWC, Tanzania reformed all laws relating to child rights and welfare, particularly the two child laws: the Law of the Child Act in 2009 and the Zanzibar Children's Act in 2011. The employment laws also have been repealed and replaced by more effective laws: the Employment and Labour Relations Act[1935] and the Labour Institutions Act[1936] in 2004, which apply in Tanzania Mainland; and the Labour Relations Act[1937] and the Employment Act[1938] in 2005, which apply in Zanzibar. Whereas in Tanzania Mainland, LCA and labour laws peg the minimum age of employment at 14 years,[1939] in Zanzibar the minimum age of employment under the Children's Act is set at the age of 15 years.[1940]

Both child laws and labour laws in Tanzania Mainland and Zanzibar prohibit employment of a child under the minimum age of employment; for those children above the set age threshold, they can only do "light work". In all these laws, "light work" entails work 'which is not likely to be harmful to the health or development of

1931 *Ibid*, para 198.

1932 Child labour is stringently prohibited under Article 32 of the CRC and Article 15 of the ACRWC.

1933 Children's sexual exploitation and sexual abuse are strictly prohibited under Article 34 of the CRC and Article 27 of the ACRWC.

1934 'Consideration of Reports Submitted by States Parties under Article 44 of the Convention – Concluding Observations: United Republic of Tanzania', op. cit, paras 63 & 64.

1935 Act No. 6 of 2004.

1936 Act No. 7 of 2004.

1937 Act No. 1 of 2005.

1938 Act No. 2 of 2005.

1939 *See* particularly Mashamba, C.J., 'Legal Protection of Working Children in Tanzania' *St. Augustine Law Journal*, Vol. 1 No. 1, 2011.

1940 *See* Section 98(2) of the Zanzibar Children's Act.

the child and does not prevent or affect the child's attendance at school, participation in vocational orientation or training programmes or the capacity of the child to benefit from school work.'[1941] These laws, in the main, prohibit a child (even if he or she is above the minimum age of employment) to be employed to work in a situation that, first, places at risk the child's well-being, education, physical or mental health, or spiritual, moral or social development;[1942] and, second, it is inappropriate for a person of that age.[1943]

Despite the foregoing legislative measures to combat child labour, child labour still persists in Tanzania. The Intergraded Labour Force Survey of 2006, for instance, found that child labour involves 2,468,488 children, and out of that 591,846 were involved in hazardous condition.[1944] In response to this problem and to the CROC's recommendation that it should employ multiple measures to address child labour, in 2005 Tanzania adopted the National Strategy for Elimination of Worst Form of Child Labour. This Strategy, *inter alia*, sets out measures to curb child labour issues in Tanzania. In addition, Tanzania has developed and adopted the National Employment Policy which prohibits child labour.

(ii) Sexual Exploitation and Sexual Abuse

In its previous Concluding Observations on Tanzania's second periodic report, the CROC urged the Tanzanian Government:

(a) to strengthen its legislative measures and develop an effective and comprehensive policy that addresses the sexual exploitation of children, including the factors that place children at risk of such exploitation;

(b) to avoid criminalizing child victims of sexual exploitation; and

(c) to implement appropriate policies and programmes for the prevention, recovery and reintegration of child victims, in accordance with the Declaration and Agenda for Action and the Global Commitment adopted at the 1996 and 2001 World Congress Against Commercial Sexual Exploitation of Children.[1945]

In its efforts to implement the CRC,[1946] the ARWC[1947] and in compliance with the above recommendations, Tanzania has undertaken several measures to address the problem of sexual exploitation and sexual abuse. Such measures include the enactment of provisions protecting children who are in need of special protection by recognising children living at risk of being sexually exploited and abused under the LCA[1948] and the Zanzibar Children's Act.[1949] The Law of the Child Act and the Law of the

1941 *Ibid*, Section 98(4). For a similar description of "light work", See also Section 77(3) of the LCA.

1942 *See* particularly Section 5(4)(b) of the ELRA.

1943 *Ibid*, Section 5(4)(a).

1944 United Republic of Tanzania, 'Tanzania 3rd, 4th and 5th Reports on the Implementation of the Convention on the Rights of the Child (CRC) 2005-2011', op. cit, para 251.

1945 CROC, 'Consideration of Reports Submitted by States Parties under Article 44 of the Convention – Concluding Observations: United Republic of Tanzania', op. cit, paras 65 & 66.

1946 Article 34 of the CRC.

1947 Article 27 of the ACRWC.

1948 Section 16 and 83 of the Law of the Child Act.

1949 Section 19 of the Zanzibar Children's Act.

Child (Child Employment) Regulations (2012)[1950] prohibit any person to engage a child in activities of sexual nature or activity that exposes the child's sexual parts or exposes such child to sexual scenes or pictures[1951] and make it an offence for anyone attempting or putting a child into such an act.[1952] According to Regulation 8(2) of the Law of the Child (Child Employment) Regulations (2012), in determining acts which constitute sexual exploitation 'reference shall be made to the Penal Code Act'.[1953] This prohibition is also extended to exposing the child to purchase, sale, delivery or use of pornographic materials.[1954]

A One-Stop Centre, based at a hospital with a police officer on duty, has been established at the National Hospital in Zanzibar in order to provide holistic services for children, including counseling, legal help and medical care to victims of abuse including sexual abuse. Three One-Stop Centres are being piloted in Magu, Temeke and one in Hai with the intention of scaling up the efforts to other districts. Furthermore, the Tanzania Police Force has established Gender and Children's Desks in every major police station in order to improve the way in which the police handle cases to encourage reporting of gender-based violence and child abuse incidences. Dedicated officers staff the desks. Police officers have been trained in 193 out of 366 police stations on the mainland. The roll out of the desks nationwide to all districts is in the Police Strategic Plan, to be completed by 2013. The plan includes the assignment and renovation of rooms for the desks and interviewing of child victims, in conflict with the law and witnesses.[1955]

1950 GN No. 195 of 2012 (published in the Gazette of the United Republic of Tanzania, No. 22 Vol. 93 dated 1 June 2012).

1951 *See* particularly Section 83(1) of the Law of the Child Act (LCA) and Regulation 8(1) of the Law of the Child (Child Employment) Regulations (2012).

1952 *See* particularly Section 83(3) of the LCA.

1953 *See* particularly Part XV (Sections 129A-162) of the Penal Code Act, Cap. 16 R.E. 2002.

1954 Regulation 8(3) of the Law of the Child (Child Employment) Regulations (2012).

1955 United Republic of Tanzania, 'Tanzania 3rd, 4th and 5th Reports on the Implementation of the Convention on the Rights of the Child (CRC) 2005-2011', op. cit, para 257.

Part Five

Protection of the Rights of Children in Conflict with the Law in East Africa

Chapter Sixteen

Administration of Juvenile Justice

16.0 Introduction

The adoption of the UN Convention on the Rights of the Child (CRC) in 1989 and the African Charter on the Rights and Welfare of the Child (ACRWC) in 1990 has revolutionised the conception of juvenile justice worldwide. The two instruments have resulted in a radical shift from the doctrine of *parens patriae* – "the state as parent" – and the paternalistic approach to rehabilitating children in conflict with the law to modern-day conception of juvenile justice that combine welfarism and child justice resulting in *reintegration* of offending children back to society. From the early conception of juvenile justice in the US and Western Europe which insisted on the needs as opposed to deeds of the offending child, the CRC and the ACRWC have brought about the importance of the child's rights in the administration of juvenile justice.[1956]

Before the two instruments were adopted in the late 20th century, there were other international instruments relating to children's rights[1957] that contained provisions which 'were protectionist and welfare orientated in character.'[1958] In the texts of these instruments the tone of the rights was that the child was 'not in a position to exercise his own rights; adults exercised them in place of the child and in doing so were subject to certain obligations. Thus it could be said that a child had special legal status resulting from his inability to exercise his rights.'[1959] This early perception of children's rights was given judicial underpinning in a 1979 Irish case of the *State (M) v The Attorney General*,[1960] where the Irish Supreme Court recalled that:

> […] the courts have consistently construed the right of liberty of [a child], as being a right which can be exercised not by its own choice (which it is incapable of making) but by the choice of its parent, parents or legal guardian, subject always to the right of the courts in appropriate proceedings to deny that choice in the dominant interest of the welfare of the child.

However, the rights of the child subsequently and gradually evolved towards "empowering the child"; and, with the adoption of the CRC and the ACRWC, there

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1956 *See* particularly Odongo, G.O., 'The Domestication of International Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context.' LL.D. Thesis, University of Western Cape, 2005; and Mashamba, C.J., 'A Study of Tanzania's Non-Compliance with its Obligation to Domesticate International Juvenile Justice Standards in Comparison with South Africa'. Ph.D. Thesis, Open University of Tanzania, 2013.

1957 In particular, the Geneva Declaration of the Rights of the Child, adopted by the League of Nations in 1924; and a number of ILO Conventions relating to labour standards for working children adopted since 1919 (See particularly ILO Convention on Forced Labour, No. 29 of 1930; ILO Convention on Abolition of Forced Labour, No. 105 of 1957; ILO Convention on Equal Remuneration, No. 100 of 1951; ILO Convention on Discrimination, Employment and Occupation, No. 111 of 1958; and ILO Convention on Minimum Age, No. 138 of 1973). See also ILO Convention on Worst Forms of Child Labour, No. 182 of 1999.

1958 Tomkin, J., *Orphans of Justice: In Search of the Best Interests of the Child when a Parent is Imprisoned – A Legal Analysis*. Geneva: Quaker United Nations Office, 2009, p. 11.

1959 This statement was made by a French delegate to the Commission on Human Rights in 1959 and is quoted in Veerman, P., *The Rights of the Child and the Changing Image of Childhood*. Dordrecht: Nijhoff, 1992, p. 164.

1960 [1979] IR 73.

has been a clear move 'towards recognising that the child is an active holder of rights and not merely a passive object of the rights bestowed upon her or him.'[1961]

This Chapter, therefore, examines the administration of modern juvenile justice in the world. It traces the evolution of juvenile justice from the time when the first juvenile court was established in Illinois, US, in 1899 to the adoption of the CRC in 1989 and the ACRWC in 1990. In doing so, the Chapter discusses the dominant theories in juvenile justice since it emerged in the last part of the 19th century – *parens patriae*, 'welfarism', 'back to justice' and 'corporatism' – and their ramifications on the development of juvenile justice to its contemporary state. As such, the Chapter examines the spread of juvenile justice from the US to Europe, particularly into the UK, and later to Africa during the colonial and post-colonial epochs. In the final analysis, the Chapter examines the key principles of contemporary administration of juvenile justice and how they are being domesticated and implemented in various parts of the world, including in East Africa.

16.1 The Evolution of Juvenile Justice

Prior to the turn of the 20th century, children were treated as adults by the court system. This was because there were no specialized courts for dealing with children. Even as early as the beginning of the 19th century, there was a growing concern about the welfare of children – especially those deemed to be delinquent. Society's response to this growing problem of neglected children was to create houses of refuge. These houses were set up in many cities and were run by reformers who sought to keep juveniles out of adult prisons and away from adult criminals. As analyzed below, the concept of juvenile justice emerged from such sheer neglect and abuse of juvenile offenders to the situation where society had to treat such children with some degree of humanity according to their needs and not their deeds.

16.1.1 The State of the Rights of Children in Conflict with the Law in the Pre-Juvenile Justice Era

It has been noted that the historical origins of the British common law system actually reveal a 'brutal indifference to a child's fate.'[1962] According to Rebecca Rios-Kohn: 'It is well documented that until approximately the nineteenth century, children were treated like property or chattel but were valued by their families for their contributions through their work.'[1963] Perceived in the foregoing context, children who committed crimes in early common law were not given any special treatment because they were considered as adults. At common law, for instance, the minimum age of criminal responsibility was set as young as seven years, 'and children guilty of crimes were imprisoned.'[1964] Indeed:

> The harshness of the laws at that time is illustrated by the Stubborn Child Statute enacted by the State of Massachusetts in 1646, which provided that a stubborn or rebellious son above 15 years of age could be put to death pursuant to a complaint submitted by the child's parents. According to historical records, children were hanged as at 1708 and the

1961 Tomkin, op. cit.

1962 Rios-Kohn, op. cit.

1963 *Ibid*.

1964 *Ibid*.

> notion of a juvenile court for the juvenile offenders only emerged in the late twentieth century.[1965]

This kind of treatment offered to children at early common law was akin to treating children as if they were invisible. It was this perception of children that made some states in England and the US to enact 'laws protecting animals from cruelty before they would enact legislation to protect children from abuse.'[1966] This mistreatment of children in the early common law was exemplified in the famous case labelled as the "Mary Ellen Affair." Thus:

> In this 1874 case that occurred in New York City, a child's parents were prosecuted for keeping their daughter chained to a bed and fed only bread and water. Because of the absence of legal protection for children at the time, the prosecutors were forced to draw an analogy with a law for the prevention of cruelty against animals.[1967]

This kind of treatment of children in both the UK and US prompted wide criticism amongst children's rights reformers, leading amongst whom were Jane Adams and her fellow progressive reformers who, together with the Chicago Bar Association, convinced the Illinois legislature to establish a separate court on Cook County. The juvenile court, created under the 1899 Illinois Juvenile Court Act, was among other things intended to deal with troubled children 'in a more benign setting than the criminal courts.'[1968] In the beginning, the 'mission of the juvenile court was to help young law violators get back on the right track, not simply to punish their illegal behaviour.'[1969]

Therefore, the principle of the best interests of the child or "the child's welfare" was recognised by the common law courts in the early twentieth century. However, the same courts did not recognise the existence of a legal relationship between parent and child where the child was born out of wedlock. As Rebecca Rios-Kohn contends:

> At common law, a child born to a woman outside of marriage was regarded as a *filius nullius*, or bastard, and had few rights. As Blackstone noted, "he can inherit nothing, being looked upon as a child of nobody." The mother had no parental rights but had a duty to support the child. At the same time the father of a child born outside of marriage could not acquire parental rights nor had any legal duties in relation to the child's upbringing and well-being. Under the English common law, all children born before matrimony were deemed bastards by the law.[1970]

The above quoted Blackstone's reasoning aimed at justifying 'the common law's refusal to grant children born outside of marriage legitimate status even if subsequent to their birth the parents became legally married.'[1971] This view reflects the way the laws 'were

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1965 *Ibid*.

1966 *Ibid*.

1967 *Ibid*. See also *Encyclopedia Britannica*, "Human Rights." Available at www.britanica.com/eb/article-1906289/human-rights (Accessed on 14 June 2013).

1968 Shepherd, R.E., Jr., 'Still Seeking the Promise of Gault: Juveniles and the Right to Counsel' *Criminal Justice Magazine* Vol. 15 Issue 1, Spring 2000. Available at www.abanet.org/crimjust/juvjus/cjmag/18-2shep.html (Accessed on 6 January 2013).

1969 Butts, J.A., 'Can we do Without Juvenile Justice?' *Criminal Justice Magazine* Vol.15 No. 1, Spring 2000. Available at www.abanet.org/crimjust/juvjus/cjmag/15-1 jb.html (Accessed on 6 January 2013).

1970 Rios-Kohn, op. cit, p. 41.

1971 *Ibid*.

drafted at the time, to protect certain societal interests but not necessarily those of the child's.'[1972]

16.1.2 The History and Emergency of a Juvenile Court

In order to understand the contemporary trends in the administration of juvenile justice system worldwide, it is crucial to take into account how the system has progressed since its inception in the US up until it spread all over the world.[1973] The juvenile court was created in the late 1800s to reform US policies regarding youth offenders. Prior to the 20th century, 'misbehaving juveniles often faced arrest by the police, initial placement in the local jail with adults, and eventual institutionalisation in a house of refuge[1974] or workhouse.'[1975] Historically:

> While recognising that children were different from adults in many ways, the [criminal justice] system failed to provide safeguards for [children] that are taken for granted today. During the last two decades of the 19th century and the early years of the 20th century, the child-saving movement defined juvenile delinquency as a social problem. With that movement came reforms in police departments, courts, and correctional institutions, as well as the creation of a complex juvenile justice system.[1976]

In the US, juvenile justice in its earliest form was conceived and developed out of the need for a separate court for child offenders, away from the ordinary courts that dealt with offending adults. With the creation of a separate juvenile court system, the contemporary ideals and principles of juvenile justice were hatched, nurtured and developed beyond the borders of the US.

(a) The Need for, and Purpose of, a Separate Juvenile Court in the US

The reform of the criminal justice system with a view to embodying a separate juvenile court system was founded on a reform concept which asserted that, 'children are different from adults, and the juvenile justice system should reflect these differences.'[1977] Recognising that young people may be less culpable than adults and more amenable to change, 'reformers acknowledged society's responsibility to protect children and created a system whose central tenets were not punishment and retribution, but protection, treatment, and rehabilitation.'[1978]

1972 *Ibid*.

1973 *See* particularly, Butts, J.A., 'Can we do Without Juvenile Justice,' op. cit; Shepherd, R.E., Jr., 'Still Seeking the Promise of Gault: Juveniles and the Right to Counsel,' op. cit; Hoghuhi, M., 'The Juvenile Delinquent has Become the Demon of the Twentieth Century', in Hoghuhi, M., The Delinquent: Directions for Social Control. London, Burnet Books 13, 1983; and Steinberg, L., 'Juveniles on Trial: MacArthur Foundation Study Calls Competency into Question' Criminal Justice Magazine Vol.18 No. 3, 2003. Available at www.abanet.org/crimjust/juvjus/cjmag/18-3ls.html (Accessed on 13 January 2013).

1974 Especially noteworthy was the New York City's House of Refuge, established in 1825 'as the first systematic attempt to separate juvenile offenders from adult criminals and to provide 'correction' rather than punishment.' Inciardi, J., *Criminal Justice* 7th edn. New York/Oxford: Oxford University Press, 2002. p. 638. *See* also Pickett, R.S., *House of Refuge: Origins of Juvenile Reform in New York State, 1815-1857* Syracuse: Syracuse University Press, 1969.

1975 Regoli, R.M. and J.D. Hewitt, *Delinquency in Society* 4th edn. Boston: McGraw-Hill, 2000, p. 358.

1976 *Ibid*.

1977 Steinberg, *Ibid*.

1978 *Ibid*.

It was upon this foundation that the first juvenile court was established in Cook County under the 1899 Illinois Juvenile Court Act.[1979] Therefore, the original juvenile court was 'based on the notion that children were different from adults; that rehabilitation was possible and more important than punishment; that most children were redeemable; and that judges, making individualised decisions about children, could best determine whether the juvenile or adult court was the appropriate forum to prosecute a case.'[1980] So, within a short period after the first juvenile court was established in Cook County, Chicago in the US, later on 'specialised juvenile courts existed in every state in the United States and throughout Western Europe.'[1981] By 1945, there was a juvenile court in every state in the US.[1982]

(b) Early Dominant Theories in Juvenile Justice: Parens patriae and 'Welfarism'

When the early reforms in the processing and treatment of juvenile offenders took place in Chicago and later in all states in the US in the latter part of the 19th century, there was an 'increasing awareness that the roots of crime and delinquency were not necessary to be found within individual offenders but, rather, were products of the culture and environment in which they lived.'[1983] Coupled with the hitherto concern over the abuse and neglect of children both in and out of criminal justice's penal institutions in the US, the new juvenile justice values emerged 'based on the already established concept of *parens patriae*.'[1984]

The concept of *parens patriae* – meaning, "the state as parent" – was first developed at common law in England, where the Court of Chancery had the power to intervene in property matters to protect the rights of children. With the emergency of the new juvenile justice philosophy in the US, this jurisdictional focus was expanded to include the managing of "dependent and neglected" children. In this regard, the US court intervention 'was justified by the theory that such child's natural protectors – the parents – were unable or unwilling to provide an appropriate level of care.'[1985] In order to atone this situation, the court had to take the place of parents – i.e. *parens patriae* – by providing specific protection to dependent and neglected children, most of whom were juvenile delinquents. This took the form of merging the concept of *parens patriae* with the medical model of treatment 'to establish a system of juvenile justice designed to reform and rehabilitate young offenders.'[1986] In this context:

> The underlying philosophy was that if a child "went astray," it was the parents who had failed. The court could take over the role of the parent, diagnose the problem, and prescribe the appropriate treatment. It did not matter what the child had done. His or her deviant behaviour was merely a symptom of the problem. The duty of the court was not to blame the child or determine guilt, but to identify and treat the underlying problem.[1987]

1979 Shepherd, Jr., op. cit.

1980 Mlyniec, W.J., 'The Special Issues of Juvenile Justice: An Introduction' *Criminal Justice Magazine* Vol.15 No. 1, Spring 2000. Available at www.abanet.org/crimjust/juvjus/cjmag/15-1myl.html (Accessed on 13 January 2013).

1981 *Ibid*.

1982 Inciardi, J., *Criminal Justice*, op. cit, p. 639.

1983 *Ibid*. p. 638.

1984 *Ibid*.

1985 *Ibid*.

1986 *Ibid*.

1987 *Ibid*.

Furthermore, the court had to consider the young offender's welfare as its central concern. This would serve two purposes: one, it would protect the future of the child; and, two, it would permit an informal court process 'that considered the entire history and background of the child's difficulties, without being hampered by the limitations and requirements of official criminal procedure.'[1988] In the end, this would make the juvenile processing a civil rather than a criminal matter.

When the first propagandists for the reform of the criminal justice towards juvenile justice emerged in the US – popularly known as "child savers"[1989] – and later in Western Europe, the early and dominant model was the welfare theory.[1990] This theory provided the rationale for the approach to children deemed to be delinquent.[1991] The advocates for the welfare theory asserted that 'because the "welfare" of young offenders should be a paramount consideration, [child] offenders should, wherever possible, be dealt with by experts in the care and protection of children and young people.'[1992] This assertion was contrary to the argument advanced by conservative politicians, senior police officers, magistrates and judges in the US and Western Europe, 'who wished to retain a strong element of retribution in the youth justice system.'[1993]

As was the case with the concept of *parens patriae*, under the "welfare" theory 'courts assumed an important role in protecting a child.'[1994] Seen in this context:

> Welfarism advocated for a separate justice system for juveniles. At the heart of such a system was a social construction of childhood under which children were perceived as immature, both mentally and socially. Indeed, the prevailing philosophy underlying the original idea of a juvenile court was that rather than use criminal punishment to address children's violations of the law, children were to be nurtured and given guidance with a view to making them responsible adults. Thus, welfarism was informed by a desire to be benign as manifested in the general role of the state as *parens patriae*.[1995] By this, the juvenile court judge was an instrument of the state for the application of intervention measures in situations that embodied prevailing social inadequacies.[1996]

1988 *Ibid*.

1989 Child savers included penologists, philanthropists, and women's organisations. See particularly Mashamba, C.J., 'A Study of Tanzania's Non-Compliance with its Obligation to Domesticate International Juvenile Justice Standards in Comparison with South Africa', op. cit.

1990 Odongo, G.O., 'The Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context', op. cit, p. 20.

1991 *Ibid*, p. 21.

1992 Pitts, J., 'Youth Justice in England and Wales.' Op. cit, p. 77.

1993 *Ibid*.

1994 Odongo, op. cit.

1995 An English law doctrine symbolizing the role of the Monarchy in protecting vulnerable parties in courts of equity. The advent of welfarism saw the extension of this doctrine in English law to children's issues, in which judges assumed wide discretionary powers to forcibly order the removal of children from destitute families. In the realm of juvenile justice, the philosophy of the doctrine meant securing the welfare of the child in the belief that the state must act as a child's parents 'securing needs rather than rights of the offender.' *See* Schissel, B., *Social Dimensions of Canadian Youth Justice* Toronto: Oxford University Press, 1993, p. vi. Elizabeth Scott explains that under this doctrine, interpreted as 'parenthood of the State', the State 'has the responsibility to look out for the welfare of children and other helpless members of society. Thus, parental authority is subject to government supervision; if parents fail to provide adequate care, the State will intervene to protect children's welfare." *See* Scott, E., 'The Legal Construction of Childhood', in Rosenheim, M.K., et al (Editions), *A Century of Juvenile Justice* Chicago: University of Chicago Press, 2002, p. 116. In the early 20th century one consequence of this approach was that 'children's courts should not be an instrument to punish the child but one that protects and educates.' *See* Bottoms, A. and J. Dignan, 'Youth Justice in Great Britain', in Tonry, M and A.N. Doob, *Youth Crime and Youth Justice: Comparative and Cross-National Perspectives* (Volume 31) Chicago/ London: University of Chicago Press, 2004, p. 22.

1996 Odongo, op. cit.

To achieve this role, the juvenile court was given powers to extend "protection" measures to minors in 'irregular situations' who included law violators, abandoned or neglected children, those in situations that put their well-being at risk and child orphans. In sum:

> […] the categories comprised both children in need of care and protection and delinquent children. For these children in 'irregular situations', their cases were to be attended to by an administrative judge who reached the verdict on the proper protection to be extended for the children's welfare (or 'best interests'). The verdict would usually entail probation or supervision, authorizing institutionalization in an orphanage or foster home, or sentencing the child to one of the penal institutions that existed then.[1997] The 'best interests' of the child was thus viewed in light of the paternalistic role of the state in the choice of the best protection measure.[1998]

In sum, the juvenile court, through the doctrine of *parens patriae*, 'placed emphasis on treatment, supervision and control rather than on punishment and allowed the state to intervene affirmatively in the lives of more young offenders.'[1999]

Through the 19th and 20th centuries, the doctrine of *parens patriae* and the welfare theories gained steady ground in the US, Canada and Western Europe. As Pitts notes, the welfare theory in juvenile justice in the UK was given greater impetus in the 1960s 'by research that showed that the children who passed through the juvenile courts were overwhelmingly poor, badly educated and, in many cases, victims of violence or abuse.'[2000] When the Labour government was elected in the UK in 1964, it became sympathetic to these children, which indicated that the "welfarist" argument would prevail. This sympathetic approach was exacerbated by the proposals made by the 1964 White Paper in the UK, entitled: *The Child, the Family and the Young Offender.* This White Paper, *inter alia*, 'proposed the replacement of the juvenile court with a family council, composed of health and welfare professionals, which would address the social and psychological problems underlying youth crime.'[2001] In fact, the White Paper originated from a report for the Fabian Society by the late Lord Longford in 1963, in which he observed that:

> No understanding parent can contemplate without repugnance the branding of a child in early adolescence as a criminal, whatever offence he may have committed. If it is a trivial case, such a procedure is indefensible, if a more serious charge is involved this is, in itself, evidence of the child's need for skilled help and guidance. The parent who can get such help for his child on his own initiative can most invariably keep the child from court. It is only the children of those not so fortunate who appear in the criminal statistics.[2002]

Notably, the White Paper proposed a radical shift of power 'from the police, magistrates, lawyers and judges to psychologists, psychiatrists and social workers.'[2003] However, this proposal was vehemently and successfully opposed by the Conservative Opposition, leading to a significantly modified reform package that was presented to Parliament

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1997 Clement, M., *The Juvenile Justice System: Law and Process* London: Butterworth-Heinemann, 1997, p. 18.

1998 Odongo, op. cit, p. 22.

1999 Mack, J.W., 'The Juvenile Court' *Harvard Law Review* Vol. 23, 1909, pp. 104-122. p. 119 (Reprinted in Feld, B.C. (Edition), *Readings in Juvenile Justice Administration* New York: Oxford University Press, 1999). See also Odongo, op. cit, p. 24.

2000 Pitts, op. cit, p. 77.

2001 *Ibid*.

2002 Reproduced in *Ibid*, pp. 77 & 78.

2003 *Ibid*, p. 78.

in the Children and Young Persons Act (1969). With this law, the juvenile court was retained with restricted powers of the magistrate to impose Borstal sentences. The law also passed responsibility for the supervision of young offenders in the community (from probation officers as was the case under the Probation of Offenders Act); and decisions about placements of young offenders in Approved Schools, which were re-designated Community Homes with Education (CHEs) to local-authority social workers.

The 1969 law also introduced a new measure: Intermediate Treatment (IT), 'which could be utilised formally as a requirement in a Supervision Order, but which also permitted local authorities to establish community-based schemes to "prevent" youth crime among children and young people deemed to be "at risk" of offending.'[2004] Upon proving its worth, the UK government envisaged, the IT would replace the Detention Centre and the Attendance Centre. In retrospect, 'it is evident that the 1969 Act marked the highpoint of the 36-year struggle to construct a child-centred youth justice system, in which a concern for the "welfare" of the child, their needs rather than their deeds, was paramount.'[2005]

(c) The Need for Constitutional Oversight of the New Juvenile Court in the US

Although the doctrines of *parens patriae* and welfarism were meant to treat the offending child basing on their needs, rather than their deeds – with a view to rehabilitating them – the administration of juvenile justice in the US in the early days was later to be seen as violative of certain children's rights. Two problems emerged in this context: first, in the early juvenile justice system in the US, children 'were not allowed the so-called due process safeguards of the law.'[2006] Indeed, this was in the absence of legal representation and other procedural safeguards like rules of evidence. Secondly, there was and 'extensive reliance on the use of institutionalization, often, for indeterminate periods of time.'[2007]

This was a result of the fact that in the US the juvenile court system 'functioned for nearly 70 years with little constitutional oversight, and without the required presence of lawyers.'[2008] Interestingly:

> As the 1960s progressed, however, both the courts and society [in the US] had to deal with growing questions about the continued validity and vitality if the juvenile court's informality and treatment focus in the absence of full regard for due process. On the one hand, critics from the right complained that the "kiddie court" was not fully capable of dealing with the "new" and "more dangerous" delinquent youths of that era, while their counterparts from the left urged with equal heat that the court was ignoring the juveniles' rights.[2009]

One of the overarching issues that critics from the left advanced was the lack of the right to counsel, which was dealt with for the first time in *Gideon v Wainwright*.[2010]

2004 *Ibid*, p. 78.
2005 *Ibid*.
2006 Odongo, op. cit. p. 26.
2007 *Ibid*, p. 26.
2008 Shepherd, Jr., op. cit.
2009 *Ibid*.
2010 372 US 335 (1963).

The issue of the right to counsel was further expounded in *Kent v United States*.[2011] In this case, Morris Kent was denied his due process and statutory rights when the trial judge failed to hold a hearing prior to transferring the 16-year-old to the adult court for trial and did not give Kent's lawyer access to social information relied on by the court. Subsequently, the Court decided, among other things, that 'there must be a meaningful right to representation by counsel in that the child's attorney must be given access to the documents considered by the juvenile court in making its decision, and that the court must accompany its waiver order with a statement of the reasons for transfer.'[2012]

Although in *Kent* the US Supreme Court was dealing with procedural irregularity in transfer proceedings, Justice Fortas, in reference to the importance of the right to counsel, observed succinctly that: 'the right to representation by counsel is not a formality. It is not a grudging gesture to a ritualistic requirement. It is of the essence of justice.'[2013] One year after the decision in Kent, the President's Commission on Law Enforcement and the Administration of Justice, appointed by President Lyndon Johnson, issued its report 'that expressed, among other things, serious reservations about many of the fundamental premises of the [US] juvenile justice system, including its lack of procedural safeguards.'[2014]

In principle, some of the issues identified above were addressed by the US Supreme Court in the landmark case of *In Re Gault*.[2015] In fact, Gerald Francis Gault was a 15-year-old Arizona youth charged with making rude telephone call to a female neighbour. He was taken into custody without notice given to his parents, detained awaiting a hearing, convicted by a juvenile court in a rather summary hearing, and committed to a juvenile correctional facility for an indeterminate period not to extend his 21st birthday. Justice Fortas, once again, wrote the opinion for the US Supreme Court and 'he initially ruled – for the first time, surprisingly – that juveniles are persons within the meaning of the Fourteenth Amendment and, thus, are protected by its Due Process Clause.'[2016]

According to Justice Fortas, Gault's constitutional rights had been violated in several important respects – i.e. first, juveniles and their parents are entitled to constitutionally adequate notice of the precise nature of the charges against the youth. Second, a youth charged with an act of delinquency must be advised of the right to the assistance of counsel and, if indigent, given the right to have counsel appointed. Third, the juvenile has the right to confront the witnesses against him or her in the hearing guilty or innocence and to cross-examine those witnesses. And, lastly, the privilege against self-incrimination applies to juvenile proceedings and the child must be informed of that right as well.

Reinforcing the central importance of the right to counsel developed in *Gideon* and reinforced in *Kent*, Justice Fortas was of the opinion that: 'it would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase "due process." Under our Constitution, the condition of being

2011 383 US 541 (1966).
2012 Shepherd, Jr., op. cit.
2013 383 US at 561.
2014 Shepherd, Jr., op. cit.
2015 387 US 1 (1967).
2016 Shepherd, Jr., op. cit.

a boy does not justify a kangaroo court.'[2017] Most interesting on this issue was Gerald Gault's observation made at an American Bar Association ceremony honouring Amelia Lewis with the Livingston Hall Award. Amelia was actually the lawyer who initiated Gault's *habeas corpus* proceedings, challenging the Arizona practices. At this ceremony, Gault observed that, 'without a lawyer, he had no idea what was happening to him in court until the judge said he was committed "until he was twenty-one" and he realised that was more years than he could count on the fingers of one hand.'[2018] Remarkably, '*Gault* marked the constitutional domestication of the previously *parens patriae* juvenile court, and a new era dawned based on a process model contrasted with the historic informality of juvenile court proceedings.'[2019]

Later on, the US courts went further requiring the juvenile to be proved guilty beyond reasonable doubt during the adjudicatory stage of delinquency cases.[2020] At the same time, courts subsequently held that although the right to a jury was not required by the US Constitution in delinquency cases, a state could provide a jury if it so wished.[2021] In addition, subsequent courts held that the Double Jeopardy Clause prevented a juvenile court from transferring a juvenile to the adult court after previously finding him or her delinquent.[2022]

16.1.3 Criticisms against the Separate Juvenile Court in the US: Emergence of the Back to Justice Theory

Despite these remarkable developments in the US juvenile justice system, there is now a blistering debate whereby some jurists in the US are pressing for radical reform of the juvenile justice, including re-incorporating juvenile court back onto the "ordinary" criminal courts. Some scholars[2023] have referred to this movement as a "back to justice theory."[2024] One of the proponents of the abolition of a separate juvenile justice system in the US is Professor Barry Feld of the University of Minnesota. In his view and that of other abolitionists, the 'court's responsibility for young offenders should be ended.'[2025] To him, the juvenile court 'no longer lives up to its part of the initial bargain. Prosecutors in juvenile courts openly promote dispositions that amount to proportional retribution. Judicial decisions are based explicitly on the severity of each juvenile's crime rather than the complexity of his or her problems.'[2026]

This assertion is actually a counter-attack against the dream of the early juvenile justice reformers, who a century ago, 'dreamed a dream that the juvenile system could reform delinquent children and transform society. And they worked devotedly to

2017 *In Re Gault*, op. cit, pp. 27-28.

2018 Shepherd, Jr., op. cit.

2019 *Ibid*.

2020 *In Re Winship*, 397 US 385 (1970).

2021 *McKeiver v Pennsylvania,* 403 US 532 (1971).

2022 *See* particularly *Breed v Jones*, 421 US 519 (1975); and *Swisher v Brady*, 438 US 204 (1978).

2023 *See,* for instance, Breen, C., *The Standard of the Best Interests of the Child* The Hague: Martinus Nijhoff, 2002; Gale, F., et al (eds), *Juvenile Justice: Debating the Issues* Australia: Allen and Unwin, 1993; Krisberg, B., *Juvenile Justice: Redeeming our Children* London: Sage Publications, 2005; Pitts, J., 'Youth Justice in England and Wales', op. cit and Odongo, op. cit.

2024 Odongo, *Ibid*. 29-34.

2025 Butts, J.A., 'Can we do Without Juvenile Justice?', op. cit.

2026 *Ibid*.

transform that dream into reality.'[2027] This being the case, the contemporary movement aimed at abolishing the juvenile court in the US would make these reformers 'recoil in horror at the prospect of the increasing numbers of juveniles being tried and convicted in criminal courts and sentenced to serve long terms in adult prisons.' [2028]

In contrast to the conformists of the US juvenile justice system, it is Professor Feld's view that the juvenile justice system has strayed too far from its original mission, which calls for policy makers to cancel it. According to him, today's juvenile court 'retains much of the terminology of juvenile law, but functions as a pseudocriminal court. Worse, it fails to provide complete due process protections for the accused youth. Juvenile courts are still not required to provide bail, jury trials, or the right to a speedy trial for youthful offenders.'[2029]

Therefore, Professor Feld and other abolitionists recommend that all people violating the penal law, regardless of their age, should be dealt with in a criminal court. Nonetheless, the criminal justice system should 'continue to recognise the lessened culpability of the very young by imposing sentences with a "youth discount" – a 17-year-old defendant would get 75 percent of the sentence length due an 18-year-old, a 16-year-old would get 50 percent, etc.'[2030]

This proposition is actually very strong and policy makers in the US are finding it difficult to avoid. As Jeffrey Butts contends, it would be wrong 'to assume that all critics of the juvenile justice court are heartless, law-and-order types who feel little compassion for the poor, disproportionately minority youth who comprise the bulk of the juvenile court's clients.'[2031] The critics most in favour of abolishing the juvenile justice system (Professor Feld, for example) 'are often motivated by a concern for youth.'[2032] In their learned view, 'the juvenile court has never lived up to its rehabilitative promise and it never will.'[2033] More importantly, they contend that 'the juvenile court's lower standards of due process are no longer tolerable given its modern emphasis on just deserts and retribution. Courts were meant to handle law violations, the abolitionists say, not social welfare problems.'[2034]

At the same time, as Butts points out, it is wrong to describe all defenders of the juvenile court as "soft on crime" or unconcerned with victim's rights. Accordingly, some of those who defend the juvenile justice system 'do so because they believe [that] despite its flaws, the juvenile court offers a unique opportunity for broad, early intervention and effective crime prevention.'[2035] In fact, the juvenile court was originally 'conceived as an informal, quasi-civil court precisely in order to free it of the procedural complexities that prevent the criminal court from acting too aggressively. The juvenile court was deliberately designed to be flexible and quick to intervene.'[2036]

2027 Shepherd, R.E., Jr., 'The Juvenile Court Centennial Revisited – One State's Dreamers.' Available at www.abanet.org/crimjust/juvjus/14-2cjm.html (Accessed on 17 February 2013).

2028 *Ibid*.

2029 Butts, J.A., 'Can we do Without Juvenile Justice?', op. cit.

2030 *Ibid*.

2031 *Ibid*.

2032 *Ibid*.

2033 *Ibid*.

2034 *Ibid*.

2035 *Ibid*.

2036 *Ibid*.

Nonetheless, many states in the US have already started embarking on legislative reforms where the juvenile court has been engrained in the ordinary criminal justice system. As such, since the US Supreme Court's decision in *Gault* in 1967, lawmakers across the US 'have encouraged juvenile courts to embrace the goals and operational style of the criminal courts.'[2037] In fact, juvenile courts today in the US 'pursue many of the objectives once unique to criminal courts, including incapacitation and retribution. Both juvenile courts and criminal courts rely on plea bargaining for case outcomes.'[2038] In fact, both are forced by growing caseloads 'to adopt assembly-line tactics and they often have difficulty providing individualised dispositions. The day-to-day atmosphere in modern juvenile courts (especially in urban areas) is increasingly indistinguishable from that of criminal courts.'[2039]

16.1.4 'Corporatism' as the Third Model of Juvenile Justice

Developments in, and criticisms against, the juvenile justice system necessitated the emergency of yet another important mode in the administration of juvenile justice in the 1980s. This period witnessed the growing number of countries around the world who saw the need to develop local multi-agency diversion panels to deal with offending children. The multi-agency panels were, in most cases, composed of representatives from the police, social services, education, the youth and the voluntary sector (such as NGOs or religious charities). In England and Wales, for instance:

> Multi-agency diversion panels developed a range of educational, recreational and therapeutic 'alternatives to prosecution,' to which children and young people in trouble [with the law] could be diverted as a condition of their police caution. Many panels offered robust informal intervention in the spheres of education, family relationships, use of leisure, vocational training and drug abuse.[2040]

This kind of approach to dealing with child offenders ushered in a new model of juvenile justice: "corporatism" that supplanted both the "welfare" and the "back to justice" models,[2041] 'and was triggered, initially, by a desire to manage young offenders more cost-efficiently.'[2042] The panels diverted a volume of child and young offenders away from the criminal justice system, thus minimising the costs. Viewed in this context:

> The emergence of corporatism did expose the simplistic nature of justice-welfare models while at the same time documenting the reality that juvenile justice practice had evolved beyond the core essentials of either justice or welfarism (for example in the primacy of diversion). This said, corporatism did not gain much significance as a theory *per se* but rather as a means of bringing to the fore the changes in practice, especially within the UK. In the debates on the philosophical frameworks for juvenile justice, it found little favour outside the UK and has largely been eclipsed even in recent texts there.[2043]

2037 *Ibid*.

2038 *Ibid*.

2039 *Ibid*.

2040 Pitts, op. cit, p. 82. *See* also Sloth Nielsen, J., 'The Role of International Law in the Development of South Africa's Legislation on Juvenile Justice' *Law, Democracy and Development* Vol. 64, 2001.

2041 Pratt, J., 'Corporatism: The Third Model of Juvenile Justice' *British Journal of Criminology* Vol. 29, 1989.

2042 Pitts, op. cit, pp. 82 & 83.

2043 Odongo, op. cit, p. 38.

However, the corporatism movement has received criticism particularly relating to the ever-present danger that its involvement of informal systems of justice 'may make greater inroads into the lives and liberties of their subjects than would be the case in formal system it shadows.'[2044] As Pitts observes, critics have argued that 'because corporatism, through the medium of the "caution plus", elaborates a "shadow tariff" alongside the formal tariff operating within the juvenile court, it effectively acts as "judge and jury" without regard to either the rules of evidence or due process of law.'[2045]

However, as Pitts argues, there is little evidence that this has actually happened. Notably, the Conservative government in the UK – eager to build on the successes of the multi-agency diversion panel and alternatives to custody developed as part of the Intermediate Treatment Initiative – institutionalised many of the practices in the panels within the Criminal Justice Act (1991).[2046] Nonetheless, through Corporatism, 'the goal of securing welfarism, justice or rights for young people has become increasingly obscured.'[2047]

16.2 The Spread of the Notion of Juvenile Justice Out of the US

Although the notion of having a separate juvenile court is under constant criticism in the US, where it germinated, the concept is being engrained in many legal systems across the globe.[2048] As Odongo contends, this trend 'is reflected in countries over the world starting with Western European countries. In Africa, the phenomenon of juvenile courts was largely of colonial import and remains prevalent in a number of countries.'[2049] In this part, therefore, we trace this development in view of what took place since then up until to date.

16.2.1 The Spread and Development of the Juvenile System in the UK

Inspired by the US juvenile court, by 1910 separate juvenile courts and discrete institutional and administrative machinery for 'dealing with young offenders had been established in most Western European countries.'[2050] In effect, the advent of the juvenile court, 'with its unique amalgam of science, law and administration, ushered into existence a wholly new kind of human being, the "juvenile delinquent", the management of whom constituted its *raison d'etre*.'[2051]

In England and Wales, for instance, three significant laws were enacted to give the juvenile court a legal force. These were the Children Act (1908) and the Prevention of Crime Act (1908), which established a national system of juvenile courts; and the Probation of Offenders Act (1907) that introduced community supervision as

2044 Pitts, op. cit, p. 83.

2045 *Ibid*.

2046 *Ibid*.

2047 Muncie, J., 'Children's Rights and Youth Justice', in Franklin, B. (Edition), *The New Handbook of Children's Rights - Comparative Policy and Practice* London/New York: Routledge, 2002, p. 91.

2048 *See* generally Walgrave, L and J. Mehlbye, 'An Overview: Comparative Comments on Juvenile Offending and its Treatment in Europe', in Mehlbye, J. and L. Walgrave (Editions), *Confronting Youth in Europe-Juvenile Crime and Juvenile Justice* Copenhagen: AKF Forlaget, 1998, pp. 21-53; and Pitts, J., 'Youth Justice in England and Wales', op. cit, pp. 71-99.

2049 Odongo, op. cit, p. 18.

2050 Pitts, op. cit, p 73.

2051 *Ibid*. *See* also Platt, A., *The Childsavers* Chicago: Chicago University Press, 1969.

alternative to custody. As Pitts reflects: 'By 1920, approximately 8,000 of the 10,000 people being supervised by probation officers were aged between 8 and 18 years.'[2052]

Under the Prevention Crime Act in the UK, the Industrial Schools and reformatories were placed under the administrative control of the Home Office. The Act also Borstal institutions,[2053] which 'were penal institutions for inmates aged between 16 and 20 years, staffed by teachers as well as prison officers, and unlike adult prisons they provided educational and vocational programmes and military training.'[2054]

As Crimmens and Pitts reminisce, one of the paradoxical ramifications of the introduction of these new institutions for child offenders brought about the 1907/8 law reform in laws relating to juvenile delinquents in the UK, was an unprecedented raise of the number of juvenile delinquents consigned to the reformatories and Borstals.[2055] The reason for this increase was attributed to the new institutional approach of these institutions that focused on reforming juvenile delinquents as opposed to punishing them. The institutions were, thus, seen as beneficial to the consigned children as opposed to the ordinary prisons. However, the increase in the number of confined children in these institutions led to imposition 'of greater custodian control on a larger number of less problematic subjects,'[2056] than it was envisaged. Originally, the institutions were 'established to create "alternative custody" and vouchsafe the humane treatment of those [children] consigned to custody.'[2057]

In effect, this "spreading of the net of control" was exacerbated by the issue of the probation order under the Probation of Offenders Act (1907). The order 'placed young offenders under obligatory surveillance, with the ever-present danger of harsher penalties if they did not abide by the conditions of the probation order.'[2058] In effect, these conditions required 'not only that a young person desist from crime but that they also pursue an honest and industrious life, refrain from associating with other people involved in crime, and report to their probation officer when required to do so.'[2059] This helped in scaling down crime rate of youth and child offending in England and Wales at the start of the twentieth century.[2060]

16.2.2 The Spread and Development of Juvenile Justice into Africa

The introduction of colonial rule in Africa in the 19th century went hand in hand with the imposition of legal systems, especially in the form of criminal justice, that were transplanted from the colonial powers – particularly, Great Britain and France. These powers had themselves 'over a relatively long period, evolved advanced and complex criminal justice systems in an attempt to meet the increasing demands of

2052 *Ibid*, p. 74.

2053 Borstal is a name of a village in Kent where the first institution of this kind was established.

2054 Pitts, op. cit, p. 74.

2055 Crimmens, D. and J. Pitts, *Positive Residential Practice, Learning the Lessons of the 1990s* Lyme Regis: Russell House Publishing, 2000.

2056 Pits, op. cit.

2057 *Ibid*.

2058 *Ibid*. p. 75.

2059 *Ibid*.

2060 *Ibid*.

their society.'[2061] It should be noted that the origins of criminal law in these countries were derived from Roman private law, 'which is based on determining the level of culpability for crimes against person and property, including libellous comments, assault and injury, theft of property and financial dishonesty.'[2062]

In the Roman private law, high level of discretion was retained by the administrators of the law and punishment was mainly based on reparations. With the collapse of the Roman Empire, this law lost its original form; but was developed into what is now practised in the Western world.[2063] So, when the colonialists established their presence in Africa, they introduced criminal justice systems that were rooted in their homeland's legal systems. As a result, the majority of the legal systems existing today in Sub-Saharan Africa are certainly influenced by those in their former colonialists.

In order to establish and retain control of large populations in African colonies with relatively few administrators, the colonialists established a dual system of law, which imposed institutions akin to those in their home countries[2064] at the same time retaining some of the well established indigenous African justice systems.[2065] This is what has come to be known as dual legal system – or legal pluralism as best known in jurisprudential terms.[2066] In this regard, the British colonial criminal justice was 'concerned particularly with the maintenance of law and order; sentencing was based on the principles of retribution and general deterrence and there was a marked reluctance to take into account customary notions of compensation and restitution.'[2067]

So, juvenile justice being a sub-sector of the criminal justice system was born out of this colonial experiment. In many cases, juvenile justice laws in Africa formed part of colonially inherited laws 'with the resultant effect that the philosophy of how to manage child offenders reflected the social construction of childhood as conceptualized by the colonizing countries.'[2068] Mirrored through this reality, Odongo proposes two questions that arise from this historical reality: first, whether or not the juvenile justice laws in Africa could mirror the welfarism and justice models then prevalent in Western Europe; given the fact that colonialism was introduced not for the betterment of Africa's welfare, but for colonial and capitalist interests. Second, 'whether more recent developments in western countries have found their way into African juvenile justice systems.'[2069]

2061 Bowd, R., 'Status quo or Traditional Resurgence: What is Best for Africa's Criminal Justice Systems?', in Chikwanha, A.B. (Edition), *The Theory and Practice of Criminal Justice in Africa* Pretoria: Institute for Security Studies, 2009, pp. 35-55, p. 36.

2062 *Ibid*.

2063 *Ibid*.

2064 *Ibid*, p. 39.

2065 Skelton, A., 'Restorative Justice in Child Justice Systems in Africa', in Sloth-Nielsen, J. (Edition), *Children's Rights in Africa: A Legal Perspective* Hampshire: Ashgate Publishing Limited, 2008, pp. 129-145, p. 130.

2066 A Comprehensive definition of legal pluralism is detailed in Magoke-Mhoja, M., *Child-Widows Silenced and Unheard: Human Rights Sufferers In Tanzania* Dar es Salaam: Children's Dignity Forum, 2006, pp.14-22; and Odgaard, R., 'The Struggle for Land Rights in The Context of Multiple Normative Orders in Tanzania', a paper available at http://www.greenagrinet.dk/files/forslag_1083231778_rie.ordgaard.2004 (Accessed on 8 May 2013). See also Woodman, G.R., 'Progress Through Complexity: Options for the Subjects of Legal Pluralism', in Mehdi, E. and F. Shaheen (Editions), *Women's Law in Legal Education and Practice in Pakistan* Copenhagen: New Social Science Monographs, 1997.

2067 Coldham, S., 'Criminal Justice Policies in Commonwealth Africa: Trends and Prospects' *Journal of African Law* Vol. 44, 2000, pp. 218-238, p. 220.

2068 Odongo, op. cit, p. 40. See also Alemika, E.O. and I.C. Chukwuma, *Juvenile Justice Administration in Nigeria: Philosophy and Practice* Lagos: Centre for Law Enforcement Education, 2001, p. 10.

2069 Odongo, *Ibid*.

According to Odongo, in recent times, Africa has witnessed 'socio-economic transformations similar to those which shaped the social construction of childhood and by extension the subject of juvenile justice in terms of welfare or justice models in North America and Western Europe in the early 20th century.'[2070] These socio-economic conditions are seen in the relationship between youth crime and urbanisation in the African context in amplification of the general link between urbanisation and increase in crime rate.[2071] As observed in Section 4.2.1 above, part of the efforts of "the progressives" or "child savers" in fashioning ways of dealing with child deviance 'arose as a result of increased industrialization and consequent urbanization from which they feared there would result social disruption, including the problem of deviancy.'[2072] In fact:

> This is mostly manifest in very fast rates of urbanization reaching an average rate of 5 per cent per annum in the sixteen years between 1980 and 1996.[2073] With urbanization comes the strain on basic services and, together with a host of factors such as the whittling down of the traditional family structure and the high prevalence of the HIV/AIDS pandemic, increasing crime rates including youth offending are inevitable.[2074]

Indeed, the consequences of economic restructuring programmes, the impact of debt crisis on social policies and community life 'are all relevant factors to the general issue of crime in Africa and child offending in particular.'[2075] As the United Nations notes, 'in Africa as [with the Asian and the Pacific regions], child crime and delinquency are primarily urban phenomena and specifically attributable to hunger, poverty, malnutrition and unemployment which are linked to the marginalization of children in already severely disadvantaged segments of society.'[2076]

So, these factors have just helped to reshape the African juvenile justice systems in the 1990s and 2000s, which witnessed immense juvenile justice law reform initiatives in the context of the CRC and ACRWC. These reforms, by implications, have helped to do away with the colonially inherited juvenile justice laws in many Sub-Saharan countries.[2077] However, before this period, most of African juvenile justice systems were founded on colonially inherited laws, which were marked by the dominance of welfarism. For instance, most of British colonies – e.g. Kenya, Nigeria, Uganda, Tanzania, and Zimbabwe – had until recently a semblance of juvenile justice laws akin to the repealed 1933 British Children and Young Persons Act. In these countries, the juvenile laws – mostly bearing the same name as the British juvenile justice law – provided for the welfare of young offenders and the establishment of juvenile courts. They covered both children in need of care[2078] and protection and children in

2070 *Ibid*, pp. 39-40.

2071 Petty, C. and M. Brown, 'Urbanisation and Issues of Justice', in Petty, C. and M. Brown (Editions), *Justice for Children: Challenges for Policy and Practice in sub-Saharan Africa* London: Save the Children, 1988, p. 63.

2072 Odongo, op. cit, p. 40 (note 77).

2073 UNICEF, *State of the World's Children* Oxford/New York: Oxford University Press, 1998. (Comparing this with a growth rate of 0.8 per cent over the same period in industrialized countries where the bulk of the population (up to 75%) was already living in urban areas by then).

2074 Odongo, op. cit, p. 41.

2075 *Ibid*.

2076 United Nations, *International Review of Criminal Policy Nos. 48 & 49 (1998-1999)* New York: United Nations, 1999, p. 7.

2077 *See*, for instance, Ghana, Kenya, Namibia, South Africa, Tanzania and Uganda.

2078 Under the repealed Tanzanian Children and Young Persons Act, Cap. 13 R.E. 2002, this was provided for in Section 25.

conflict with the law and made no distinct provisions for the separate treatment in the application of the law for these two groups of children.[2079]

Although the former colonies continued to apply the colonially inherited juvenile justice laws based on welfarism, their former colonial powers had experienced radical transformation of the laws from welfarism to justice model and eventually, some elements of a crime control philosophy in the new western juvenile justice systems.[2080] It was only in the 1990s and 2000s when Sub-Saharan countries began to reform their colonially inherited laws partly due to their ratification and implementation of the CRC and ACRWC. This steady widespread of the juvenile justice system has been intensified by the promulgation of the CRC in 1989 and the ACRWC in 1990.[2081]

Both the ACRWC and the CRC – supplemented by the trio non-binding international juvenile justice instruments[2082] – 'represent a blend of both justice and welfare theories.'[2083] In addition, the CRC 'and other instruments offer a new model for considering juvenile justice in light of the overall vision of child autonomy and respect for the child's rights.'[2084] According to Doek, child autonomy is very important in exploring whether children's rights have had an impact on juvenile justice in the domestic legal systems.[2085] In addition, Odongo argues that 'the CRC reveals an attempt to move away from paternalistic views of juvenile justice by the emphasis it places on *reintegration* as the primary objective of the juvenile justice system rather than *rehabilitation*.'[2086]

In Africa, for instance, since the turn of the past millennium many countries have been busy overhauling their inherited colonial laws and replacing them with modern, more accessible and often more comprehensive children's statutes that, *inter alia*, promote and protect the rights of juveniles in conflict with the law.[2087] Indeed, while some of these law reform processes 'are complete and the final statutes passed by parliament, others are not yet at that stage and are either under development or in parliamentary processes.'[2088] In the former examples are Ghana, Kenya, Madagascar, Nigeria and Uganda; whereas examples of the latter are Botswana, Lesotho,

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2079 Odongo, op. cit. See also South Consulting, 'Juvenile Justice in Kenya: Project Identification Mission', an Unpublished Report Commissioned by the Royal Netherlands Embassy, 1999; Owasanoye, B. and M. Wernham (Editions), *Street Children and the Juvenile Justice System in Lagos State* London: Consortium for Street Children, 2004, p. 27; and Kaseke, E., 'Juvenile Justice in Zimbabwe: The Need for Reform' *Journal of Social Development in Africa* Vol. 8 No. 1, 1998, pp. 11-17.

2080 Odongo, op. cit.

2081 See particularly Rios-Kohn, op. cit; and Sloth-Nielsen and Mezmur, op. cit.

2082 Beijing Rules, Riyadh Guidelines and the UN Rules for the Protection of Juveniles Deprived of their Liberty.

2083 Odongo, G.O., 'The Impact of International Law on Children's Rights on Juvenile Justice Law Reform in the African Context' in Sloth-Nielsen, J. (Edition), *Children's Rights in Africa: A Legal Perspective* Hampshire: Ashgate Publishing Limited, 2008, pp. 147-163, p. 148.

2084 *Ibid*.

2085 Doek, J., 'Modern Juvenile Justice in Europe.' In Rosenheim, M.K. et al (Editions), *A Century of Juvenile Justice* Chicago/London: University of Chicago Press, 2002, p. 524.

2086 Odongo, G.O., 'The Impact of International Law on Children's Rights on Juvenile Justice Law Reform in the African Context', op. cit, p. 148. See also Van Bueren, G., *The International Law on the Rights of the Child* The Hague: Martinus Nijhoff, 1995.

2087 Sloth-Nielsen and Mezmur, *Ibid*, pp. 332 & 333. See also Mashamba, C.J., 'A Study of Tanzania's Non-Compliance with its Obligation to Domesticate International Juvenile Justice Standards in Comparison with South Africa', op. cit.

2088 Sloth-Nielsen and Mezmur, *Ibid*, p. 333.

Mozambique, Namibia, South Africa, South Sudan and Swaziland where the review and redrafting processes are just commencing.[2089]

In fact, all these law reform processes are inspired by the CRC and the ACRWC; that is, they are 'premised on the rights of the child rather than the powers of the parents.'[2090] Interestingly:

> [In Africa today] there is an ongoing debate about the inclusion of juvenile justice legislation in comprehensive child law enactments, a debate which has not been resolved. Kenya, Nigeria and Uganda provide examples of composite approaches to the issue, with child justice being included in the overall Children's Act. Lesotho, too, has adopted the strategy of linking child justice to child protection and welfare generally; possibly arising from the strategic concern, linked to harsh public and political perceptions about crime in Southern Africa, that separation of child offenders legislatively-speaking might eventually result in a punitive criminal justice response to children in conflict with the law.[2091]

Therefore, there is a considerable legislative action aimed at promoting and protecting juvenile justice in Africa to date.[2092] Tanzania, just coming late in the picture,[2093] has adopted a composite approach to legislating on juvenile justice. Unlike South Africa that has separated the juvenile justice legislation[2094] from the mainstream child rights law,[2095] Tanzania has included provisions relating to juvenile justice in a comprehensive Law of the Child Act (2009), which comprises all children's rights except those which have to do with inheritance[2096] and early marriages.[2097]

16.3 Contemporary Administration of the Juvenile Justice System

As indicated in the previous section, juvenile justice now occupies a central role in the administration of criminal justice the world over. With the increasing inevitability to have child-specific laws in many legal systems around the world, a need to have a separate juvenile justice system becomes of paramount significance. In this section,

2089 *Ibid*.

2090 *Ibid*.

2091 *Ibid*, pp. 333-334. This public and political perception on crime in Africa resulted in the splitting of the child justice bills from the comprehensive laws in Ghana, Mozambique, South Africa, Tanzania and The Gambia.

2092 *Ibid*, pp. 332-335. For a comprehensive comparison of legislative action in certain African countries, *see* particularly Odongo, G., 'The Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context', op. cit.

2093 *See* Mashamba, C.J., 'Emerging Issues in Diverting Juvenile Offenders from the Criminal Justice System: The Socio-Cultural Realities, Economic and Politics of Administration of Juvenile Justice in Tanzania', in Sorensen, J.J. and I. Jepsen (Editions), *Juvenile Justice in Transition: Bringing the Convention on the Rights of Child to Work in Africa and Nepal* Copenhagen: Danish Institute for Human Rights, 2005. See also Mashamba, C.J., 'Accepting the Necessary Evil: The Need for a new Statute Promoting and Protecting Children's Rights in Tanzania' *The Justice Review* Vol. 5 No. 5, 2007, pp. 11-15.

2094 *See* the South African Child Justice Act.

2095 *See* the South African Children's Act.

2096 However, Section 10 of the Tanzanian Law of the Child Act has a semblance of the child's right to parental property in the following regards: 'A person shall not deprive a child of reasonable enjoyment out of the estate of a parent.'

2097 Although stakeholders, particularly members of the CSO lobby groups, pressed for the inclusion of issues relating to inheritance rights and early child marriages in the Law of the Child Act (2009), the Government opted for the exclusion of provisions touching on these matters, arguing that it needed ample time for further and wider consultations with stakeholders in these matters. Nonetheless, the drafters of the Law of the Child Act (2009) were clever enough to include a more technical provision protecting children in inheriting from their deceased parents. For a comprehensive account of Tanzania's legislative efforts on this law, *see* particularly Mashamba and Gamaya, op. cit.

therefore, we shed a light on the contemporary principles of administration of juvenile justice.

16.3.1 The Rationale for a Separate Criminal Justice System for Offending Children in Modern Times

The aforementioned trends in dealing with offending children at the international as well as local arenas reflect the results of the global experience and reflection over several decades on the best ways to protect the rights of the child, particularly the one in conflict with the law.[2098] The imperatives of having special rules and principles that protect the welfare of young offenders, separate from adult offenders, are best opined by C. de Rover in the following regards:

> Because of their age, *juveniles are vulnerable to abuse, neglect* and exploitation and need to be protected against such threats. In keeping with the objective of *diverting juveniles away from the criminal justice system* and directing them towards the community, special measures for the prevention of juvenile delinquency must be developed.[2099] [Emphasis supplied.]

Viewed in the foregoing context, the contemporary criminal justice system should be 'concerned with the balancing of competing interests, those of the victim and of society.'[2100] In this regard:

> Society cannot let misdeeds go unnoticed, while the child offender requires the development and application of responsive and useful measures aimed at ensuring future maturation into law abiding adulthood. It goes without saying that child offenders are frequently drawn from the most vulnerable and marginalised groups. They are the children of broken families, they live in gang-infested neighbourhoods, they are without satisfactory adult role models, they themselves have been victimised from early in life, they often have proven psychological and psychiatric deficits, low achievement rates at school and so forth.

Therefore, criminal law and the criminal justice system should ensure that such children are treated in such a manner that would not further victimise them; rather, alternative measures should be embedded in the criminal justice system that ensure that those children in conflict with the law grow and develop into responsible and productive adults. Recently, the need to deal with children in conflict with the law in a more compassionate manner and positive manner has been expressed judiciously in *Centre for Child Law v Minister of Justice and Constitutional Development and others*,[2101] where the South African Constitutional Court held that:

> The Constitution draws this sharp distinction between children and adults not out of sentimental considerations but for practical reasons relating to children's greater physical and psychological vulnerability. Children's bodies are generally frailer and their ability to make choices generally more constricted than those of adults. They are less able to protect themselves, more needful of protection and less resourceful in self-maintenance than

2098 *See* Mashamba, C.J., 'Emerging Issues in Diverting Juvenile Offenders from the Criminal Justice System: The Socio-Cultural Realities, Economic and Politics of Administration of Juvenile Justice in Tanzania', op. cit.

2099 De Rover, op. cit, p. 315.

2100 Sloth-Nielsen and J. Gallinetti, "Just Say Sorry?' *Ubuntu*, Africanisation and the Child Justice System in the Child Justice Act 75 of 2008' P.E.R. Vol. 14 No. 4, 2011, pp. 63-90, p. 83. *See* also Muntingh, L., *A Societal Responsibility: The Role of Civil Society Organisations in Prisoner Support, Rehabilitation and Reintegration* Pretoria: Civil Society Prison Reform Initiative and Institute for Security Studies, 2009; and Muntingh, L., *Exprisoners' Views in Imprisonment and Re-Entry* Cape Town: Civil Society Prison Reform Initiative and Community Law Centre, 2010.

2101 2009 ZACC 18.

> adults. These considerations take acute effect when society imposes criminal responsibility and passes sentence on child offenders.[2102]

In practice, there has been in existence a semantic misunderstanding when a state is urged to set up a juvenile justice system or to undertake comprehensive reform of the existing system.[2103] However, according to children's rights activists,[2104] juvenile justice is not a system but an overlapping of systems.[2105] In that regard, therefore, 'the administration of juvenile justice is not so much a *different* set of rights to which juveniles are entitled, as a set of provisions that aim to offer protection in addition to the rights of adult persons - which of course apply equally to juveniles.'[2106] Rather, the juvenile justice system is a necessary, parallel establishment to the effective functioning of any criminal justice system in any jurisdiction to date.

16.3.2 Juvenile Justice as an Integral Part of Human Rights

Today, it has been well settled that it is of paramount significance to accord children and adolescents special care and assistance. Thus, the need for 'a separate body of human rights treaties for young people of the apparent age below 18 years.'[2107] This is so principally because, 'children and adolescents are in a period of development. What happens to them or fails to happen at each step of the way in the law enforcement process not only affects them in the here-and-now but will also shape their future development for good or for ill.' Therefore, states 'must respond to the criminal activity of minors, certainly for the sake of society and for the sake of the offenders.'[2108]

Therefore, the administration of juvenile justice aims at enhancing the 'well-being of the juvenile and to ensure that any reaction to juvenile offenders is proportionate to the circumstances of the juvenile and the offence. Juvenile offenders should be diverted from criminal justice system and redirected to community support services wherever possible.'[2109] As such, the abovementioned international instruments are designed specifically, first, to protect the human rights of juveniles; second, to protect the well-being of juveniles who come into contact with the law; third, to protect juveniles against abuse, neglect and exploitation; and, lastly, to introduce special measures to prevent juvenile delinquency.[2110] These international instruments contain, *inter alia*, the principles outlined below.

2102 *Ibid*, paras 26 & 27.

2103 Mashamba, C.J., 'Emerging Issues in Diverting Juvenile Offenders from the Criminal Justice System: The Socio-Cultural Realities, Economic and Politics of Administration of Juvenile Justice in Tanzania', op. cit.

2104 *See*, for instance, Abramson, B., 'Juvenile Justice: The 'Unwanted Child' of State Responsibilities – An Analysis of the Concluding Observations of the Committee on the Rights of the Child in Regard to Juvenile Justice from 1993 to 2000.' Defence for Children International. Available at www.dci-au.org/html/unwanted.html (Accessed on 23 February 2013).

2105 According to Abramson, 'there is no single system but rather an overlapping of several independent systems, such as the police, judiciary and prisons'.

2106 De Rover, op. cit.

2107 Mashamba, C.J., 'Emerging Issues in Diverting Juvenile Offenders from the Criminal Justice System: The Socio-Cultural Realities, Economic and Politics of Administration of Juvenile Justice in Tanzania', op. cit.

2108 Abramson, op. cit.

2109 De Rover, op. cit.

2110 *Ibid*.

16.3.3 Basic Principles of Administration of Juvenile Justice

The general principles of administration of juvenile justice are contained in the CRC, which requires States Parties to take measures that combat abuse, neglect and exploitation of children through its "4 Ps" principles.[2111] The CRC contains, in the main, measures that aim at protecting juveniles in conflict with the law. Article 40 is relevant to this point. It provides for the right of children alleged or recognized as having committed an offence to respect for their human rights; and, in particular, to benefit from all aspects of the due process of law, which include, but not limited only to, legal or other related assistance, in preparing and presenting their defence. The article also requires that 'recourse to judicial proceedings and institutional placements (of juvenile offenders) should be avoided wherever possible'.[2112] Thus, the article emphasizes *resort to diversion system* of the administration of juvenile justice.

In terms of the provisions of Article 37 of the CRC, deprivation of liberty for children can only be used *as a measure of last resort and for the shortest appropriate time*. Parallel to these provisions are the provisions of Article 39 of the CRC, which provide for rights of children as victims of crime. The Article requires States Parties thereto to take appropriate measures to promote physical and psychological recovery and social reintegration for children victims of abuse, neglect, torture or any other forms of cruel, inhuman or degrading treatment or punishment. Such recovery and reintegration ought to occur in an environment that fosters the health, self-respect and dignity of the child.[2113]

It is axiomatic that Africa is the only continent on the earth that has got a specific child rights instrument, i.e., the ACRWC. Detailed provisions about juvenile justice are contained in Article 17 of the ACRWC. The Article, more or less, contains similar provisions as those provided for in Articles 37, 39 and 40 of the CRC. Nonetheless, Article 17 of the ACRWC includes further aspects of placing the child at the centre of family and community. In particular, the ACRWC provides, under Article 17(3), that: '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.'

It also does not contain any express provision on diversion in contrast to Article 40(4) of the CRC. Unlike the CRC, the ACRWC leaves a room for States Parties thereto to set their own minimum age of criminal responsibility. This room, which is amenable to abuse by certain notorious states which have already set the age of criminal responsibility as lower as 7 years, is couched in the following wording: 'There shall be a minimum age below which children shall be presumed not to have the capacity to infringe the penal law.'[2114] Nonetheless, the ACRWC 'is an instrument that seeks to "Africanize" the administration of juvenile justice.'[2115]

2111 The "Ps" stand for: the *participation* of children in decisions affecting their own destiny, the protection of children against discrimination and all forms of neglect and exploitation, the *prevention* of harm to children, and the provision of assistance for their basic needs.

2112 Defence for Children International, *International Standards Concerning the Rights of the Child – United Nations Convention on the Rights of the Child* (Vol. 1) Geneva: Defence for Children International, 1995, p. 9.

2113 Mashamba, C.J., 'Emerging Issues in Diverting Juvenile Offenders from the Criminal Justice System: The Socio-Cultural Realities, Economic and Politics of Administration of Juvenile Justice in Tanzania', op. cit.

2114 Article 17(4) of the ACRWC.

2115 Mashamba, C.J., 'Emerging Issues in Diverting Juvenile Offenders from the Criminal Justice System: The Socio-Cultural Realities, Economic and Politics of Administration of Juvenile Justice in Tanzania', op. cit.

16.4 Prevention of Juvenile Delinquency Through International Human Rights Law

The principles of prevention of juvenile delinquency are provided for in the UN Guidelines for the Prevention of Juvenile Delinquency (also popularly known as the *Riyadh Guidelines*).[2116] The *Riyadh Guidelines*[2117] were promulgated to form a positive, pro-active, and comprehensive approach to the prevention of juvenile delinquency.[2118] The Guidelines, for many reasons, 'express a growing awareness that children are full-fledged human beings.'[2119] They are concerned primarily with the prevention of juvenile delinquency. Indeed:

> They focus, particularly, on early protection and preventive intention paying particular attention to children in situations of *social risk*. *Social risk* here implies children who are demonstrably endangered and in need of non-punitive measures because of the effects of their circumstances and situation on health, safety, education…as determined by a competent authority.[2120]

This concept buttresses the *Riyadh Guidelines*, paying particular attention to factors that underlie social risk, including possible inherent behaviours of a particular child or group of children, inherent characteristics like disability, relationship between the child and the family, and socio-economic circumstances in which the child lives, such as poverty. It can be summed up, in effect, that in most 'cases children at social risk are affected by the interplay of all those factors, the more adverse the factors, the greater the chance that the child will drift towards delinquent activities.'[2121]

The *Riyadh Guidelines* are said to be comprehensive in that they deal with almost every social area; the three main environments in the socialization process (family, school and community), the mass media, social policy, legislation and juvenile justice administration.[2122] They emphasize for 'comprehensive prevention plans at every government level,' including coordination of efforts between governmental and non-governmental agencies.[2123] They highlight, further, a need to have systematic and continuous monitoring and evaluation, as well as community involvement 'through a wide range of service and programmes; interdisciplinary cooperation; youth participation in prevention policies and processes.'[2124] The Guidelines, moreover, introduce socialization process by which emphasis should be placed 'on preventive policies facilitating the successful socialization and integrating of all children and young persons, in particular through the family, the community, peer groups, schools, vocational training and the world of work, as well as through voluntary organizations.'[2125]

2116 The Guidelines were passed at the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders held in Havana Cuba in 1990, by resolution 45/112.

2117 So named referring to an important international experts' consultative meeting on the draft text held in Riyadh, Saudi Arabia, in 1988.

2118 Mashamba, C.J., 'Emerging Issues in Diverting Juvenile Offenders from the Criminal Justice System: The Socio-Cultural Realities, Economic and Politics of Administration of Juvenile Justice in Tanzania', op. cit.

2119 Cappelaere, G., *International Standards Concerning the Rights of the Child – United Nations Guidelines for the Prevention of Juvenile Delinquency* Geneva: Defence for Children International, 1995, p. 1.

2120 Mashamba, op. cit.

2121 *Ibid*.

2122 Cappelaere, op. cit, p. 2.

2123 *See* particularly Guideline 9 of the *Riyadh Guidelines.*

2124 *Ibid*.

2125 *Ibid*, Guideline 10.

The Guidelines also comprise of some elements calling for proactive approach such as the focus on upgrading the quality of life, the overall well being of children as potential members of the society. Under Guideline 6, for example, the Guidelines punctuate that: 'Community-based services should be developed (with) [F]ormal agencies of social control (being) utilized only as a last resort.' By virtue of Guideline 2, prevention of juvenile delinquency requires efforts by the entire society to ensure harmonious development of adolescents, with respect for the promotion of their personality from early childhood.' In relation to the mass media, the *Riyadh Guidelines* categorically enumerate that mass media 'should portray the positive contribution of young people to the society (so as to enable them feel that their respective contribution [is] valuable to the society).'[2126]

Pursuant to the provisions of Guideline 5(f), the Guidelines demand that if a state labels a child as a delinquent or deviant, 'the labelling can unwittingly contribute to a child's anti-social behaviour.'[2127]

16.5 Safeguarding the Best Interest of the Child in the Administration of Juvenile Justice

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the *Beijing Rules*) do provide explicitly for safeguarding the best interest of the child in the course of administration of juvenile justice.[2128] The Rules operate within the framework of two other sets of rules governing juvenile justice, both adopted in 1990: The United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines) and the United Nations for the Protection of Juveniles Deprived of their Liberty (the JDL Rules). In principle:

> These three sets of rules can be seen as guidance for a three stage process; firstly, social policies to be applied to prevent and protect young people from offending [the *Riyadh Guidelines*]; secondly, establishing a progressive justice system for young persons in conflict with the law [the *Beijing Rules*]; and finally, safeguarding fundamental rights and establishing measures for social re-integration of young people deprived of their liberty, whether in prison or other institutions (the JDL Rules).[2129]

These Rules develop and extend those articles of the CRC that cover issues such as arrest, detention, investigation and prosecution, adjudication and disposition and the institutional and non-institutional treatment of juvenile offenders.[2130] They, in the main, provide a framework within which a national juvenile justice system should operate and a model for state of affair and humane response to children who may find themselves in conflict with the law.[2131] In sum, the Beijing Rules cover the whole range of administration of juvenile justice processes, which include investigation and prosecution, adjudication and disposition, and non-institutional treatment and institutional treatment of juvenile offenders.

2126 Mashamba, C.J., 'Emerging Issues in Diverting Juvenile Offenders from the Criminal Justice System: The Socio-Cultural Realities, Economic and Politics of Administration of Juvenile Justice in Tanzania', op. cit..

2127 *Ibid*.

2128 *Ibid*.

2129 Van Bueren, G. and A. Tootell, *Introduction to the United Nations Standard Minimum Rules for the Administration of Juvenile Justice* Geneva: Defence for Children International, 1995, p.1.

2130 De Rover, op. cit, p. 318.

2131 Mashamba, op. cit.

Nonetheless, it is important to note that the *Beijing Rules* are not a binding treaty; although some of them have become binding on States Parties by being incorporated into the CRC[2132] and the ACRWC,[2133] others can be treated not as establishing new rights but as providing more detail on the contents of existing rights.[2134] However, the UN General Assembly has created some sort of enforceability by requiring States Parties to inform the Secretary General every five years on the application of the Rules. Non-Governmental Organizations (NGOs) are also urged to collaborate with governmental institutions in implementing these principles.[2135]

16.6 Protecting the Rights of Juveniles Deprived of their Liberty

The UN Rules for the Protection of Juveniles Deprived of their Liberty (the JDL Rules) ensure that juveniles are "compelled" to be deprived of their liberty 'only when there is an absolute necessity to do so.'[2136] The Rules emphasise that juveniles under detention should be treated humanely, with due regard for their status and with full respect for their human rights.[2137] Under the JDL Rules, the expression of "children deprived of their liberty" applies to include deprivation of children's liberty in all situations, including children in welfare institutions. Accordingly, deprivation of liberty in this regard includes, 'any form of detention or imprisonment or the placement of a person in a public or private custodial setting from which a person under the age of 18 is not permitted to leave at will, by order of any judicial, administrative or other public authority.'[2138]

In that respect, the Rules apply to juveniles deprived of their liberty by operation of penal law on those under 18 years of age deprived of their liberty in health and welfare placements.[2139] It is interesting to note that these Rules have the advantage of applying to all those children under 18 deprived of their liberty without any reference to national definitions of childhood, and without being dependent upon the jurisdiction of special proceedings.

Forming the crux of a body of rules meant to provide elaborations of the basic principles of the CRC, these Rules comprise of such fundamental principles, *inter alia*, as, first, children should be deprived of their liberty only as a last resort and for the minimum period; and this should be limited only to practically exceptional cases. Second, juveniles should only be deprived of their liberty in accordance with the principles and procedures of international law. Third, there is a need to have established small open facilities to enable individualized treatment and to avoid the additional negative effects of deprivation of liberty.[2140]

Fourth, deprivation of liberty should only be in facilities which guarantee meaningful activities and programmes promoting the health, self-respect and sense

2132 See particularly Article 40 of the CRC.

2133 See particularly Article 17 of the ACRWC.

2134 Mashamba, op. cit.

2135 *Ibid*.

2136 De Rover, op. cit, p. 318

2137 *Ibid*.

2138 van Bueren, G., *Standards Concerning the Rights of the Child: United Nations Rules for the Protection of Juveniles Deprived of their Liberty* Geneva: Defence for Children International, 1995, p. 1.

2139 *Ibid*.

2140 Van Bueren, op. cit.

of responsibility of juveniles, so as to foster their skills to assist them in developing their potential as members of society.[2141] Fifth, there should be decentralization of detention facilities so as to enable access and contact of juveniles with family members hence reintegration into the community. Sixth, all juveniles deprived of their liberty should be helped to understand their rights and obligations during detention and be informed of the goals of the care provided.[2142] And, lastly, juvenile justice personnel should receive appropriate training including basic principles of welfare and human rights.[2143] Domestic Implementation of the Provisions of the International Standards of Children's Rights in the Juvenile Justice.

16.7 Domestic Implementation of the Provisions of the International Standards of Children's Rights in the Juvenile Justice

The UN Guidelines for Action on Children in the Criminal Justice System[2144] aim at assisting states in the domestic implementation of the provisions of the CRC (and the ACRWC) together with those of the above stated rules and guidelines. The Guidelines for Action provide, *inter alia*, for measures to be taken at the international level in implementing the provisions of the aforesaid instruments, the importance of a rights-based approach in juvenile administration and pro-active responses based on effective preventive and re-integrative measures. They further accentuate the essence of the principle of non-discrimination including gender sensitivity in the administration of juvenile justice, upholding of the best interest of the child, the right to life, survival and development and the duty of states to respect the view of the child.[2145]

In the final analysis, it can be noted that all these international instruments apply independent of each other. As such, in broad practical terms, criminal justice personnel 'should look: first, to the Convention on the Rights of the Child and then to the Riyadh Guidelines in seeking to prevent children from coming into conflict with the law; secondly, to the Convention and the Beijing Rules when dealing with children alleged as or accused of having come into conflict with he law; thirdly, to the Convention and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty for dealing with children found to be in breach of the criminal law.'[2146]

16.8 The International Umbrella Principles in Administration of Juvenile Justice

The *International Umbrella Principles* are a number of fundamental principles that apply to each and every stage of the administration of juvenile justice.[2147] They are essentially subsumed from the relevant international instruments, as discussed above, to provide basic common standards in the administration of juvenile justice the world over. For the purposes of this study, therefore, some fifteen *International Umbrella Principles* are herein below reproduced so as to enable us to understand them:

2141 *Ibid*.

2142 *Ibid*.

2143 *Ibid*.

2144 These Guidelines were drafted by a group of experts' meeting held in Vienna in 1997.

2145 Mashamba, op. cit.

2146 *Ibid*.

2147 *Ibid*.

(a) Juvenile justice legislation should apply to all those under the age of 18 as the age of childhood;[2148]

(b) Juvenile justice is an integral part of national development process of the state and as such should receive sufficient resources to enable the juvenile justice system to be organized in accordance with international principles;[2149]

(c) The principle of non-discrimination and equality is applicable to juvenile justice, and this includes a prohibition on discrimination on account of the child and child's family;[2150]

(d) The guiding principle for any policy or action concerning juvenile justice is that the best interests of the child is a paramount consideration;[2151]

(e) Delay in deciding matters relating to a child is prejudicial to the best interests of the child;[2152]

(f) Every child shall be treated with humanity and with respect for the inherent dignity of the human person, taking into account the age of the child;[2153]

(g) At all stages, children should be treated in a manner that facilitates their reintegration into society and their assuming a constructive role in society;[2154]

(h) Children are entitled to express their views freely in relation to criminal justice, and the views of the child should be given due weight in accordance with both the age and the maturity of the child;[2155]

(i) Children have the right to seek, receive and impart information concerning the juvenile justice system in a form that is both accessible and appropriate to children;[2156]

(j) Juvenile justice should be organized in a manner consistent with children's rights to privacy, family, home and correspondence;[2157]

(k) If children are deprived of their family environment they are entitled to special protection and assistance;[2158]

(l) No child shall be subject to torture or to other cruel, inhuman, degrading or harsh treatment or punishment;[2159]

2148 Rule 11 (a) of the UN Rules for the Protection of Juveniles Deprived of their Liberty; Article 6 para 5 of the ICCPR; and Article 37(a) of the CRC prohibiting the death penalty and life imprisonment without the possibility of release for crimes committed by child below the age of 18; Article 1 of the CRC and Article 2 of the ACRWC, which define a *child as any human being below the age of 18 years*.

2149 Rule 1.4 of the *Beijing Rules* states that, 'Juvenile justice shall be conceived as an integral part of the national development process of each country.'

2150 Article 2 of the CRC; and Article 3 of the ACRWC.

2151 Article 3(1) of the CRC.

2152 *Ibid*, Article 37(d) and Article 40(2)(b)(ii) and (iii); and Article 17(2)(c)(iv) of the ACRWC.

2153 Article 37(c) of the CRC; and Article 17(1) of the ACRWC.

2154 Article 40 of the CRC; and Article 17(3) of the ACRWC.

2155 Articles 12 and 13 of the CRC.

2156 *Ibid*, Article 13; and Guideline 11(b) of the Guidelines for Action on Children in the Criminal Justice System.

2157 Article 16 of the CRC; and Article 17(2)(d) of the ACRWC.

2158 Article 20(1) of the CRC; and Article 17(2)(c)(iii) of the ACRWC.

2159 Article 37 of the CRC; and Rule 87(a) of the UN Rules for the Protection of Juveniles Deprived of their Liberty.

(m) At any stage of the juvenile justice process, children should not be unlawfully or arbitrarily deprived of their liberty;[2160]

(n) The arrest, imprisonment or detention of children should only be used as a measure of last resort and for the shortest appropriate period of time;[2161] and

(o) Parents (or guardians) are to be notified of any arrest, detention, transfer, sickness, injury or death of their child.[2162]

To supplement the International Umbrella Principles above stated, Penal Reform International (PRI) and members of the Interagency Panel on Juvenile Justice (IPJJ) have developed ten points[2163] as their contribution to the Committee on the Rights of the Child Day of general Discussion on "State Violence against Children," in Geneva, 22 September 2000. The points were deduced from the aforementioned international instruments, focusing at ways of reducing violence within the juvenile justice system around the world.[2164] In this regard, PRI and IPJJ believe that 'a proper administration of juvenile justice cannot be achieved without a strong education and social welfare system. Helping young people in conflict with the law to become law abiding adults is much more the job of parents, teachers, social workers and psychologists than it is (for the) police, courts and prisons.'[2165] With the ten-point scheme, PRI and IPJJ seek to advance the point that 'juvenile offending should be dealt with as far as possible outside the formal criminal justice and penal system,' as it is important to make sure that 'alternative systems – particularly those involving institutional care – take proper steps to protect children from violence and abuse.'[2166]

16.9 Some Principles and Issues in International Juvenile Justice

16.9.1 Criminal Capacity of Children and Minimum Age of Criminal Responsibility

As Odongo points out, the issue of age and criminal responsibility relates to two distinct aspects: first, it relates to the age at which children are deemed as having no mental capacity to commit a crime (*doli incapax*); and, second it relates to the age at which it is appropriate to render them liable to prosecution and formal sanctions (*doli*

2160 Article 37(b) of the CRC.

2161 *Ibid*, Article 37(b).

2162 *Ibid*, Article, 9 para 4 and Rule 56 of the UN Rules for the Protection of Juveniles Deprived of their Liberty.

2163 These points are contained in a document entitled: 'Ten-Point Plan for Fair and Effective Criminal Justice for Children,' available as a PRI's briefing note.

2164 Mashamba, C.J., 'Emerging Issues in Diverting Juvenile Offenders from the Criminal Justice System: The Socio-Cultural Realities, Economic and Politics of Administration of Juvenile Justice in Tanzania', op. cit. The ten-point plan developed by PRA requires law and policy makers as well as criminal justice practitioners to: 1. develop and implement a crime prevention strategy for children; 2. collect accurate evidence and data on the administration of criminal justice for children and use this to inform policy reform; 3. increase the age of criminal responsibility; 4. set up a separate justice system for children with trained staff; 5. abolish status offences; 6. ensure that children have the right to be heard; 7. invest in diverting children from the formal criminal justice system; 8. use detention as a last resort; 9. develop and implement reintegration and rehabilitation programmes; and 10. prohibit and prevent all forms of violence against children in conflict with the law.

2165 *Ibid*.

2166 *Ibid*.

capax).[2167] In principle, the "age of criminal responsibility" refers to 'the mental capacity of children (cognitive and connative) to commit crimes',[2168] for which they may be prosecuted and found guilty of offending. Children below this age (the minimum age of criminal responsibility) are considered as lacking the capacity to commit crimes. Cappelaere, et al, define the "age of criminal responsibility" as referring to 'the age at which a person is considered capable of discernment (the capacity to distinguish right from wrong) and therefore bearing the responsibility for his criminal acts. It is the age from which the child is judged capable of contravening the criminal law'.[2169] On the other hand, the age at which a person becomes liable to the adult criminal justice system (with the full procedures and penalties of the ordinary criminal law being considered applicable) is treated as the upper age of criminal responsibility.[2170]

In assessing the criminal capacity of children at common law, courts consider such factors as the educational level, cognitive ability, domestic and environmental circumstances, age and maturity of the child, the nature and seriousness of the alleged offence, the impact of the offence on any victim, and the interests of the community. Other factors are the probation officer's assessment report, the prospects of establishing criminal capacity if the matter were to be referred to preliminary inquiry, the appropriateness of diversion and other relevant factors.[2171]

The UN Committee on the Rights of the Child (the CROC) has often been concerned 'about the (very) low age of criminal responsibility in too many States Parties, which often belong to the Commonwealth and have inherited the low minimum age from British rule. The CRC requires that States Parties set a minimum age for criminal responsibility but without providing further information on what is acceptable in that regard.'[2172] Accordingly, the Beijing Rules limit themselves to the rule that the minimum age for criminal responsibility should not be too low. From the many recommendations of the CROC to the States Parties in this regard:

> […] it can be concluded that in all instances where the minimum age for criminal responsibility was below the age of 12 years, the Committee recommended an increase of that age without explicitly stating what it should be. However, it may nevertheless be concluded that the *de facto* acceptable lowest minimum age for criminal responsibility is 12 years and that the Committee favours a minimum age for criminal responsibility higher than 12 years.[2173]

As Prof. Jaap Doek (former chairperson of the CROC) argues, the practice of the implementation of this rule gives reason for concern. According to him, in many countries, 'the prosecutor has the discretion to decide whether he or she will charge

2167 Odongo, op. cit, pp. 131 & 132 (note 5). See also Bottoms, A. and J. Dignan, 'Youth Justice in Great Britain.' In Tonry, M. and A.N. Doob, *Youth Crime and Youth Justice: Comparative and Cross-National Perspectives* (Volume 31) Chicago & London: The University of Chicago Press, 2004, p. 121.

2168 Odongo, *Ibid*.

2169 *See* Cappelaere, G., et al, *Children Deprived of Liberty: Rights and Realities*. Amsterdam: Defence for Children International, 2005, p. 26.

2170 Odongo, op. cit.

2171 Wakefield, L. and V. Odaga, 'The Activities of the Child Justice Alliance during 2011' Article 40 Vol. 13 No. 2, September 2011.

2172 Doek, J., 'Child Justice Trends and Concerns with a Reflection on South Africa', in Gallinetti, J. et al (Editions), *Child Justice in South Africa: Children's Rights under Construction* Newlands/Cape Town: Open Society Foundation for South Africa and Child Justice Alliance, 2006, p. 13.

2173 *Ibid*.

the child.'[2174] Because of this the CROC 'is not in favour of the *doli incapax* rule and would prefer to set the minimum age at the level where the States Parties would like it to be in principle.'[2175] The CROC considers 14 years to be appropriate 'as this is the age when children are considered to be *doli capax*.'[2176]

16.9.2 Diversion

Diversion is a central pillar of a modern child's rights-oriented juvenile justice system; and 'the extent to which a juvenile justice system incorporates diversion both in legislation and practice is one pointer to the system's adherence to children's rights.'[2177] Prof Jap Doek argues that:

> 'Although there are encouraging steps in a number of countries to develop measures with a view to divert the cases from the traditional criminal procedures … there are still too many States Parties that have taken very little or no action in this regard.'[2178]

He further argues that in addition, and when judicial proceedings have been initiated, 'there are often no or very few effective alternatives for the traditional sanctions - in particular the deprivation of liberty.'[2179] However, writing before the Bill for the enactment of the CJA, Prof Doek noted that:

> The Bill has to be commended for the very strong emphasis on diversion and alternatives to deprivation of liberty, although there does not seem to be a clear distinction between diversion as a measure to avoid judicial proceedings and measures available during the trial (also called diversion) that do not actually divert the case but present alternatives for traditional sanctions. However, the provisions for diversion are detailed and meet international standards. Nevertheless, I still wonder whether it is necessary and what would be the reason of having three levels of diversion?[2180]

In conventional criminal procedure there are three opportunities for action by three different role-players in the diversion process: the police, the prosecutor and the court. Within a wide-ranging diversion policy the police can, and should, play a crucial role when the child 'has first contact with the police [where] the judicial proceedings have not yet been initiated. In other words, there is the possibility that the police may issue an informal warning. There is not enough attention paid to the role of the police in the diversion process.'[2181]

In this section we, thus, examine the law and practice of diversion in South Africa. We commence this discussion by looking at the definition and origins of diversion and its entrenchment in the South African criminal justice system.

2174 *Ibid*.

2175 *Ibid*.

2176 *Ibid*.

2177 Odongo, G.O., 'The Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context', op. cit, p. 191.

2178 Doek, J., 'Child Justice Trends and Concerns with a Reflection on South Africa', op. cit, p. 14. In the terminology of the CRC, Article 40(3)(b) these are 'measures for dealing with such children without resorting to judicial proceedings'.

2179 Doek, *Ibid*, p. 14.

2180 *Ibid*, pp. 14 & 15.

2181 *Ibid*, p. 15.

Diversion has been defined as the election – in suitable and deserving cases – 'of a manner of disposal of a criminal case other than through normal court proceedings.'[2182] Viewed in this nous, diversion usually 'implies the provisional withdrawal of the charges against the accused, on condition that the accused participates in particular programs and/or makes reparation to the complainant. Diversion is preferable to the mere withdrawal of cases as the offender is charged with taking responsibility for his or her actions.'[2183]

In relation to juvenile justice, diversion refers to 'programmes and practices which are employed for young people who have initial contact with the police, but are diverted from traditional juvenile justice processes before children's court adjudication.'[2184] In a broad sense, diversion has been defined as entailing 'strategies developed in the youth justice system to prevent young people from committing crime or to ensure that they avoid formal court action and custody if they are arrested and prosecuted'.[2185] In Odongo's view, this definition is so broad as to include preventative programmes in relation to child offending.[2186] It has, therefore, been observed that 'diversion can incorporate a variety of strategies from school-based crime prevention programmes through to community-based programmes used as an alternative to custody.'[2187] Odongo argues that:

> Although pre-trial diversion represents the earliest stage at which child offenders may be channelled away from the formal criminal justice process, diversion may occur at any stage. In most juvenile justice systems in Africa, the use of diversion remains a relatively new concept, though different forms of diversion became an integral part of juvenile justice systems in most Western countries from the 1970s.[2188]

The use of diversion in most African juvenile justice systems, including the East African experience, 'remains relatively a new concept',[2189] as opposed to Europe, North America and Australasia 'where diversionary practices in juvenile justice have been in place for many years.'[2190] However, in existence there are different forms of diversion programmes in Africa, which are an integral part of juvenile justice systems akin to

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2182 Part 7 of the Prosecution Policy of the South African National Prosecuting Authority. See also Anderson, A.M., 'Restorative Justice, the African Philosophy of *Ubuntu* and the Diversion of Criminal Prosecution.' An unpublished paper (on file).

2183 Anderson, *Ibid*.

2184 Polk, K., 'Juvenile Diversion in Australia: A National Review'. Unpublished paper presented at the conference on *Juvenile Justice: From Lessons of the Past to a Roadmap for the Future*, convened by the Australian Institute of Criminology in conjunction with the New South Wales Department of Juvenile Justice, Sydney, 1 & 2 December 2003.

2185 Muncie, J., *Youth and Crime: A Critical Introduction* London: Sage, 1999, p. 305. *See* also Wood, C., *Diversion in South Africa: A Review of Policy and Practice, 1990-2003* Pretoria: Institute for Security Studies (ISS) Paper 79, 2003, p. 1.

2186 Odongo, G.O., 'The Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context', op. cit, p. 192.

2187 *Ibid*; and Wood, *Ibid*.

2188 Odongo, G.O., 'The Impact of International Law on Children's Rights on Juvenile Justice Law Reform in the African Context', op. cit, pp. 152 & 153. See also Sarre, R., 'Destructuring and Criminal Justice Reforms: Rescuing Diversion Ideas from the Waste Paper Basket.' *Current Issues in Criminal Justice*, Vol. 10 No. 3, 1999, p. 259.

2189 Odongo, G.O., 'The Impact of International Law on Children's Rights on Juvenile Justice Law Reform in the African Context', op. cit, p. 153.

2190 Odongo, G.O., 'The Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context', op. cit, p. 201.

most Western countries that emerged from the 1970s.[2191] Over the years, diversion practices have indicated that 'diversion is a process of flexible nature with no hard and fast demands for formal programmes as an alternative to formal court procedure.'[2192] Viewed in this context, therefore:

> Diversion does not necessarily require a child to be placed in a formal programme but includes interventions such as receiving a police caution, writing an apology letter, participating in an alternative dispute resolution forum or being placed under supervision […].[2193]

Originally, diversion in Western Commonwealth countries became prominently associated with the procedure of police cautioning, both formal and informal.[2194] This approach has dominated juvenile justice systems in the Western countries, due to the fact that most Western jurisdictions 'recognise that the police are the first point of contact for juvenile offenders and so allocate substantial discretion to them in terms of who qualifies for diversion.'[2195] In this context, therefore, the police have been described 'as the "gatekeepers" to diversion in England, Germany, Ireland and New Zealand.'[2196]

Further development has seen the practice of police cautioning developing 'into varied forms in some of the Western jurisdictions and different ways exist for the administration of cautions.'[2197] In addition to diversion of a child offender out of the system by way of a police caution and no other further action ensues, 'cautioning may now entail, in addition, the referral of a child on a voluntary basis into a programme such as a drug and alcohol counselling centre.'[2198] With the rise of restorative justice practices, new diversion interventions that focus on repairing the harm caused by crime were developed, including family group conferences (FGCs) and victim offender mediations (VOMs) that developed in the early 1990s.[2199] Indeed:

> The link between police cautions and these new diversion practices was seen for example in the case of England and Wales in the early 1980s. At this early stage, VOMs or FGCs were rarely invoked on their own in England and Wales. Instead, a form of victim-child offender relationship or contact was forged through the avenue of police cautions.[2200]

For a long time, the practice of diversion in Western jurisdictions 'was predicated on the discretion of the police and other criminal justice role players such as presiding

2191 Sarre, R., 'Destructuring and Criminal Justice Reforms: Rescuing Diversion Ideas from the Waste Paper Basket' *Current Issues in Criminal Justice* Vol. 10 No. 3, 1999, pp. 259-272, p. 259.

2192 Odongo, G.O., 'The Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context', op. cit, p. 193.

2193 Wood, C., *Diversion in South Africa: A Review of Policy and Practice, 1990-2003* Pretoria: Institute for Security Studies (ISS) Paper 79 ISS, 2003, p. 1.

2194 Polk, K., 'Juvenile Diversion in Australia: A national Review' (Unpublished Paper presented at the conference entitled 'Juvenile Justice: From Lessons of the Past to a Road Map for the Future' convened by the Australian Institute of Criminology in conjunction with the New South Wales Department of Juvenile Justice and held in Sydney, 1 & 2 December 2003), p. 2. Polk defines formal cautioning as involving the warning and release of a child offender by the police and specific recording of such caution while informal cautioning simply entails the warning and release of the child offender without a formal note or record.

2195 Odongo, G.O., 'The Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context', op. cit, pp. 202 & 203.

2196 *Ibid*, p. 203.

2197 *Ibid*.

2198 *Ibid*.

2199 *Ibid*, p. 204.

2200 *Ibid*.

officers of youth courts.'[2201] Consequently, the lack of statutory recognition and definition of diversion led to a number of factors which amounted to obstacles to the effectiveness of diversion: 'Issues of lack of consistency, lack of uniformity and inequity in the application of diversion options were therefore inevitable.'[2202] In order to address this anomaly, legislation has to be passed in most Western jurisdictions to regulate diversion. One of such examples was the enactment of the New South Wales' (Australia) Youth Offender Act in 1997.

This law had provisions aimed, *inter alia*, at regulating diversion. Commenting on this law, Bargen points out that:

> [T]he Act provides a legislative framework for the diversion of young offenders from court. Police discretion in the use of warnings, cautions and youth justice conferences is guided to an extent not usually seen in legislation.[2203]

According to Bargen, this law enacted provisions 'aimed at formally recognizing diversion options in statute and reducing the procedures associated with diversionary options.'[2204] Further it included provisions 'aimed at enabling the police to determine the appropriateness of warnings and cautions; and introducing levels of review of these determinations, including judicial review of administrative decisions on diversion.'[2205] As such, this legislation can be described as 'going some way towards addressing some of the barriers to diversion identified throughout the 1980s and 1990s.'[2206]

Therefore, the practice of codifying diversion practices in many jurisdictions influenced the inclusion of provisions relating to diversion in the CRC and international standards.[2207] Now Article 40(3) of the CRC 'expressly provides for alternative diversionary measures over formal judicial proceedings, giving diversion binding status for the first time in international law.'[2208] Read together with the underlying principle laid down in Article 37(b) of the CRC that detention should be used as a matter of last resort, Article 40(3) of the, therefore, 'calls for alternative, non-custodial measures to traditional criminal trials.'[2209] Therefore, almost legislation enacted after the adoption of the CRC, including the Kenyan Children Act, has enacted some or all of the diversionary alternatives in this Article.

With the exception of South Africa, a few child justice centred laws enacted in Sub-Saharan Africa have enacted diversion. However, the South African Child Justice Act (the CJA) incorporates comprehensive provisions relating to diversion of child offenders away from the juvenile justice system at all stages of the process.[2210] However,

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2201 *Ibid*, p. 207.

2202 *Ibid*.

2203 Bargen, J., *et al*, 'Regulating Police Discretion: An Assessment of the Impact of the New South Wales Young Offenders Act, 1997' *Criminal Law Journal* 2005, p. 134.

2204 Odongo, G.O., 'The Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context', op. cit, p. 208 (noted 60).

2205 *Ibid*.

2206 *Ibid*.

2207 *Ibid*, p. 209.

2208 Odongo, G.O., 'The Impact of International Law on Children's Rights on Juvenile Justice Law Reform in the African Context', op. cit, p. 153.

2209 *Ibid*.

2210 *See* particularly Wood, op. cit; Odongo, G.O., 'The Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context', op. cit; and Mashamba, C.J., 'A Study of Tanzania's Non-Compliance with its Obligation to Domesticate international Juvenile Justice Standards in Comparison with South Africa', op. cit.

before we traverse on the salient features of the diversion provisions in this law, we first set out a brief background to diversion in South Africa.

16.9.3 Sentencing

Sentencing refers to the final decision made by a criminal court in relation to the term of imprisonment (or otherwise) the accused person is liable to serve. It is normally made at the conclusion of criminal proceedings. It is significant to note at the outset that sentencing 'is pre-eminently a matter for the discretion of the trial court.'[2211] The trial court's discretion to hand down a certain type of sentence depends on 'the seriousness and the nature of the crime, and also on whether the relevant legislation dictates a particular punishment for a crime.'[2212] It should also be noted that trial courts, regardless of their jurisdiction, are often guided by similar sentencing principles in deliberating over an appropriate sentence, which include retribution, deterrence, prevention and rehabilitation. In many jurisdictions, such as South Africa, these principles are guided by what has come to be referred to as the "*Zinn Triad*": i.e., the crime in question; the personal circumstances of the offender; and the interests of the community at large.[2213]

However, where the trial court has failed 'to exercise its discretion properly and judicially or at all, and thereby committing a material misdirection, an appeal court will be at large to interfere with the sentence.'[2214] It should also be noted that sentencing 'is clearly the most difficult part of criminal proceedings. It involves a careful and dispassionate consideration of balancing the gravity of the offence, the interests of society and the personal circumstances of the offender[2215] not forgetting, the interests of the victim.'[2216]

(a) The Universal Rationale for Sentencing

For years, criminal justice has grappled with what should be the rationale 'to serve as a guiding principle in sentencing.'[2217] For a long time around the world, 'the public has alternated between revulsion at inhumane sentencing practices and prison conditions (denounced as "barbaric" and "uncivilized") on the one hand, and dissatisfaction with overly compassionate treatment (seen as "coddling criminals") on the other.'[2218] Viewed in this context, the fate of convicted offenders 'has repeatedly shifted according to prevailing values and current perceptions of danger and fear of crime.'[2219] Arising from

2211 *See* particularly *S v Pillay* 1977 (4) SA 531 (A) at 534H-535A; and *S v Frazzie* 1964 (4) SA 673 (A).

2212 Tomkin, J., *Orphans of Justice: In Search of the Best Interests of the Child when a Parent is Imprisoned – A Legal Analysis*. Geneva: Quaker United Nations Office, 2009, p. 26.

2213 The *Zinn Triad* was developed in *S v Zinn* 1969 (2) SA 537 (A) and approved in the Supreme Court in *S v Malagas* 2001 (2) SA 1222 (SCA). In similar tone, the Irish Supreme Court held in *The People (DPP) v M.* [1994] 3 IR 306; [1994] I.L.R.M. 541, where it was held that the sentence must be appropriate to the gravity of the offence and the personal circumstances of the offender. In *R v Asia Salum and another* (1986) TLR 12, the High Court of Tanzania held that: 'In imposing sentence the court is required to take into consideration several factors; such as, the gravity of the offence, the record of the accused, his age and the interests of society and those of the accused.' *See* also *Republic v Kidato Abudullah* [1973] L.R.T. n. 82.

2214 *Fredericks v S* [2011] ZASCA 177.

2215 *S v Zinn* 1969 (2) 537 (A) at 540 G.

2216 *Fredericks v S*. Op. cit.

2217 Inciardi, J.A., *Criminal Justice*, op. cit, p. 424.

2218 *Ibid*.

2219 *Ibid*, pp. 424 & 425.

this thinking are five competing schools of thoughts about the rationale of sentencing: retribution, vengeance, incapacitation, deterrence, and rehabilitation.[2220]

Today, therefore, international standards relating to criminal justice concerning sentencing have evolved and codified in many international human rights instruments. In relation to sentencing of children, the CRC and the Beijing Rules have set out minimum sentencing standards, premised around two important sets of standards: first, principles that should underpin and provide the aims of sentencing; and, second, principles that set out restrictions or prohibitions on sentencing that are to be imposed on children. Underlying this supposition, the CRC lays down the "principle of proportionality", which requires that the administration of juvenile justice must aim at ensuring 'that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.'[2221] In addition to this principle, is the principle enunciated in Article 37 of the CRC restricting deprivation of liberty in respect of children to be used as a last resort and for the shortest appropriate period. This article also bars capital punishment,[2222] life imprisonment without a possibility of release, and any cruel, inhuman or degrading treatment or punishment.

(b) Best Practices in Sentencing Child Offenders: The Case of South Africa

States Parties to the CRC are obliged to adopt sentencing policies that are in harmony with the foregoing principles. In compliance with this obligation, for instance, the Child Justice Act (CJA) has incorporated provisions regulating sentencing of children found guilty of committing criminal offences in Chapter 10. In South Africa, before the CJA was enacted and became operational, there were, in addition to the Constitution, guidelines on sentencing which had been authoritatively laid down in case law.[2223] The first case to explicitly consider the principles relevant to sentencing of children in the context of the foregoing international law and in the new constitutional era in South Africa was *S v Z en Vier Sake*.[2224] In this case, five matters came before the High Court on review in which children in conflict with the law had been sentenced to suspended terms of imprisonment. Considering the options and principles applicable to child offenders, the court laid down the following guidelines on sentencing of children:

(a) diversion should be considered prior to trial and sentencing in appropriate cases;

(b) age must be properly determined prior to sentencing;

(c) a sentencing court must act dynamically to obtain full particulars about the accused's personality and personal circumstances;

2220 *Ibid*. In relation to sentencing of child offenders, these principles have been given wide due consideration by the South African Supreme Court of Appeal in *Fredericks v S* (2008/11) [2011] ZASCA 177 (29 September 2011). This case is discussed later in this section.

2221 Article 40(4) of the CRC. *See* also General Comment No. 20, 2007; and Rule 17(1)(a) of the Beijing Rules.

2222 The imposition of death sentence for children who commit offences is prohibited under Article 6(5) of the International Covenant on Civil and Political Rights (ICCPR) and Article 37(a) of the CRC. This rule is so universally practised and accepted, to the extent of reaching the level of *jus cogens. See* particularly Odongo, G.O., 'The Impact of International Law on Children's Rights on Juvenile Justice Law Reform in the African Context', op. cit, p. 159.

2223 Ballard, C., 'Youthfulness and Sentencing Prior to the Operation of the Child Justice Act: A Case Review of *Fredericks v The State*' Article 40 Vol. 14 No. 1, April 2012.

2224 1999(1) SACR 427 (E).

(d) a sentencing court must exercise its wide sentencing discretion sympathetically and imaginatively;

(e) a sentencing court must adopt, as its point of departure, the principle that, where possible, a sentence of imprisonment should be avoided; and should bear in mind especially that: the younger the accused is, the less appropriate imprisonment will be; imprisonment is rarely appropriate in the case of a first offender; and short-term imprisonment is appropriate; and

(f) a sentencing court must not impose suspended imprisonment where imprisonment is inappropriate for a particular accused.[2225]

Subsequently, case law 'generally affirmed these guidelines and courts thus became receptive to the idea that a sentence should be responsive to the individualised needs of the child, and where possible, sentences of imprisonment should be avoided.'[2226] For instance, in *Ntaka v The State*[2227] the appellant, who was 17 years old at the time he committed the offence of rape, argued before the South African Supreme Court of Appeal (SCA) that the High Court, 'in sentencing him to ten years' imprisonment (of which four were conditionally suspended), had failed to investigate adequately the possibility of correctional supervision.'[2228] Although Judge Cameron (writing for the majority) found that, in the light of the gravity of the offence, 'a prison sentence [was] unavoidable'; he held that the High Court sentence disregarded:

> … the youthfulness of the appellant when he committed the crime. It treats him too much like the adult when he was not when he raped his victim. *It may set him for ruin, while foreclosing the possibility, embodied in his youth, that he will still benefit from resocialisation and re-education. It fails to individualize the sentence with the emphasis on preparing him, as a child offender, for his return to society*. [Emphasis supplied].

Therefore, Judge Cameron reduced the term of imprisonment from ten to five years; and, invoking the provisions of Section 276(1)(i) of the Criminal Procedure Act (1997),[2229] he placed the appellant under correctional supervision.

Another noteworthy judgment is *Brandt v S*[2230] where the SCA replaced a sentence of life imprisonment imposed by the High Court on an offender, who was 17 years at the time of the commission of the offence, with a sentence of 18 years' imprisonment. In particular, the SCA held that:

> In Sentencing a young offender, the presiding officer must be guided in the decision-making process by certain principles: including the principle of *proportionality; the best interests of the child*; and, *the least possible restrictive deprivation of the child's liberty*, which should be a *measure of last resort* and *restricted to the shortest possible period of time*. Adherence to recognised international law principles must entail a limitation on certain forms of sentencing such as a ban on life imprisonment without parole for child offenders.[2231] [Emphasis supplied].

2225 These principles are discussed in Ballard, op. cit, pp. 10 & 11.

2226 *Ibid*, p. 10.

2227 [2008] ZACSA 30, March 2008 (Unreported).

2228 Ballard, op. cit.

2229 Act 51 of 1997, which permits the placement of child offender under correctional supervision 'in the discretion of the Commissioner or a parole board'.

2230 [2005] 2 All SA 1 (SCA).

2231 *Ibid*, para. 20.

The most recent decision[2232] to consider the principles applicable in sentencing of child offenders prior to the operation of the CJA in South Africa is *Fredericks v S*.[2233] In this case, the appellant appealed to the SCA against the sentence only imposed by the Western Cape High Court (Cape Town) (Dlodlo and Yekiso, JJ).[2234] He and his co-accused were convicted and sentenced by the Parrow Regional Court as follows: on count 1: robbery with aggravating circumstances as contemplated in Section 1 of the Criminal Procedure Act (1997), whereby firearms and knife were used, for which they were sentenced to 15 years' imprisonment each; on count 2: rape, whereby his co-accused only was sentenced to 10 years' imprisonment; and on count 3: rape, to 10 years' imprisonment each. Effectively, the appellant was to serve a total of 25 years' imprisonment and his co-accused, 35 years' imprisonment. On appeal to the Western Cape High Court, their appeal was dismissed and the sentences were confirmed. On further appeal to the SCA, the only issue for determination was whether or not, in the circumstances of this case, the Regional Court and the High Court misdirected themselves in imposing a lengthy custodial sentence on a juvenile who was 14 years and 10 months old at the time of the commission of the offence.

It should be noted that the commission of the offences in this case took place on 6 July 1999, well before the CJA was enacted and became operational. Thus, the SCA applied the principles applicable to sentencing of child offenders as enshrined in the South African Constitution and case law. The SCA found the sentencing of a 14-year-old child to 25 years' imprisonment, given the circumstances of this case, 'startlingly inappropriate.' The SCA noted the difficulty that arises 'when a juvenile has to be sentenced for having committed a very serious crime like in this case'; and held that:

> Whilst the gravity of the offences calls loudly for severe sentence with strong deterrent and retributive elements, the youthfulness of the appellant required a balanced approach reflecting an equally strong rehabilitative component. After all, the appellant was an immature youth merely 14 years old. Although youthfulness remains a strong mitigating factor, one cannot ignore the sad reality that, nowadays it is the youth that is engaged in violent and serious crimes.

It acknowledged, nonetheless, that although the general purpose of sentencing is to deter, punish and prevent the re-occurrence of crimes in society, when it comes to

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2232 The judgment in appeal in this case was delivered by the SCA on 29 September 2011.

2233 Case No. 208/2011 [SCA] (neutral citation *Fredericks v S* (2008/11) [2011] ZASCA 177 (29 September 2011)). This case is considered at length in Ballard, C., 'Youthfulness and Sentencing Prior to the Operation of the Child Justice Act: A Case Review of *Fredericks v The State*', op. cit.

2234 Briefly, the facts of this case were thus: On 6 of July 1999, in the dead of night, the appellant and his co-accused entered the premises of the complainant, Mr Esterhuizen, with the intention of unlawfully breaking into the house and steal. They found Mr Esterhuizen outside the house, as the barking of the dogs had woken him. They produced a firearm and a knife. They forced Mr Esterhuizen back into the house. All the other occupants of the house, his wife and children, were awakened and bundled into one room and threatened with the firearm and knife. The appellant and his co-accused demanded money. Having failed to solicit money they demanded bank cards. The appellant took Mr Esterhuizen's bank cards and went to the bank to withdraw money, after having forcefully obtained the pin code. His co-accused remained in the house while wielding the firearm. The appellant returned without the money. The two accused started removing the goods, as listed in the charge sheet, whose value was estimated at R6220.00. While ransacking the house, the appellant raped one of the children, E, a 15-year-old girl and later his co-accused also raped her. Later the co-accused raped the other child, L, 18 years of age. This whole episode took about six to seven hours. The appellant removed the stolen goods, while his co-accused remained in the house but left the house later. Apparently these goods were to be used to pay back a debt they owed a rival gang. The appellant and his co-accused were later arrested, charged, convicted and sentenced by the Parrow Regional Court. Effectively the appellant was to serve a total of 25 years' imprisonment and his co-accused, 35 years' imprisonment. They appealed to the Western Cape High Court (Dlodlo, J and Yekiso, J concurring). Their appeal was dismissed and the sentences confirmed. Leave to appeal against sentence to the SCA was granted by the High Court in respect of the appellant only.

child offenders, 'rehabilitation seems to be emphasized more.'[2235] In coming to this conclusion, the SCA considered the decision in *S v Jansen*,[2236] where it was held that:

> In the case of a juvenile offender it is above all necessary for the Court to determine what appropriate form of punishment in the peculiar circumstances of the case would best serve the interests of society as well as the interests of the juvenile. *The interests of the society cannot be served by disregarding the interests of the juvenile, for a mistaken form of punishment might easily result in a person with a distorted or more distorted personality being eventually returned to society*. [Emphasis mine].

Having considered the relevant constitutional and international law principles, the SCA held that 'the attention given to a child when considering sentence is not done in a vacuum. The seriousness of the offence, its impact on the victims and the interests of the broader society must be taken into consideration.' This reasoning is in line with what Botha, JA, held in *S v Jansen*;[2237] that is: 'To enable a Court to determine the most appropriate form of punishment in the case of a juvenile offender, it has become the established practice in the Courts to call for a report of the offender by a probation officer in, at least, all serious cases.'[2238]

Elaborating on its observation that sentencing 'is clearly the most difficult part of criminal proceedings', the SCA held that:

> It becomes more onerous where a child is the offender and the offence is a very serious one. In the present case the robbery involves the use of a firearm and a knife whilst the rape is of a child under the age of 16 years. A decision regarding an appropriate sentence becomes even more difficult – when a juvenile has to be sentenced for having committed a very serious crime like in this case.

Therefore, the court held while the gravity of the offences requires a 'severe sentence with strong deterrent and retributive elements, the youthfulness of the appellant required a balanced approach reflecting an equally strong rehabilitative component.' Appreciating the fact that the appellant was an immature youth merely 14 years old at the time he committed the offence, the SCA balanced between his youthfulness, as "a strong mitigating factor"; and the seriousness of the crime he committed, which calls for severe punishment of the offender with a view to preventing re-occurrence. Out of this balance, the court decided to lower the sentence, aiming at rehabilitation of the appellant. This finding was premised in the provisions of Section 28(1)(g) of the South African Constitution, which provides that:

> Every child has the right – not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under Sections 12 and 35, the child may be detained only for the shortest appropriate of time, …

In the light of these provisions, the SCA was of the view that: 'Failure to give effect to the above constitutional imperative renders such omission a material misdirection by a presiding officer.' The court observed further that:

> This conclusion was influenced by *Brandt v S*,[2239] where Ponnan, JA, held that international law principles, which are well re-echoed in the South African Constitution, reiterate that

2235 Ballard, op. cit. *See* also *S v B* 2006 (1) SACR 311 (SCA), paras. 19-20.

2236 1975 (1) SA 425 (A) at 427H-428A.

2237 *S v Jansen*, op. cit.

2238 *See* particularly *S v Adams* 1971 (4) SA 125; and *S v Yibe* 1964 (3) SA 502 (E).

2239 [2005] 2 All SA 1 (SCA).

proportionality is a consideration and that 'child offenders should not be deprived of their liberty except as a measure of last resort and, where incarceration must occur, the sentence must be individualized with the emphasis on preparing the child offender from the moment of entering into the detention facility for his or her return to society.' In *S v Williams*[2240] it was suggested that South Africa's child justice legislation should incorporate accepted international standards, as well as such further rules and limitations as to ensure effective implementation of the international standards. Concepts, such as resocialization and re-education when dealing with sentencing of children, were suggested to be regarded as complementary to the traditional aims of punishment relating to adults. In fact, when the CJA was enacted, it paid heed to these judicial pronouncements as indicated in the following analysis.

16.9.4 International Perspectives

The imprisonment of an adult, in most cases, affects 'both the lives of those within the prison walls and those beyond.'[2241] Amongst the people affected by the imprisonment of an adult, particularly a parent/mother, are children. Around the world, there are many children who live in prisons although they have not committed any crime.[2242] In most cases, such children find themselves in prison facilities by virtue of their parents (particularly mothers) being accused or convicted of an offence.

Referred to by Roger Shaw as "the orphans of justice",[2243] children incarcerated with their parents/mothers 'are too often ignored by prison systems and officials, with their needs and best interests unmet.'[2244] However, children whose parents are involved with the criminal justice, including those incarcerated, 'have equal rights to all other children.'[2245] Viewed in this context, the rights of such children 'should not be affected because of the status of their parent, or because of decisions about their parent.'[2246] At the centre of this consideration, is the child's best interests. As urged in the Recommendations and Good Practice from the UN Committee on the Rights of the Child Day of General Discussion in 2011:

> The best interests of the child must be a primary consideration in relation to all actions that may affect children of incarcerated parents, whether directly or indirectly. States should create and implement laws/policies to ensure this occurs at every stage of the criminal justice process.[2247]

2240 1995 (7) BCLR 861 (CC).

2241 Tomkin, J., *Orphans of Justice – In Search of the Best Interests of the Child When a Parent is Imprisoned: A Legal Analysis* Geneva: Quaker United Nations Office, 2009, p. 9 (arguing that: 'It is estimated that 9.25 million people are imprisoned throughout the world'). For an updated World Prison Population List, visit www.prisonstudies.org. The list was first published in 1999 by the Research, Development and Statistics Directorate of the Home Office of the UK as Research Findings No. 88 by Roy Walmsley.

2242 Robertson, O., *Children Imprisoned by Circumstance* Geneva: Quaker United Nations Office, April 2008, p. v.

2243 Shaw, R., 'Fathers and Orphans of Justice', in Shaw, R. (Edition), *Prisoners' Children, What are the Issues?* London: Routledge, 1992, pp. 41-48.

2244 Robertson, op. cit.

2245 Robertson, O., *Collateral Convicts: Children of Incarcerated Parents – Recommendations and Good Practice from the UN Committee on the Rights of the Child Day of General Discussion 2011* Geneva: Quaker United Nations Office, March 2012, p. 4.

2246 *Ibid* (referring to Jean Zermatten, CROC member, oral intervention at the CROC's Day of General Discussion 2011).

2247 *Ibid*.

In considering the importance of protecting children incarcerated with their parents/mothers, Article 30(1) of the ACRWC[2248] obliges States Parties to 'undertake to provide special treatment to expectant mothers and to mothers of infants and young children who have been accused or found guilty of infringing the penal law.' In particular, States Parties have an obligation to:

(a) ensure that a non-custodial sentence will always be first considered when sentencing such mothers;

(b) establish and promote measures alternative to institutional confinement for the treatment of such mothers;

(c) establish special alternative institutions for holding such mothers;

(d) ensure that a mother shall not be imprisoned with her child;

(e) ensure that a death sentence shall not be imposed on such mothers;

(f) the essential aim of the penitentiary system will be the reformation, the integration of the mother to the family and social rehabilitation.

Although Article 30 of the ACRWC refers to "children of imprisoned mothers" only, experience from various jurisdictions has indicated that even fathers are sometimes found incarcerated with their children.[2249] For instance, in Aoteraroa/New Zealand, it has been established that around 26% of males and 47% of female prisoners 'had dependent children prior to imprisonment, with 35% of female prisoners and 12% of male prisoners being sole carers for their children.'[2250] In the US, of 1.2 million incarcerated men and women (54% of the prison population) have children under 18 years of age.[2251]

It is to be noted that the imprisonment of parents, particularly of mothers of dependent young children, 'is deeply problematic, because the child is being punished along with the parent.'[2252] In this regard, it can be noted that:

> While it is argued that the punishment of offenders always has repercussions for innocent relatives, where children are concerned the effects can be particularly catastrophic to them and costly to the State, both immediately, in terms of providing for the children's care, and long term, in terms of the social problems arising from early separation.[2253]

Articulating further repercussions of imprisoning a child with his or her parents, a report published by the Parliamentary Assembly of the Council of Europe notes that: 'prisons do not provide an appropriate environment for babies and young children, often causing long term developmental difficulties. Yet if babies and children are to

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2248 It should be noted that unlike the ACRWC, which has a specific provision on the rights of children of prisoners, the CRC does not have such specific provision. It has been argued that, although the CRC 'has not yet become a living charter for children of imprisoned parents' [Wolleswinkel, R., 'Children of Imprisoned Parents' in Willems, J., (Edition), *Developmental and Autonomy Rights of Children: Empowering Children, Caregivers and Communities* (Inetersentia), 2002, p. 7], 'the general rights provided for in it apply to such children.' Tomkin, op. cit, p. 32.

2249 Cantwell, N., et al, *Moving Forward: Implementing the 'Guidelines for the Alternative Care of Children'* UK: Centre for Excellence for Looked After Children in Scotland, 2012, p. 60.

2250 Robertson, op. cit, p. 5.

2251 *Ibid*.

2252 United Nations Children's Fund, *Implementation Handbook for the Convention on the Rights of the Child,* op. cit, p. 124.

2253 *Ibid*.

be forcibly separated from their mothers, they suffer permanent emotional and social damage.'[2254]

Jean Tomkin has used two terms in describing the effects of separating a child from his or her imprisoned parents: *primary prisonisation* and *secondary prisonisation*.[2255] Whereas *primary prisonisation* applies to circumstances where a child remains in prison with his or her parent,[2256] *secondary prisonisation* can be described as the "institutionalization" of the prisoner's family outside the prison.[2257]

(a) Primary Prisonisation

In the context of Article 30 of the ACRWC, Article 9 of the CRC and Article 3(1) of the Council of Europe's Committee of Ministers Recommendation,[2258] *primary prisonisation* is only permissible when it is in the best interests of the child concerned.

Elaborating this principle, Rule 33(3) of the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) stipulates that where children are allowed to stay with their mothers in prison, awareness-raising on child development and basic training on the healthcare of children shall be provided to prison staff. This enables them to respond appropriately in times of need and emergency. Under Rule 42(2), the Bangkok Rules requires the prison regime to be flexible enough to respond to the needs of pregnant women, nursing mothers and women with children in prison.

In addition, Rule 42(3) of the Bangkok Rules requires prison regimes to provide appropriate programmes for pregnant women, nursing mothers with children in prison. Such programmes should further ensure that pregnant and/or breastfeeding women prisoners do receive advice on their health and diet under an arrangement to be drawn up and monitored by qualified healthcare practitioners.[2259]

On its part, the Council of Europe's Committee of Ministers Recommendation provides that where it is considered to be in the child's best interests to be with his or her parent in prison, provisions should be made to ensure that the security and welfare of the child is considered. This should be undertaken through provision of appropriately furnished accommodation and staff who are appropriately qualified.[2260] It underscores that children of imprisoned parents are not themselves prisoners; thus, they should not be treated as such.

In a study of the ramifications of *primary prisonisation* on the child's wellbeing, Jean Tomkin describes a number of advantages of this phenomenon. She clearly points out that, where a child lives in prison with his or her imprisoned parent, the prison 'must be developed into a suitable environment for small children, within the

2254 Parliamentary Assembly of the Council of Europe, 'Mothers and Babies in Prison', Doc. 8762, 2000. Available at http://assembly.coe.int/Documents/WorkingDocs/doc00/EDOC8762.htm (Accessed on 15 June 2013).

2255 Tomkin, J., *Orphans of Justice – In Search of the Best Interests of the Child When a Parent is Imprisoned: A Legal Analysis*, op. cit, pp. 29, 35.

2256 *Ibid*, p. 35.

2257 Comfort, M., '*Papa's House*: The Prison as Domestic and Social Satellite' *Ethnography* Vol. 3, 2002, p. 471.

2258 Council of Europe's Committee of Ministers, Recommendation to Member States on the European Prison Rules, Rec. 2, 2006.

2259 Rule 48(1) of the Bangkok Rules.

2260 Article 36(2) and (3) of Council of Europe's Committee of Ministers' Recommendation to Member States on the European Prison Rules, op. cit.

constraints of prison regulations and requirements.'[2261] This has also been given further elaboration by the Council of Europe's Committee for the Prevention of Torture, which has emphasized that where children remain in prisons with their parents 'the goal should be to produce a child-centred environment, free from the visible trappings of incarceration, such as uniforms and jangling keys.'[2262]

Tomkin is also of the view that, through the provision of adequate facilities, 'the advantages of maintaining contact between the mother and child become more significant.'[2263] Accordingly, this kind of contact 'facilitates the child's development while contributing to the rehabilitation of the prisoner through securing family links, rather than aggravating and intensifying feelings of loss and failure associated with the imprisonment of a parent.'[2264]

Notwithstanding the foregoing reasoning, it remains obvious that the prison environment is an ideal one in which to raise a child.[2265] In the main, the question that must be addressed is: whether the legal rights of the child can adequately be safeguarded in such circumstances and whether, ultimately, the best interests of the child are served if he or she is to be separated from his or her incarcerated parent. This, therefore, brings to the fore the need to resort to the *secondary prisonisation* as described below.

(b) Secondary Prisonisation

The effect of *secondary prisonisation* on the rights and welfare of the child is better examined in the light of the general principles enshrined in the ACRWC and the CRC. As such, the effect of imprisoning a parent 'is of particular importance with regard to the child's right to development and the child's right to the care and company of his or her family.'[2266] As in primary prisonisation, in secondary prisonisation courts are obliged under Article 3 of the CRC to have regard to the best interests of the child potentially affected by the imprisonment order or conviction.[2267] In addition to this principle, courts should also bear in mind that insofar as possible, the imprisonment of a parent should be a last resort.[2268]

(i) The Ramifications of Imprisonment on the Child's Right to Development

The right to development demands that a child is raised and cared for 'in order to assist the maximum development of the child within his or her capacities.'[2269] According

2261 Tomkin, J., *Orphans of Justice – In Search of the Best Interests of the Child When a Parent is Imprisoned: A Legal Analysis,* op. cit, p. 37.

2262 *Ibid* (quoting Ayre, L., et al (Editions), Children of Imprisoned Parents: European Perspectives on Good Practice Paris: EUROCHIPS, 2006, p. 20).

2263 *Ibid*.

2264 *Ibid*.

2265 *Ibid*, p. 35.

2266 *Ibid*, p. 29.

2267 In *R v Mills* [2002] CR APP R 52, the UK Court of Appeal held that a mother with dependent children convicted of a nonviolent crime should not be imprisoned where an alternative was available.

2268 *See* particularly Article 30(a) of the ACRWC; and Tomkin, op. cit, p. 32.

2269 Tomkin, *Ibid*.

to Joseph Murray, there are four categories of effects that may hold back a child's development: *selection effects, mediating effects, moderating effects and direct effects*.[2270]

Selection effects occur where some extraneous factors – such as parent's anti-social behaviour – causes the imprisonment of the parent, 'which in turn is the cause of the child's developmental problems.'[2271] Seen in this context, the developmental problem is the parent's behaviour, 'rather than the imprisonment *per se*.'[2272] according to Murray, parental criminal convictions, regardless of the sentences that follow, are a strong independent predictor of children's own criminal and antisocial behaviour in later life.'[2273]

Mediating effects entail indirect consequences of the imprisonment of the parent that impact negatively on the child's development, including loss of income that 'the family may incur due to the practical implications of a custodial sentence, as well as children's exposure to multiple carers.'[2274]

Moderating effects refer to such specific intrinsic characteristics of the individual child as age, gender or personality, which 'affect how parental imprisonment will influence the development of the child.'[2275] *Direct effects* refer to actual effects of imprisonment on the child, which include 'the actual separation of the child from the parent, the possibility that the child will imitate the anti-social behaviour; and that the child will experience fear as a result of not knowing what is happening to the parent.'[2276]

(ii) The Ramifications of Imprisonment on the Child's Right to be with his or her Family

Under both the ACRWC and the CRC, the child has the right to be cared for by and grow up with his parents in a family environment. Empirical studies have indicated that by relocating family moments and events to the prison visiting room, the result is 'a curious inversion of the premise that frequent visitation facilitates societal reintegration … as family celebrations, and romance are imported into the carceral environment, the penitentiary becomes a domestic satellite.'[2277] Viewed in this setting, the home 'becomes a symbolic prison for the family on account of the sense of isolation and social exclusion commonly felt by prisoners' families.'[2278]

(c) Mitigating the Negative Impact of Imprisonment on Children

From the assessment of the effects of separation or non-separation of a child from his or her imprisoned parent, it can be pointed out that the imprisonment of a parent has far-reaching negative implications on the child's development and future. Therefore, there is a need to mitigate the imprisonment of parents/mothers. One of the mitigating factors is to find more constructive, non-custodial sanctions. In particular, the ACRWC

2270 Murray, J., 'The Effects of Imprisonment on Families and Children of Prisoners' in Liebling, A. and S. Maruna(Editions), *The Effects of Imprisonment* Cullompton, Devon (England): Willan, 2005, p. 442.

2271 Tomkin, op. cit, p. 29.

2272 *Ibid*.

2273 *Ibid*, pp. 20-30.

2274 *Ibid*, p. 30.

2275 *Ibid*.

2276 *Ibid*. *See* also Murray, op. cit, p. 450.

2277 Comfort, op. cit, p. 471.

2278 Tomkin, op. cit, p. 31.

provides a more mitigating factor in this regard. In Article 30(a), the ACRWC obliges States Parties to provide special treatment to expectant mothers and to mothers of infants and young children who have been accused or found guilty of infringing the penal law, by particularly ensuring 'that a non-custodial sentence will always be first considered when sentencing such mothers.'

In particular, courts 'should assess the impact on the child with particular attention to the alternatives available for the child, as it is often the lack of adequate alternative care that affects the child most severely.'[2279] In addition, Article 3(1) of the CRC, which requires courts when sentencing parents to consider the best interests of affected children as "a primary consideration", can be used to mitigate the impact of imprisonment of parents on the child. Besides, Article 9 of the CRC is useful in mitigating the impact of incarceration of a parent on the child. The article requires maintaining regular contacts between a parent and a child, which is not only in the child's best interests but also reduces recidivism and aid reintegration of the offender into society after release.[2280]

Empirical studies have indicated that parent-child visits in person are often the most positive way to ensure stability of the child's life.[2281] One of such studies has concluded that 'children who regularly visit parents from whom they are separated show better emotional adjustment, higher I.Q. scores and more improvement in behaviour than those who do not.'[2282] Regular parent-child visits are essential in maintaining contacts between parent and child and ensure stability and continuity of care and environment; thus:

> Developing positive relationships with consistently available and responsive alternative adults can help ameliorate the effects of parental loss or problems, whereas instability in the caregiving situation does not.[2283]

Therefore, wherever possible the child 'should be placed in a stable and attentive environment in order to cause the least amount of disruption to the child's life.'[2284]

16.9.5 Provision of Legal Assistance to Children in Conflict with the Law

Under international juvenile justice law, it is well established that children in conflict with the penal law should be accorded a fair trial, even more specific than adults in such a situation.[2285] According to Article 11 of the Resolution on the Right to a Fair Trial and Legal Assistance in Africa (the "Dakar Resolution") of 1999:[2286]

> **11. Children and Fair Trial**
>
> Children are entitled to all the fair trial guarantees and rights applicable to adults and to some additional protection. The African Charter on the Rights and Welfare of the Child

2279 *Ibid*.

2280 Baunach, P.J., *Mothers in Prison* New Brunswick: Transaction Books, 1985, p. 2.

2281 Tomkin, op. cit, p. 32.

2282 Ayre, et al, op. cit, p

2283 Poehlmann, J., 'Representations of Attachment Relationships in Children of Incarcerated Mothers' *Child Development* Vol. 76 No. 3, 2005. p. 682.

2284 Tomkin, op. cit, p. 33.

2285 *See* particularly Mashamba, C.J., 'Tanzania's Obligations for Juvenile Justice Reform in the Contexts of the Juvenile Justice and Access to Justice Studies under the CRC/ACERWC.' A briefing paper presented at the Child Justice Forum, Bagamoyo, 13 September 2011.

2286 Op. cit.

> requires that: 'Every child accused of 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's respect of human rights and fundamental freedoms.'[2287]

In order for fair trial for children accused of or found guilty of infringing penal law to be effectively realized there must be adequate guarantee to the right of access to justice.[2288] This is so principally because: 'Access to justice is a paramount element of the right of a fair trial. Most accused and aggrieved persons are unable to afford legal services due to the high cost of court and professional fees. It is the duty of governments to provide legal assistance to indigent persons in order to make the right to a fair trial more effective.'[2289]

States are thus urged to: 'Urgently examine ways in which legal assistance could be extended to indigent accused persons, including through adequately funded public defender and legal aid schemes.'[2290] States are also obliged to 'allocate adequate resources to judicial and law enforcement institutions to enable them to provide better and more effective fair trial guarantee to users of the legal process.'[2291]

2287 *See* also Guidelines (H) and (O) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, adopted by the African Commission on Human and Peoples' Rights in 2003.

2288 *See* Article 17(2)(c)(iii) of the ACRWC and Articles 20, 37(d) and 40(2)(b)(iii) of the CRC.

2289 Article 9 of the *Dakar Declaration*, op. cit.

2290 *Ibid*.

2291 *Ibid*.

Chapter Seventeen

Protection of the Rights of Children in Conflict with the Law in Uganda

17.0 Introduction

As considered in Chapter Five, Uganda pioneered the child law reform initiative in Africa,[2292] followed by such other countries as Ghana, Kenya, Namibia, South Africa and Tanzania.[2293] A profound outcome of this child law reform was the enactment of the Ugandan Children's Statute[2294] (later, the Ugandan Children Act[2295]) 'under which both child social welfare and juvenile justice issues are covered.'[2296] As in most of African countries where child law reform processes have recently taken place, the enactment of the Ugandan Children Act was influenced by the country's ratification of both the ACRWC and the CRC. It has been contended that for many African countries, the ratification of the ACRWC and the CRC has provided 'a climate within which to re-examine child laws.'[2297]

Seen in this context, the Ugandan Children Act has reformed a number of juvenile justice issues, including the minimum age of criminal responsibility (MACR) and determination of age and status of child offenders; the way children are to be arrested and detained; the manner through which children who are incarcerated together with their parents, particularly their mothers, are dealt with; sentencing and rehabilitation of child offenders. These issues are considered at some length in this Chapter.

17.1 Prevalence of Juvenile Delinquency in Uganda

As in many Sub-Saharan African countries, in Uganda the prevalence of juvenile delinquency is widespread. For instance, the 2008 Police Annual Crime Report notes that out of 119,072 criminal cases reported to, and recorded by, the police in 2008, 2,421 (i.e. 2%) were committed by children offenders.[2298] However, this figure has been criticized as not reflecting the true picture 'as countless scores of children are charged and prosecuted as adults.'[2299]

17.2 Criminal Responsibility and Minimum Age of Criminal Responsibility

One of the obligations imposed on States Parties under both the ACRWC and the CRC in relation to the establishment and strengthening of a functioning juvenile

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2292 Odongo, G.O., 'The Impact of International Law on Children's Rights on Juvenile Justice Law Reform in the African Context' in Sloth-Nielsen, J. (Edition), *Children's Rights in Africa: A Legal Perspective* Hampshire: Ashgate Publishing Ltd., 2008, pp.147-164, p. 148.

2293 *Ibid*.

2294 No. 8 of 1996.

2295 Cap. 59 of the Laws of Uganda.

2296 Odongo, op. cit.

2297 *Ibid*. *See* also Sloth-Nielsen, J. and B. Van Heerden, 'New Child Care and Protection Legislation in Africa: Lessons for South Africa' *Stellenbosch Law Review* 261, 1997.

2298 Foundation for Human Rights Initiative, *Juvenile Justice in Uganda: Report for the Period January-July 2009* Kampala: Foundation for Human Rights Initiative, 2009, p. viii.

2299 *Ibid*.

justice in their jurisdictions, is the duty to establish a minimum age below which children are presumed not to have the capacity to infringe the penal law.[2300] Therefore, this obligation entails that States Parties should set the maximum or upper age and minimum or lower age of criminal responsibility for children. As provided for in the ACRWC and the CRC, the upper age for children's criminal responsibility in Uganda is pegged at 18 years. This entails that persons between the 12 and 18 years of age in Uganda are 'treated as children for criminal and penal purposes.'[2301]

In relation to the lower or minimum age of criminal responsibility (MACR), the Ugandan Children Act has increased it from seven to twelve years.[2302] Previously, the MACR was pegged at seven with the *doli incapax*[2303] presumption applying until the age of twelve years. Therefore, with the enactment of the Ugandan Children Act, the *doli incapax* presumption has been abolished.[2304] Odongo provides the reason behind this abolition in the following regards:

> In Uganda's case, the abolition of the [*doli incapax*] doctrine and an increase of the minimum age to 12 was part of the comprehensive law reforms that culminated in the Ugandan Children's Statute of 1996.[2305]

Therefore, this upgrading of the MACR in Uganda is compliant with the CROC's approach 'which has consistently called for increased minimum ages of criminal responsibility where such ages are set too low.'[2306]

17.3 Arrest and Charge of Child Offenders

The manners of arresting and charging of child offenders are clearly set out in Section 89 of the Ugandan Children Act. Under sub-section (1) of this section, where a child is arrested, the arresting police officer 'shall under justifiable circumstances caution and release the child.' Sub-section (3) obliges the arresting police officer to inform the child's parents or guardians and the secretary for children's affairs of the local government council for the area in which the child resides about the arrest by the police. This should be made as soon as possible after arrest. The rationale for this requirement is that 'children should have someone present in court with them, which is a pre-requisite for bail to be awarded.'[2307]

However, as the Foundation for Human Rights Initiative (FHRI) recently established, this prerequisite is sometimes not adhered to, in that parents, guardians and the secretary for children's affairs of the local government council are not promptly informed of children's arrests. As a result, 'many children appear in court unaccompanied and the magistrate is forced to deny them bail and remand the children.'[2308] In addition,

2300 See particularly Article 40(3)(a) of the CRC and Article 17(4) of the ACRWC.

2301 Foundation for Human Rights Initiative, op. cit, p. 5.

2302 Section 88 of the Ugandan Children Act provides categorically that: 'The minimum age of criminal responsibility shall be twelve years.'

2303 The *doli incapax* rule refers to an age bracket for children within which they are presumed to lack criminal capacity to commit crimes unless and until it is proved otherwise.

2304 Odongo, op. cit, p. 151. Ghana has also adopted the Ugandan model of upping the MACR from 7 to 12 years and abolishing the *doli incapax* doctrine.

2305 *Ibid*.

2306 *Ibid*. *See* also Doek, J., 'Child Justice and Concerns with a reflection on South Africa', op. cit.

2307 Foundation for Human Rights Initiative, op, cit, p. 6.

2308 *Ibid*.

FHRI notes that the police officers are so reportedly 'negligent in getting the contacts of parents of juvenile offenders.'[2309]

When conducting interview with the child accused of committing an offence, the police must ensure that the parent or guardian of the child is present at the time of the police interview or interrogation. However, the presence of the parent or guardian may be waived where 'it is not in the best interests of the child.'[2310] It is that where a child's parent or guardian cannot be immediately contacted or cannot be contacted at all, 'a probation and social welfare officer or an authorised person shall be informed as soon as possible after the child's arrest so that he or she can attend the police interview.'[2311] However, the FHRI has noted that due to under funding of probation officers, their presence at interviews is inadequate.[2312]

The law empowers the police 'to dispose of cases at their discretion without recourse to formal court hearings in accordance with criteria to be laid down by the Inspector General of Police.'[2313] Where a child is arrested with or without a warrant and cannot be immediately taken before a court, the police officer to whom the child is brought 'shall inquire into the case'; and 'release the child on bond on his or her own recognisance or on a recognisance entered into by the parent of the child or other responsible person.'[2314] However, where the charge is a serious one, or it is necessary in the child's interests to remove him or her from association with any person, or the officer has reason to believe that the release of the child will defeat the ends of justice, the police may not release the child.[2315]

Where release on bond is not granted, a child should be detained in police custody for a maximum of twenty-four hours or until the child is taken before a court, whichever is sooner.[2316] However, the law prohibits detaining a child with an adult person.[2317] It also requires that a female child, while in custody, must 'be under the care of a woman officer.'[2318]

Where the police decide to institute criminal proceedings against the child, they must charge such a child in the Family and Children Court (FCC). Under Section 93 of the Children Act, the FCC has criminal jurisdiction to hear and determine all criminal charges against a child except in two circumstances. First, in respect of any offence punishable by death;[2319] and, second, in respect of any offence for which a child is jointly charged with a person over eighteen years of age.[2320]

2309 *Ibid*.

2310 Section 89(4) of the Ugandan Children Act.

2311 *Ibid*, Section 89(5).

2312 Foundation for Human Rights Initiative, op, cit, p. 7.

2313 Section 89(2) of the Ugandan Children Act.

2314 *Ibid*, Section 89(6).

2315 *Ibid*.

2316 *Ibid*, Section 89(7).

2317 *Ibid*, Section 89(8). However, due to lack of adequate separate facilities for child, child offenders sometimes are placed in remand facilities together with adults. See particularly Foundation for Human Rights Initiative, op, cit, p. 7.

2318 *Ibid*, Section 89(9).

2319 *Ibid*, Section 93(a).

2320 *Ibid*, Section 93(b).

17.4 Determination of Status of Child Offenders

The determination of the question whether or not a person is a child is very pivotal in determining how to deal with a person under 18 years of age. This is emphasised in Article 7 of the ACRWC, which calls for the registration of a child immediately after birth. In giving further elaboration of the child's right to being registered immediately after birth, African Union (AU) member states 'have committed themselves within the AFFC[2321] framework to ensure universal birth registration as a protection measure.'[2322] As the Africa Wide Movement for Children points out: 'The right to protection can only be exercised if the rights bearer can be identified as the true beneficiary. The proper beneficiary here is a child...'[2323]

In respect of determining the age below which a child can be presumed to be capable of committing an offence, birth registration is particularly significant. This is because, birth registration is important in ascertaining the status of the child for the purpose of deciding whether or not the child is within the MACR. In many countries around the world, children who are registered and have birth (registration) certificates are in a stronger position to exercise their rights in the juvenile justice system. This is highly contrasting in a situation where children are not registered, in which case they become vulnerable to violations – such as being treated as falling within the MACR, while they are not.

17.4.1 Birth Registration and Status of Child Offenders

In Uganda, the child's right to registration is constitutionally and legislatively protected. According to Article 18 of the 1995 Constitution and the Births and Deaths Registration Act (1970),[2324] children in Uganda must be registered within a prescribed time. According to Article 18 of the Ugandan Constitution, the State is obliged to 'register every birth, marriage and death occurring in Uganda.' Despite these constitutional and statutory guarantees, birth registration in Uganda is still low.

For instance, in 2002 birth registration was only 2% and rose to 50% in 2004.[2325] According to the UNICEF 2012 *State of the World's Children Report*, 24% of urban children who are under five years were registered as compared to 21% of their rural counterparts.[2326] UNICEF has estimated that of the approximately 1.5 million babies born in Uganda each year, only one in five is registered at under the age of five.[2327] This necessarily implies that many children who have attained the MACR were not registered; and, as such, they do not possess birth certificates to enable the police and the court to ascertain whether or not such children are within the MACR.[2328]

2321 *See* particularly para 7(a) of the Call for Accelerated Action.

2322 Africa Wide Movement for Children, *An Africa Fit for Children: Progress and Challenges* Kampala: Africa Wide Movement for Children, 2012, p. 43.

2323 *Ibid*.

2324 As amended by Decree No. 3 of 1974.

2325 Foundation for Human Rights Initiative, op, cit, p. 8.

2326 UNICEF 2012 *State of the World's Children* report. Available online at http://www.unicef.org/esaro/5480_birth_registration.html (Accessed on 13 June 2013).

2327 Africa Wide Movement for Children, op. cit, p. 45.

2328 Foundation for Human Rights Initiative, op, cit.

There are many factors behind the low rate of birth registration in Uganda,[2329] including bureaucracy, lack of resources and 'the fact that most of rural births take place away from medical facilities, very few births are actually registered.'[2330] In addition, the low birth registration rate in Uganda is attributed to inaccessible registration services, prohibitive registration fees and lack of motivation on the part of parents or guardians to register their children.[2331] These factors are compounded by the sheer lack of a comprehensive policy framework 'that is supported by adequate financing and political will', which 'constitutes a major impediment to a sustainable birth and death registration programme in Uganda.'[2332]

However, a number of programmes have been initiated by the Ugandan Government (in collaboration with various stakeholders, including UNICEF and Plan International) to accelerate birth registration. Significantly, in 2011, the Uganda Registration Services Bureau (URSB), with support from Uganda Telecom Limited and UNICEF, launched the Mobile Vital Record System (Mobile VRS). Through the Mobile VRS it is expected that 'the system will enable authorized officials to send details of a new-born baby or a dead individual as a text message to the central server at URSB offices in Kampala.'[2333] Subsequently, this system 'is expected to end inefficiencies associated with the current paper system by reducing the registration process from seven days to just hours.'[2334] In the long run, the project is expected to increase birth registration for children below five years from the currently estimated 21% to about 80% by 2014.[2335]

Due to low rate of birth registration in Uganda, the police and the court use different methods of determining age of a child for the purposes of establishing whether or not a child falls within the MACR. These methods include contact the child's parents/guardians, or in case of street children who do not have parents/guardians available, reasoning and appearance.[2336] The consequence of this anomaly is better explained by FHRI: 'In the process, it is inevitable that some children will be charged as adults especially as handling of juvenile offenders pose additional administrative challenges for the police.'[2337]

17.4.2 Age Determination and Status of Child Offenders

Age determination of a child offender is undertaken by the court under Sections 107 and 108 of the Ugandan Children Act. Under Section 107(1), it is explicitly stated that where a person, whether charged with an offence or not, 'is brought before any court otherwise than for the purpose of giving evidence and it appears to the court that he or she is under eighteen years of age, the court shall make an inquiry as to the age of

2329 Low birth registration is not a problem peculiar to Uganda only, but also rampant in all Sub-Saharan African countries. The Africa Wide Movement for Children estimates that approximately 62% of children below five years are not registered at birth in Sub-Saharan Africa, with the most affected areas being rural ones 'where civil status centres are almost non-existent or too far away.' Africa Wide Movement for Children, op. cit, p. 44.

2330 Foundation for Human Rights Initiative, op, cit, p. 8.

2331 Africa Wide Movement for Children, op. cit, p. 45.

2332 *Ibid*.

2333 *Ibid*, p. 46.

2334 *Ibid*.

2335 *Ibid*.

2336 Foundation for Human Rights Initiative, op, cit.

2337 *Ibid*.

that person.' By virtue of Article 107(2), the Ugandan Children Act requires the court, in making such an inquiry, to consider any evidence, including medical substantiation, which can help it to ascertain the age of a child. Under Section 108, the Children Act clearly states that a certificate signed by a medical officer 'as to the age of a person under eighteen years of age shall be evidence of that age.'

Where the court has made a finding as to the actual age of a person before it, such presumption of age by the court is taken as conclusive evidence of the age of that person. In terms of Section 108(1), an order or judgment of the court 'shall not be invalidated by any subsequent proof that the age of that person has not been correctly stated to the court.' In that case, the age presumed or declared by the court 'to be the age of that person shall be deemed to be that person's true age for the purposes of the proceedings' before the court.

17.5 Detention of Child Offenders

In terms of Article 37(b) of the CRC, a child is not to be deprived of his or her liberty unlawfully or arbitrarily. Where it is necessary to detain a child, detention or imprisonment of a child 'shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.' In compliance with this provision, Section 94(4) of the Ugandan Children Act explicitly provides that:

> (4) Detention[2338] shall be a matter of last resort and shall only be made after careful consideration and after all other reasonable alternatives have been tried and where the gravity of the offence warrants the order.

In its General Comment No. 10 on "Children's Rights in Juvenile Justice", the CROC has emphasized that States should make available an effective package of alternatives to pre-trial detention. This is because of the fact that the use of pre-trial detention as a form of punishment 'violates the presumption of innocence. The duration of pre-trial detention should be limited in law and subject to regular review.'[2339]

As in many jurisdictions, the detention of a child offender in Uganda takes place at two stages: during pre-trial procedure and at the trial. The detention procedure is set out in Section 91 of the Ugandan Children Act. According to Section 91(1) of the Children Act:

> (1) Where a child is not released on bail, the court may make an order remanding or committing him or her in custody in a remand home[2340] to be named in the order, situated in the same area as the court making the order.

2338 According to Section 94(2) of the Ugandan Children Act, "detention" means placement in a centre 'designated for that purpose by the Minister in such circumstances and with such conditions as may be recommended to the court by the probation and social welfare officer.'

2339 United Nations Children's Fund, *Implementation Handbook for the Convention on the Rights of the Child* Geneva: UNICEF Regional Office for Europe, 2007, p. 558.

2340 Under Section 91(8), the Ugandan Children Act provides that: 'Pending the establishment of remand homes, the Minister may declare any establishment as a remand home.' Currently, there are five functional Remand Homes in Uganda – Guru, Fort Portal, Mbale, Naguru, and Rukukuru. See particularly Foundation for Human Rights Initiative, op. cit, p. 15.

However, the law requires that whenever possible, the court 'shall consider alternatives to remand such as close supervision or placement with a fit person determined by the court on the recommendation of a probation and social welfare officer.'[2341]

Where there is no remand home within a reasonable distance of the court, the court 'shall make an order as to the detention of the child in a place of safe custody as it deems fit.'[2342] In this context, a "place of safe custody" is a place which 'the court considers fit to provide good care for the child and assures that the child shall be brought to court when required and shall not associate with any adult detainee.'[2343] The local government council is obliged to provide an appropriate place of custody; and before making an order remanding or committing a child in custody, the court must ascertain that there is a place readily available.[2344]

In compliance with the principle that the child should be detained for the shortest appropriate period of time, Section 91(5) of the Ugandan Children Act sets out time limit within which a child is to be detained. In particular, it requires that remanding a child in custody shall not exceed six months in the case of an offence punishable by death;[2345] or three months in the case of any other offence.[2346] This provision is given further elaboration in Section 94(1)(g), which empowers the Family and Children Court (FCC) to make an order, where the charges have been admitted or proved against a child, for:

> [The] detention for a maximum of three months for a child under sixteen years of age and a maximum of twelve months for a child above sixteen years of age and in the case of an offence punishable by death, three years in respect of any child.

Under Section 94(3), the Children Act requires that where a child has been remanded in custody prior to an order of detention being made in respect of the child, the period spent on remand shall be taken into consideration when making the order.

In conformity with the principle enshrined in the ACRWC and CRC, both Article 34(6) 1995 Constitution of the Republic of Uganda and Section 91(6) of the Ugandan Children Act prohibit remanding a child in custody in an adult prison.[2347] The Foundation for Human Rights Initiative (FHRI) has provided the rationale for this prohibition thus: 'in all decisions taken within the context of the administration of juvenile justice, the best interests of the child shall be of paramount concern, and juvenile justice is aimed primarily at the rehabilitation of the offender.'[2348]

It should be noted that, despite the foregoing statutory requirements for the detention of child offenders, there is a perennial challenge of lack of facilities for placing children in detention. Consequently, in most incidents children are placed in detention facilities together with adults.[2349] This is also aggravated by the lack of structured diversion programmes.[2350] It has been noted that in Uganda there are few

2341 *Ibid*, Section 91(9).

2342 *Ibid*, Section 91(2).

2343 *Ibid*, Section 91(3).

2344 *Ibid*, Section 91(4).

2345 *Ibid*, Section 91(5)(a).

2346 *Ibid*, Section 91(5)(b).

2347 Foundation for Human Rights Initiative, op, cit, p. 3.

2348 *Ibid*.

2349 *Ibid*, p. 9.

2350 *Ibid*.

diversion initiatives that are run by civil society organisations (CSO), such as Save the Children.[2351] The major challenge with these CSO-backed diversion programmes is sustainability. In its survey on this matter, FHRI notes that such kind of initiatives do not receive government support; consequent to which they collapse in the event of lack of donor funding.[2352]

Article 23 of the Ugandan Constitution prohibits the deprivation of personal liberty, except in, *inter alia*, bringing such person before the court upon reasonable suspicion that that person has committed or is about to commit a criminal offence under the laws of Uganda.[2353] However, wherever possible such person should be admitted to bail. Bail of a child suspected of committing an offence is set out in Section 90 of the Ugandan Children Act. According to sub-section (1) of Section 90:

> (1) Where a child appears before a court charged with any offence, the magistrate or person presiding over the court shall inquire into the case and unless there is a serious danger to the child, release the child on bail—
>
> (a) on a court bond on the child's own recognisance;
>
> (b) with sureties, preferably the child's parents or guardians who shall be bound on a court bond, not cash.

Where bail is not granted, the court 'shall record the reasons for refusal and inform the applicant of his or her right to apply for bail to a chief magistrate's court or to the High Court.'[2354]

17.6 Access to Legal Representation

According to Article 40(2)(b)(ii) of the CRC, States Parties are obliged to ensure that a child has legal or other appropriate assistance in the preparation and presentation of his or her defence. This provision forms the basis upon which the child's right to legal representation is founded. Under Section 16(1)(e) of the Ugandan Children Act, the child has a right to legal representation. In addition, whenever possible, the parents or guardians of the child shall be present in the proceedings involving their child.[2355] Both in principle and practice, a Probation and Social Welfare Officer has a duty to also escort a child detained at a remand home to the court for hearing.[2356]

The Government may only provide legal assistance to a child who is charged with a capital offence once the case is committed to the High Court for hearing.[2357] This implies that children charged with non-capital or petty offences do not receive legal assistance from the Government; whereby such assistance is provided by non-state actors.[2358] One of such non-state actors is the Legal Aid Clinic (LAC) at the Law Development Centre, which provides its services at the Naguru Remand Home. It

2351 *Ibid*. Whereas Save the Children Fund runs diversion programmes in Gulu and Kasese, in Nakawa, Kawempe and Makindye divisions diversion programmes are run in partnership with Legal Aid Clinic.

2352 Foundation for Human Rights Initiative, op, cit, p. 9.

2353 Article 23(1)(c) of the Ugandan Constitution.

2354 Section 90 of the Ugandan Children Act.

2355 *Ibid*, Section 16(1)(2)(d).

2356 *Ibid*, Section 16(2)(c). See also Foundation for Human Rights Initiatives, op. cit, p. 10.

2357 Foundation for Human Rights Initiatives, *Ibid*.

2358 *Ibid*.

also trains "fit persons" to act as facilitators for mediation where cases are diverted from the formal criminal justice system.[2359]

Although the provision of legal aid services by non-state actors to juveniles accused of committing criminal offences enhances access to justice for such juveniles, the voluntary legal aid providers in Uganda face a number of hurdles. One of such hurdles is the perennial lack of sustainable funding to enable them to continue providing legal aid to juveniles even after the end of donor funded projects. Besides, these voluntary legal aid providers do not have wider geographical presence in all parts of the country, which means those children in conflict with the law located in areas where there are no such legal aid services do not access these services.[2360]

17.7 The Rights of Children Incarcerated with their Parents in Uganda

Although there is no specific provision in the Ugandan penal and child laws to regulate the incarceration of parents with their children, children are quite often held in remand and prison facilities with their parents who are accused or convicted of infringing the law. A prison survey conducted by the Foundation for Human Rights Initiative (FHRI) has revealed that children as young as below three years are placed in carceral institutions with their mothers. For instance, FHRI's visit to Luzira Prison found out that there were 21 children 'who included those born in prison and those brought to prison with their mothers.'[2361]

As FHRI notes, Luzira Women's Prison is one of the best-equipped female prisons in Uganda with a Day Care Centre catering for children who are in prison with their mothers. In contrast, at Guru Prison, FHRI found five babies some over three years in a prison where there are no facilities for babies and young children placed there with their convicted mothers. To mitigate this situation, the Guru Prison authorities have devised an alternative to this anomaly where elderly inmates do look after the babies and children while their mothers are away on routine prison activities.[2362]

17.8 Sentencing

The Ugandan Children Act explicitly sets out principles and procedures in sentencing of children found to have infringed the penal law. As considered below, there are two bodies vested with the powers to sentence child offenders under the Children Act: the Family and Children Court and the Village Executive Committee.

17.8.1 Sentencing Powers of the Family and Children Court

The disposition of criminal cases facing children in the FCC takes place in a number of ways. In disposing of criminal charges facing children, the FCC is obliged to consider a number of minimum values: first, detention of a child 'shall be a matter of last resort and shall only be made after careful consideration and after all other reasonable alternatives have been tried and where the gravity of the offence warrants

2359 *Ibid*, pp. 10-11.

2360 *Ibid*, p. 11.

2361 Foundation for Human Rights Initiative, Op. cit, p. 12.

2362 *Ibid*, p. 13.

the order.'[2363] Second, before making a detention order, the court must be satisfied that a suitable place is readily available.[2364] Third, no child shall be detained in an adult prison.[2365] Fourth, no child 'shall be subject to corporal punishment.'[2366] Fifth, in terms of paragraph 2 of the First Schedule to the Ugandan Children Act, in all matters relating to a child, particularly before a court of law, 'regard shall be had to the general principle that any delay in determining the question is likely to be prejudicial to the welfare of the child.'

In determining any question relating to circumstances set out in the fifth minimum standard above, the court or any other person shall have regard, in particular, to:

(a) the ascertainable wishes and feelings of the child concerned considered in the light of his or her age and understanding;[2367]

(b) the child's physical, emotional and educational needs;[2368]

(c) the likely effects of any changes in the child's circumstances;[2369]

(d) the child's age, sex, background and any other circumstances relevant in the matter;[2370]

(e) any harm that the child has suffered or is at the risk of suffering;[2371]

(f) where relevant, the capacity of the child's parents, guardians or others involved in the care of the child in meeting his or her needs.[2372]

Procedurally, the order under which a child is committed to a detention centre 'shall be delivered with the child to the person in charge of the detention centre and shall be sufficient authority for the child's detention in accordance with the terms of the order.'[2373] It should be noted that, a child in respect of whom a detention order is made 'shall, while detained under the order and while being conveyed to and from the detention centre, be deemed to be in legal custody.'[2374]

In principle, the FCC has the power to make an array of orders where the charges have been admitted or proved against a child: it may order for absolute discharge[2375] or caution the child;[2376] order for conditional discharge of the child for not more than twelve months;[2377] or binding the child over to be of good behaviour for a maximum of twelve months.[2378] The FCC may also order for compensation, restitution or fine,

2363 Section 94(4) of the Ugandan Children Act.
2364 *Ibid*, Section 94(5).
2365 *Ibid*, Section 94(6).
2366 *Ibid*, Section 94(9).
2367 Paragraph 3(a) of the First Schedule to the Ugandan Children Act.
2368 *Ibid*, paragraph 3(b).
2369 *Ibid*, paragraph 3(c).
2370 *Ibid*, paragraph 3(d).
2371 *Ibid*, paragraph 3(e).
2372 *Ibid*, paragraph 3(f).
2373 *Ibid*, Section 94(7).
2374 *Ibid*, Section 94(8).
2375 *Ibid*, Section 94(1)(a).
2376 *Ibid*, Section 94(1)(b).
2377 *Ibid*, Section 94(1)(c).
2378 *Ibid*, Section 94(1)(d).

taking into consideration the means of the child so far as they are known to the court; but an order of detention shall not be made in default of payment of a fine.[2379]

In addition, the FCC may issue a probation order in accordance with the Probation Act for not more than twelve months, 'with such conditions as may be included as recommended by the probation and social welfare officer; but a probation order shall not require a child to reside in a remand home.'[2380] Further, the FCC may issue an order for detention of the child for a maximum of three months for a child under sixteen years of age and a maximum of twelve months for a child above sixteen years of age and 'in the case of an offence punishable by death, three years in respect of any child.'[2381] It should be noted that where a child has been remanded in custody prior to an order of detention being made in respect of him or her, the period spent on remand must be taken into consideration when making the order.[2382]

17.8.2 Sentencing Powers of the Village Executive Committee Courts

In the Ugandan administrative and governance set up, a village executive committee discharges an array of functions at the village level, including presiding over petty civil and criminal cases.[2383] In respect of criminal cases facing a child, the village executive committee court has the criminal jurisdiction set out in the Third Schedule to the Ugandan Children Act in a case involving a child.[2384] In this context, the village executive committee court is the court of first instance in respect of the criminal offences referred to above involving children.[2385]

The sentencing powers of the village executive committee court are well spelt out in the Ugandan Children Act. Notwithstanding any penalty prescribed by the Ugandan Penal Code Act in respect of the offences set out in the Third Schedule to the Children Act, the village executive committee court may make an order for an assortment of reliefs in respect of a child against whom the offence is proved.[2386] These orders range from reconciliation;[2387] compensation;[2388] restitution;[2389] apology; to caution.[2390]

In addition to the foregoing reliefs, the village executive committee court may make a guidance order 'under which the child shall be required to submit himself or herself to the guidance, supervision, advice and assistance of a person designated by

2379 *Ibid*, Section 94(1)(e).

2380 *Ibid*, Section 94(1)(f).

2381 *Ibid*, Section 94(1)(g).

2382 *Ibid*, Section 94(3).

2383 *Ibid*, Section 92(1) and (2).

2384 *Ibid*, Section 92(2).

2385 *Ibid*, Section 92(3). Under Section 92(8) of the Children Act, proceedings in respect of a child appearing before an executive committee court 'shall be in accordance with the procedure laid down by the Executive Committees (Judicial Powers) Act, except that the court shall have due regard to provisions set out in Section 16(1)(b), (c), (d) and (f) of this Act.'

2386 *Ibid*, Section 94(4).

2387 *Ibid*, Section 94(a).

2388 *Ibid*, Section 94(b).

2389 *Ibid*, Section 94(c).

2390 *Ibid*, Section 94(d).

the court.'[2391] Such guidance order must be for a maximum period of six months.[2392] In addition, the executive committee court 'shall not make an order remanding a child in custody in respect of any child appearing before the court.'[2393]

17.9 Rehabilitation of Juvenile Offenders

One of the main purposes of a functioning juvenile justice system is the rehabilitation of child offenders where they are found to have infringed the penal law. Like in Tanzania where there is one rehabilitation centre – i.e. Irambo Approved School – in Uganda, there is one rehabilitation facility. The Kampiringisa National Rehabilitation Centre was established in 1952 'as a boys' rehabilitation centre catering for delinquent children and juvenile offenders.'[2394] Initially, the centre catered for boys aged between 6 and 16 years; but in 1996, following the enactment of the Children Act and the closure of the Fort Portal Girls Centre, the Kampiringisa National Rehabilitation Centre was transformed[2395] 'into a rehabilitation centre for children, both boys and girls, who are in conflict with the law.'[2396]

17.9.1 Role of the National Rehabilitation Centre in the Placement of Juvenile Offenders

In 2002 the Ugandan Government further made changes to the institutional set up of the Kampiringisa National Rehabilitation Centre. It added to it another role: acting as a transition centre for children in need of care and protection, in addition to those in conflict with the law. This followed a move initiated by the Ministry of Gender, Labour and Social Development that sought to decongest the streets of Kampala by taking street children to the Centre. This move was intended to ensure that street children would be kept at the Centre for three months[2397] pending resettlement with their families.[2398]

In practice, parents have been referring children they deem truant to the Centre even in the absence of a court order finding them to be guilty of infringing the penal law. There is yet no prescribed procedure for a parent to refer his or her child to the Centre. However, the practice is for the parent to leave the child at the Centre for the period he or she desires. In principle, this practice to be repugnant to the principles enshrined in Articles 37 and 40 of the CRC and Article 17 of the ACRWC. A survey

2391 *Ibid*, Section 92(5).

2392 *Ibid*, Section 92(6).

2393 *Ibid*, Section 92(7).

2394 Foundation for Human Rights Initiatives, op. cit, p. 21. Section 96(1) of the Ugandan Children Act obliges the Minister to 'establish a National Rehabilitation Centre for Children and such other centres as he or she may deem necessary which shall each be a place for the detention, rehabilitation and retraining of children committed there.'

2395 Section 96(2) of the Children Act provides that: 'Pending the establishment of the National Rehabilitation Centre for Children, the school known as Kampiringisa Boys' Approved School shall be used as the detention centre.'

2396 Foundation for Human Rights Initiative, op. cit. In terms of Section 96(3) of the Children Act, the Kampiringisa National rehabilitation Centre 'shall have a separate wing for girls.'

2397 Section 29(1) of the Ugandan Children Act provides that: 'A care order shall be for a maximum period of three years or until the child reaches the age of eighteen years, whichever is the shorter.'

2398 Foundation for Human Rights Initiative, op. cit.

conducted by the FHRI has found this practice to be abusive of the process and the Centre by parents 'who simply do not want to or cannot take care of their children.'[2399]

In addition, children found by the court to have infringed the penal law are mixed with those who are brought at the Centre in need of care and protection. A survey conducted recently by the FHRI at the Centre reveals that, except during the sleeping hours, in all their daily activities, children in need of care and protection are mixed with those who have been convicted, without the presence of relevant rehabilitation programmes for the two distinct categories of children at the Centre.[2400] Impliedly, children in need of care and protection are compelled to live and behave as if they are in need of rehabilitation after being found to have infringed the penal law, which is inappropriate given their situation.

17.9.2 Procedure and Purpose of Placing Children in the Rehabilitation Centre

To the contrary, the referral of children in need of care and protection to the Kampiringisa National Rehabilitation Centre has clear procedure. Admission of such children has to be administered through a probation officer upon notification by the concerned parent of the unruly or truant behaviour of the child. Upon such notification, the probation officer has to refer the matter to the magistrate for a care and protection order, which has the effect of committing the child to the Centre.[2401] Under Section 28 of the Ugandan Children Act, the purposes of a care order are first, 'to remove a child from a situation where he or she is suffering or likely to suffer significant harm';[2402] and, second, 'to assist the child and those with whom he or she was living or wishes to live to examine the circumstances that have led to the making of the order and to take steps to resolve or ameliorate the problem so as to ensure the child's return to the community.'[2403]

17.9.3 Duty of the Probation and Social Welfare in Respect of Children in Rehabilitation

The duty to enforce the care and protection order is vested in the probation and social welfare officer who applies for the order. In addition, Section 32 of the Children Act vests special duties on the probation and social welfare officer in relation to the care order,[2404] before and after the termination of the care order, which are: first, to work with the parents, guardians or relatives, to whom the child is expected to return after the termination of the care order.[2405] Second, to provide to the child and family counselling, before, during and after the child's return and 'gaining the assistance of those in the community who can help in the process of resolving the problems which

2399 *Ibid*, p. 22.

2400 *Ibid*.

2401 *See* particularly Section 19(b) and Section 27 of the Ugandan Children Act (providing, *inter alia*, that on the application by the probation and social welfare officer or an authorised person, a family and children court may make a care order or interim care order, placing a child in the care of the warden of an approved home).

2402 *Ibid*, Section 28(a).

2403 *Ibid*, Section 28(b).

2404 *Ibid*, Section 30.

2405 *Ibid*, Section 32(1).

caused the care order to be made.'[2406] Third, in carrying out his or her duties under this section, the probation and social welfare officer shall bear in mind the wishes of the child.[2407]

Fourth, when a child is placed with a foster family, 'it shall be the responsibility of the probation and social welfare officer to communicate with the guardians or parents of the child, to inform them of the progress of the child and to arrange a trial period for the child to be at home as soon as it is appropriate.'[2408] Fifth, the probation and social welfare officer 'shall visit the child during the trial period at home and make plans for the future of the child in consultation with the foster parents.'[2409]

17.9.4 Parental Responsibility for Children in the Rehabilitation Centre

The head or the warden of the National Rehabilitation Centre with whom the child is placed has parental responsibilities for the child while the child is with him or her.[2410] While a child is placed at the Centre, his or her contact with parents, relatives and friends should be encouraged unless it is not in the best interests of the child.[2411] It is the duty of the head or warden of the Centre with whom the child is placed to ensure that the child's development while in the approved home or with a foster family, particularly his or her health and education, is attended to.[2412] In addition, it is the responsibility of the warden to communicate with the parents or guardians of the child, to inform them of the child's progress and to arrange through the probation and social welfare officer for a trial return home by the child as soon as it is appropriate.[2413]

In respect of provision of education to children housed at the Centre, a recent survey by the FHRI notes that only children whose parents or guardians/relatives are capable of paying school fees may attend local primary and secondary schools.[2414] The rest do not attend schooling. Surprisingly, the FHRI notes that:

> Despite the government's Universal Primary Education program (UPE), the nominal fees for scholastic materials and uniforms make it impossible for Kampiringisa Rehabilitation Centre to send these children to the local schools.[2415]

Unlike the Irambo Approved School in Tanzania, the Kampiringisa National Rehabilitation Centre does not have its own primary school or a vocational training centre for the children under its custody. This aggravates the problem of lack of education opportunities for the children placed at the Centre.

Although the Penal Code (Amendment) Act (2007) prohibits corporal punishment in the juvenile justice system,[2416] the FHRI survey at the Kampiringisa National

2406 *Ibid*, Section 32(2).

2407 *Ibid*, Section 32(3).

2408 *Ibid*, Section 32(4).

2409 *Ibid*, Section 32(5).

2410 *Ibid*, Section 31(1).

2411 *Ibid*, Section 31(2).

2412 *Ibid*, Section 31(3).

2413 *Ibid*, Section 31(4).

2414 Foundation for Human Rights Initiative, op. cit, p. 23. The FHRI survey notes that, in certain exceptional cases, members of staff of the Centre sometimes pay school fees for certain children where their parents or sponsors have not been able to do so.

2415 *Ibid*, p. 25.

2416 Similarly, the Ugandan Prisons Act (2006) outlaws corporal punishment in all prisons in Uganda.

Rehabilitation Centre has found several 'allegations of corporal punishment being meted out on children.'[2417] Another form of punishment on truant children the FHRI found to be practised at the Centre is the placement of such children in the "*batanga* cell". This is a dark cell 'where children could be detained for up to a week and given one meal a day.'[2418]

Therefore, the foregoing practice implies that the Kampiringisa National Rehabilitation Centre functions as a detention centre, not as a correctional and rehabilitation centre for children found to have infringed the penal law. Unlike its Tanzanian equivalent (the Irambo Approved School), the Centre seems to be prohibitive of children to attend schooling and it practices punishment akin to what is practised on conventional penitentiary facilities. This is contrary to the spirit enshrined in the provisions of Articles 37 and 40 of the CRC, and Article 17 of the ACRWC, all of which require that children who have been found to have infringed the penal law should be placed in rehabilitation facilities, where they are to continue to receive their education and grow up in dignity and improve their potential and talents.

17.10 Diversion

There are clear provisions in the Ugandan Children Act providing for diversion of children away from the formal criminal justice process. But diversion may be implied in provisions allowing community participation in dealing with offending children. Unlike the Kenyan and Tanzanian child laws, the Ugandan Children Act makes provision for community participation and affords 'prominent role to village courts [...] in the adjudication of some child offending cases.'[2419] In particular, Section 93 of the Ugandan Children Act vests power on the Family and Children Court (FCC) to hear and determine all criminal charges against children; except any offence punishable by death;[2420] and any offence for which a child is jointly charged with a person over eighteen years of age.[2421] According to Odongo:

> The aim of this approach is to channel child offenders away from the formal criminal justice system. Besides, this will ensure that there is wide scope for community-based diversion programmes which allow the child to remain in his or her community. These premises are further explained by the fact that the local courts are legislatively made the courts of first instance in relation to minor offences.[2422]

Therefore, the decision to refer child offenders to these courts 'does not hinge on the exercise of prosecutorial discretion.'[2423]

Nonetheless, the Ugandan Children Act contains explicit provisions for the possibility of post-trial diversion through an array of alternative sentences. For instance, instead of committing a child to detention upon a charge as proved against a child, the

2417 *Ibid*.

2418 *Ibid*, p. 26.

2419 Odongo, G.O., 'The Impact of International Law on Children's Rights on Juvenile Justice Law Reform in the African Context', in Sloth-Nielsen, J. (Edition), *Children's Rights on Africa: A Legal Perspective* Hampshire: Ashgate Publishing Limited, 2008, pp. 147-164, p. 155.

2420 Section 93(a) of the Ugandan Children Act.

2421 *Ibid*, Section 93(b).

2422 Odongo, G.O., 'The Impact of International Law on Children's Rights on Juvenile Justice Law Reform in the African Context', op. cit.

2423 *Ibid*.

FCC may order for absolute discharge[2424] or caution the child;[2425] order for conditional discharge of the child for not more than twelve months;[2426] or binding the child over to be of good behaviour for a maximum of twelve months.[2427] The FCC may also order for compensation, restitution or fine, taking into consideration the means of the child so far as they are known to the court; but an order of detention shall not be made in default of payment of a fine.[2428]

2424 *Ibid*, Section 94(1)(a).
2425 *Ibid*, Section 94(1)(b).
2426 *Ibid*, Section 94(1)(c).
2427 *Ibid*, Section 94(1)(d).
2428 *Ibid*, Section 94(1)(e).

Chapter Eighteen

Protection of the Rights of Children in Conflict with the Law in Kenya

18.0 Introduction

As we noted in Chapter Five, soon after the Government of Kenya ratified the CRC in 1990 it embarked on a child law reform process. The resultant product of this law reform process was the Children's Act in 2001, which was passed into law in March 2002.[2429] In principle, this law 'seeks to domesticate the provisions of the CRC and the ACRWC'[2430] by advancing 'Kenya's compliance with its obligations under [the] CRC and the African Children's Charter as regards juvenile justice.'[2431] The Children Act repealed and replaced, *inter alia*, the Children and Young Persons Act[2432] in the context of Section 200(1) of, and the Seventh Schedule thereto.

Issues pertaining to the rights of children in conflict with the law in Kenya are canvassed in Part XIII of the Children Act, which provides for the rights applicable to ensure 'due process for alleged child offenders and array of alternative sentences which a court has at its disposal to deal with a child found by a court to have committed a crime.'[2433] These issues are considered at length in this Chapter.

18.1 Criminal Responsibility and Minimum Age of Criminal Responsibility

As with all common law jurisdictions, such as Tanzania, Uganda and UK, the Kenyan criminal law has been embracing the common law rule, 'which regarded children under the age of seven as incapable of knowing the difference between right and wrong and therefore not having the capacity to commit crime – a doctrine referred to as *doli incapax* ('incapable of evil').'[2434] As pointed out in Chapter Sixteen, an additional component of this rule was a rebuttable presumption that 'children under the age of fourteen were *doli incapax* in the sense that a case against an alleged child offender under 14 years of age would not proceed until the prosecution proves beyond reasonable doubt that the defendant was capable of appreciating the difference between right and wrong.'[2435]

2429 Odongo, G.O., 'The Impact of International Law on Children's Rights on Juvenile Justice Law Reform in the African Context', in Sloth-Nielsen, J. (Edition), *Children's Rights in Africa: A Legal Perspective* Hampshire: Ashgate Publishing Ltd., 2008, pp. 147-164, p. 149.

2430 African Child Policy Forum, *Harmonisation of Children's Laws in Eastern and Southern Africa: Country Briefs* Addis Ababa: African Child Policy Forum, 2012, p. 66.

2431 Odongo, G.O., 'Caught between Progress, Stagnation and a Reversal of Some Gains: Reflections on Kenya's Record in Implementing Children's Rights Norms' *African Human Rights Law Journal* Vol. 12 No. 1, 2012, pp. 111-141, pp. 127 & 128.

2432 Cap. 141 of the Kenyan Laws.

2433 Odongo, G.O., 'Caught between Progress, Stagnation and a Reversal of Some Gains: Reflections on Kenya's Record in Implementing Children's Rights Norms', op. cit, p. 127.

2434 Odongo, G.O., 'The Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context.' LL.D. Thesis, University of Western Cape, 2005, p. 153.

2435 *Ibid*, note 75 (arguing that: 'While the age of 14 has been identified as having been linked with the age of puberty in Roman law, reasons for the choice of the age of 7 as the minimum age of criminal capacity in this common law rule remain unclear').

18.1.1 The Minimum Age of Criminal Responsibility

Set in the foregoing common law rule as to the minimum age of criminal responsibility (MACR), the Kenyan legislation on this issue 'modified the common law rule reducing the upper limit of the presumption from 14 to 12 while increasing the minimum age of criminal capacity from 7 to 8 years.'[2436] In addition to this common law rule, is the provision in Section 14 of the Kenyan Penal Code,[2437] which provides for the age of 12 years as the minimum age of criminal capacity for boys accused of sexual offences.

Odongo observes that the arguments that motivated these modifications to the common law rule of *doli incapax*[2438] are not clear, but 'the increase in the Kenyan age of criminal capacity from 7 to 8 years may be attributed to an embrace of a similar raise in the age of criminal capacity in English legislation in 1932,[2439] the blue print of Kenya's juvenile justice legislation before recent child law reforms.'[2440] According to him, the recent post-CRC reform 'endeavours [...] have engaged with the issue of whether to reform this common law doctrine.'[2441]

Therefore, it is to be noted that in Kenya, while the upper limit in the age of children in the juvenile justice system is eighteen years as per the ACRWC and the CRC,[2442] the Children Act has retained the age of 8 years as the minimum age of criminal capacity with the *doli incapax* presumption applying for children between this age and the age of 12.[2443] Interestingly:

> In Kenya's case the retention of the doctrine in its original form (with 8 as the minimum age) is all the more glaring due to the fact that the eventual enactment of the new child legislation by Parliament took place well after the country's Initial Report under the CRC had been examined by the CROC. In its Concluding Observations[2444] the Committee had observed that "the minimum age of eight years is too low".[2445]

However, the CROC had 'shied away from commenting on the rebuttable presumption of *doli incapax*.'[2446] This attitude of the CROC may be attributed to the fact that at the time it considered the Kenyan Initial Report under the CRC, international law was

2436 *Ibid*, p. 154.

2437 Chapter 63 of the Laws of Kenya.

2438 In England the *doli incapax* rule was abolished by the 1998 Crime and Disorder Act, which marked a radical reorganisation of the English juvenile justice system with more emphasis on 'children taking more responsibility for criminal actions' as its clarion call. Thus, Section 34 (which came into effect in September 1998) 'abolished the *doli incapax* presumption leaving England with one of the lowest ages of criminal responsibility in the world. The CROC has been critical of the abolition coupled with the low age of criminal responsibility. See CROC, 'Concluding Observations: UK', para 62(a).' Odongo, op. cit, p. 165 (note 104).

2439 According to Odongo, the UK Children and Young Persons Act (1932), 'succeeded by a host of legislation culminating in the Children's Act, 1989 which, however, for the first time excluded juvenile justice issues and dealt exclusively with child care and protection. The Crime and Disorder Act, 1998 […] was later to make provision for juvenile justice issues and this finally abolished the *doli incapax* rule while adopting 10 as the minimum age of criminal capacity.' Odongo, *Ibid*, p. 154 (noted 78).

2440 *Ibid*, p. 154.

2441 *Ibid*.

2442 Odongo, G.O., 'The Impact of International Law on Children's Rights on Juvenile Justice Law Reform in the African Context', in Sloth-Nielsen, J. (Edition), *Children's Rights in Africa: A Legal Perspective* Hampshire: Ashgate Publishing Ltd., 2008, pp. 147-164, p. 149.

2443 *Ibid*, p. 150. *See* also Odongo, G.O., 'The Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context', op. cit, p. 168.

2444 CROC *Concluding Observations:* Kenya, CRC/C/15/Add.160 07 November 2001 Para 22.

2445 Odongo, G.O., 'The Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context', op. cit.

2446 *Ibid*.

silent on threshold of the MACR.[2447] This was only resolved by the CROC's General Comment No. 10 (Children's Rights in Juvenile Justice). Released in February 2007, General Comment No. 10 has now suggested that the clear MACR should be 12 years. Hitherto, Article 17(4) of the ACRWC and Article 40(3) of the CRC only required States Parties to establish 'a minimum age below which children shall be presumed not to have the capacity to infringe the penal law.' These provisions, thus, lacked a clear specification of the MACR in international law.

The rationale proffered for the retention of this rule in Kenya is based on motivations for the Kenyan Law Reform Commission's study that 'were rooted in the reform body's interpretation of the CRC obligation in this regard.'[2448] Despite the consultative nature of the Kenyan reform study as noted in Chapter Five, the Law Commission 'did not receive much response on this specific issue and much of its interpretation was by and large predicated on the reform team's own reasoning.'[2449] Accordingly:

> This reasoning mirrored the view expressed in the European Court's judgment in V and T v UK cases […] in which the emphasis is on the procedures and conduct of a trial for children rather than focusing on a specific rule requiring the setting of a minimum age of criminal capacity. Thus, the Law Commission's Report records specific support of the reform team for the operation of the existing rebuttable presumption for children between the age of 8 and 12 and recommends "that their cases be considered exclusively in juvenile courts where they are likely to benefit from the practice of privacy and informal procedures".[2450]

The result of the retention of this rule is that, although the Kenyan Children Act makes detailed provisions for a new juvenile justice system with explicit reference to standards drawing from the CRC, it 'remains silent on the issue of a minimum age of criminal capacity and the *doli incapax* rule however, leaving the position in the Penal Code to hold sway.'[2451] Nevertheless, this position is inconsistent with the provisions of the CRC, the ACRWC and international law.[2452]

However, since 2007 the Kenyan Government has been reviewing the Children Act, through the draft Children's (Amendment) Bill (2008), with a view to strengthening provisions for, *inter alia*, raising the age of criminal responsibility from the current

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2447 Odongo, G.O., 'The Impact of International Law on Children's Rights on Juvenile Justice Law Reform in the African Context', op. cit, p. 149.

2448 Odongo, G.O., 'The Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context', op. cit, p. 171.

2449 *Ibid*.

2450 *Ibid*.

2451 *Ibid*, p. 172.

2452 Interpreting the ICCPR, the United Nations Human Rights Committee (HRC) specifically criticized a similar rule (a minimum age of 8 with the *doli incapax* rule applying until the age of 12) in Sri Lankan law whereby it had an occasion to disapprove certain variations of the common law rule relating to *doli incapax*. In particular, the HRC reacted thus:

> 'The low age of criminal responsibility and the stipulation within the Penal Code by which a child above 8 years of age and under 12 years of age can be held to be criminally responsible on the determination by the judge of the child's maturity of understanding as to the nature and consequence of his or her conduct are matters of profound concern to the Committee […].' Human Rights Committee, *Concluding Observations*: Sri Lanka, (1995) UN doc. CCPR/C/79/Add. 56, para 20.

In its *General Comment No. 17* '(Article 24) Rights of the Child' (35th session, 1989) (at para 4), the Human Rights Committee has expressed that: 'a state cannot absolve itself from obligations under the Covenant regarding persons under the age of 18, notwithstanding that they have reached the age of majority under domestic law.'

low age of 8 to a new age of 12 years.[2453] Despite the CROC urging the Kenyan Government to raise the MACR in its Concluding Observations, to date the MACR in Kenya remains eight years, which is 'a clear violation of [the] CRC and the African Children's Charter.'[2454]

18.1.2 Determination of the Age of Criminal Responsibility

The presumption and determination of age in respect of criminal responsibility in Kenya is undertaken in terms of Section 143 of the Children Act. As such, where a person, whether charged with an offence or not, is brought before any court 'otherwise than for the purpose of giving evidence, and it appears to the court that such person is under eighteen years of age, the Court shall make due inquiry as to the age of that person.'[2455] For that purpose the court 'shall take such evidence, including medical evidence, as it may require.'[2456]

However, an order or judgment of the court 'shall not be invalidated by any subsequent proof that the age of that person has not been correctly stated to the court.'[2457] It is the law that the age presumed or declared by the court to be the age of the person so brought before it 'shall, for the purposes of this Act and of all proceedings thereunder, be deemed to be the true age of the person.'[2458]

In principle, a certificate purporting to be signed by a medical practitioner as to the age of a person under eighteen years of age 'shall be evidence thereof and shall be receivable by a court without proof of signature unless the court otherwise directs.'[2459]

18.2 Arrest of Child Offenders

Under Rule 4(2) of the Child Offenders Rules, where a child is held in police custody the officer in charge of the police station has an obligation, as soon as practicable, to inform the parents or guardians of the child;[2460] or the Director of Children's Services of the arrest.[2461] At the time of any police interview with the child, the police are obliged to make sure that the parent or guardian of the child, or an advocate appointed to represent the child is present.[2462] In the alternative, where a child's parent or guardian cannot immediately be contacted or cannot be contacted at all, the police are obliged to inform a Children's Officer or an authorised officer as soon as possible after the child's arrest so that he can attend the police interview.[2463]

2453 African Child Policy Forum, *Harmonisation of Children's Laws in Eastern and Southern Africa: Country Briefs* op. cit, p. 66.

2454 Odongo, G.O., 'Caught between Progress, Stagnation and a Reversal of Some Gains: Reflections on Kenya's Record in Implementing Children's Rights Norms', op. cit, p. 128 (noting that although the CRC and ACRWC do not specify such an age explicitly, the CROC has recommended the age of 12 as the minimum age 'states should set in this regard' (note 58). *See* specifically CROC, General Comment No. 10: Children's Rights in Juvenile Justice, CRC/C/GC/10, 25 April 2007, paras 32 & 33).

2455 Section 143(1) of Children Act.

2456 *Ibid*.

2457 *Ibid*.

2458 *Ibid*.

2459 *Ibid*, Section 143(2).

2460 Rule 4(2)(a) of the Child Offenders Rules

2461 *Ibid*, Rule 4(2)(b).

2462 Rule 4(3) of the Child Offenders Rules.

2463 Rule 4(4) of the Child Offenders Rules.

18.3 Detention of Child Offenders

In the context of the ACRWC and the CRC, detention of a child in conflict with the law should only be a measure of last resort and for the shortest possible period of time. The Kenyan Constitution (2010) and Children Act have domesticated this principle. According to Article 53(1)(f)(i) of the Kenyan Constitution, a child has the right 'not to be detained, except as a measure of last resort, and where detained, to be held - (i) for the shortest appropriate period of time.' This constitutional guarantee is given further elaboration under Rule 5 of the Child Offenders Rules (Fifth Schedule to the Kenyan Children Act), which requires the police officer to release a child apprehended, unless,

(a) the charge is one of murder or manslaughter or other grave crime; or

(b) it is necessary in the interests of such person to remove him or her from association with any undesirable person; or

(c) such officer has reason to believe that the release of such person would defeat the ends of justice.[2464]

When it is necessary to detain a child in conflict with the law, such child should not be detained in the same facility with adults. This is provided for in Article 53(1(f)(ii) of the Kenyan Constitution as well as in Rule 6(1) of the Child Offenders Rules, which explicitly provides that:

> No child while detained in a police station or while being conveyed to any court, or while waiting to attend in or leave any court shall be detained with or be allowed to associate with any adult who is not a relative of the child.

In ensuring this is achieved, arrangements 'shall be made to detain the child in a separate institution or in a separate part of the police station.'[2465] In addition, a female child shall, while being detained, conveyed or waiting trial as described in paragraph (1) of Rule 6 of the Child Offenders Rules, be under the care of a woman officer.[2466]

In principle, the detention of children who await criminal trial in the court takes place in children's remand homes, which are established under Section 50(1) of the Children Act by the Minister responsible for the administration of this law. In addition, the manager of any government institution other than a prison 'may enter into an agreement for the use of that institution or any part thereof as a children's remand home on such terms as may be agreed between such manager and the Minister.'[2467]

In the context of Section 200(2) of, and paragraph (2) of the Seventh Schedule to, the Kenyan Children Act, the juvenile remand homes established, and the approved schools approved or established as the case may be, under Part V of the repealed Children and Young Persons Act 'shall be deemed to be the children remand homes and approved schools for the purposes of the Act.'

2464 Under Section 57 of the Children Act, the order committing a child to custody in a children's remand home or ordering him to be sent to a rehabilitation school 'shall be sufficient authority for his confinement in that place in accordance with the tenor thereof, […], and a child while confined and while being conveyed to or from a children's remand home or a rehabilitation school to or from a health institution, as the case may be, shall be deemed to be in lawful custody.'

2465 Rule 6(2) of the Child Offenders Rules.

2466 *Ibid*, Rule 6(3).

2467 Section 50(2) of the Children Act.

This guarantee, therefore, entails that a child who is brought before a court and charged with an offence should be released on bail on such terms as the court may deem appropriate.[2468] Where bail is not granted by the Children's Court or any lower court, the child has the right to apply for bail to the High Court.[2469]

However, in practice, the principle that children offenders should only be detained as a matter of last resort and for the shortest possible period of time is not fully adhered to. In a recent survey undertaken by Save the Children, it was found that 85% of children are in police custody or correctional care in Kenya, some of whom had committed no offence.[2470]

18.4 Access to Legal Representation

The Kenyan Children Act guarantees the child's right to legal aid and representation. According to Section 77(1), where a child is brought before a court in proceedings under this Act or any other written law, the court 'may, where the child is unrepresented, order that the child be granted legal representation.' In principle, any expenses incurred in relation to the legal representation of a child under sub-section (1) of Section 77 of the Children Act 'shall be defrayed out of monies provided by Parliament.'[2471]

In addition, where a child is charged with any offence or is for any other reason brought before a court, his parent or guardian may in any case, 'and shall, if he can be found and resides within a reasonable distance, be required to attend at the court before which the case is heard or determined during all stages of the proceedings, unless the court is satisfied that it would be unreasonable to require such attendance.'[2472] In terms of Section 79 of the Children Act, a court before which a child is brought, and especially where that child is not represented by an advocate, 'may appoint a guardian *ad litem* for the purposes of the proceedings in question and to safeguard the interests of the child.'

18.5 Proceedings in the Children's Court

Rule 4(1) of the Child Offenders Rules explicitly provides that where a child is apprehended with or without a warrant on suspicion of having committed a criminal offence he or she shall be brought before the court as soon as practicable. It is the law, therefore, that no child is to be held in custody for a period exceeding twenty four hours from the time of his apprehension, without the leave of the court. All criminal cases facing children in Kenya are processed through in the Children's Courts.[2473] In this part, we examine the procedure and proceedings in the Children's Court.

2468 *Ibid*, Rule 9(1).

2469 *Ibid*, Rule 9(2).

2470 Africa Wide Movement for Children, *An Africa Fit for Children: Progress and Challenges* Kampala: Africa Wide Movement for Children, 2012, p. 54.

2471 Section 77(2) of the Kenyan Children Act.

2472 Rule 8 of the Child Offenders Rules.

2473 In the context of Section 200(2) of, and paragraph (1) of the Seventh Schedule to, the Kenyan Children Act: '1. The juvenile courts established by Section 2 of the Children and Young Persons Act hereinafter referred to as 'the repealed Children and Young Persons Act' shall be deemed to be the Children's Courts for the purposes of the Act.'

18.5.1 Establishment and Jurisdiction of the Children's Court

Section 73 of the Children Act establishes the Children's Courts. These courts are constituted for the purpose of undertaking an array of judicial functions.[2474] First, they have jurisdiction to conduct civil proceedings on matters set out under Parts III, V, VII, VIII, IX, X, XI and XIII of the Children Act.[2475] Second, these courts have powers to hear any charge against a child, other than a charge of murder or a charge in which the child is charged together with a person or persons of or above the age of eighteen years.[2476] Third, they have powers to hear charges against any person accused of an offence under this Act;[2477] and, fourth, they can exercise any other jurisdiction conferred by this or any other written law.[2478]

In respect of the jurisdiction and functioning of the Children's Courts, four issues are to be noted. First, that reference to subordinate courts of any class, in the First Schedule to the Criminal Procedure Code, includes a Children's Court.[2479] Second, the Chief Justice may, by notice in the *Gazette*, appoint a magistrate to preside over cases involving children in respect of any area of the country.[2480] Third, where in the course of any proceedings in a Children's Court it appears to the court that the person charged, or to whom the proceedings relate, is over eighteen years of age, or where in the course of any proceedings in any court other than a Children's Court it appears to the court that the person charged or to whom the proceedings relate, is under eighteen years of age, nothing in this section shall prevent the court, if it thinks fit, from proceeding with the hearing and determination of the case.[2481]

Fourth, where any conviction or sentence made or passed by a court other than a Children's Court is appealed against or is brought before the High Court for confirmation or revision and it appears that the person convicted was at the time of the commission of the offence under eighteen years of age, the High Court 'shall have power to substitute for the conviction a finding of guilty in accordance with Section 196 and substitute for the sentence an order under Section 125(2) of this Act.'[2482]

18.5.2 Power to Remit Cases to the Children's Court

Section 185 of the Children Act empowers a subordinate court, other than a Children's Court, to remit a case to the Children's Court at any stage of the proceedings. There are two main conditions for the remittance to happen: first, where it appears to the court that a child is charged before it with an offence other than murder and is not charged together with a person or persons of or above the age of eighteen years; and,

2474 Under Section 184(1) of the Children Act, it is provided that: 'Notwithstanding the provisions of Parts II and VII of the Criminal Procedure Code, a Children's Court may try a child for any offence except for—
(a) the offence of murder; or
(b) an offence with which the child is charged together with a person or persons of or above the age of eighteen years.'

2475 Section 73(a) of the Children Act.

2476 *Ibid*, Section 73(b).

2477 *Ibid*, Section 73(c).

2478 *Ibid*, Section 73(d).

2479 *Ibid*, Section 73, proviso (i) and Section 184(2).

2480 *Ibid*, Section 73, proviso (ii).

2481 *Ibid*, Section 73, proviso (iii).

2482 *Ibid*, Section 73, proviso (iv).

second, where within the area of a subordinate court's jurisdiction there is established a Children's Court having jurisdiction.[2483] In order to facilitate this kind of remittance of cases involving children to the Children's Courts, the Chief Justice may make any rules or directions to this effect.

However, it should be noted that nothing in sub-section (1) of Section 185 of the Children Act 'shall be construed as preventing a court, if it considers in the circumstances (including the stage reached in the proceedings) that it is proper so to do, from proceeding with the hearing and determination of the charge.'[2484] Where, pursuant to the provisions of Section 184 and the proviso to Section 185(1), a court other than a children's court hears a charge against a child, such court 'shall apply all the provisions of this Act as relate to the safeguards to be accorded a child offender.'[2485]

Another interesting point to note is set out in sub-section (3) of Section 185, which states that:

> (3) No appeal shall lie against an order of remission made under this section, but nothing in this section shall affect any right of appeal against the verdict or finding on which such an order is founded, and if a child has been found guilty by the High Court and his case remitted to a Children's Court for an order under Section 191 of this Act, he may appeal against such findings to the Court of Appeal.

Under the law, it is categorically stated that where in accordance with the provisions of sub-section (1) of this section, a case is remitted to a Children's Court after a finding that the child charged is guilty of the offence, 'the Children's Court to which the case has been remitted may deal with the offender in any way in which it might have dealt with him if he had been tried and found guilty by that court.'[2486]

In addition, the court by which an order remitting a case to a Children's Court is made 'may give such directions as appear to be necessary with respect to the custody of the offender or for his release on bail or bond until he can be brought before the Children's Court.'[2487] Such court shall also cause to be transmitted to the clerk of the Children's Court a certificate 'setting out the nature of the offence and stating the stage reached in the case, and that the case has been remitted for the purposes of being dealt with under this section.'[2488]

18.5.3 The Child's Right to Privacy in the Children's Court

Like the Ugandan Children Act and the Tanzanian Law of the Child Act, the Kenyan Children Act protects the child's right to privacy in any proceedings in court in which he or she is involved.[2489] In this regard, under Section 74 of the Kenyan Children Act, a Children's Court 'shall sit in a different building or room, or at different times, from those in which sittings of courts other than Children's Courts are held.' In addition, this section prohibits members of the public to participate at any sitting of

2483 *Ibid*, Section 185(1).
2484 *Ibid*, Section 185(1), proviso.
2485 *Ibid*, Section 185(5).
2486 *Ibid*, Section 185(2).
2487 *Ibid*, Section 185(4).
2488 *Ibid*.
2489 *Ibid*, Section 186(g).

a Children's Court. However, the following persons may be allowed to participate in such proceedings:

(a) members and officers of the court;[2490]

(b) parties to the case before the court, their advocates and witnesses and other persons directly concerned in the case;[2491]

(c) parents or guardians of any child brought before the court;[2492]

(d) *bona fide* registered representatives of newspapers or news agencies;[2493] or

(e) such other persons as the court may specially authorise to be present.[2494]

The exclusion of members of the general public from participating in proceedings involving a child in the Children's Court enhances a friendly setting of the court in terms of Section 188 of the Children Act.[2495]

Section 76(5) of the Kenyan Children Act explicitly provides further elaboration of the need to preserve the child's right to privacy while his or her fate is being determined by the Children's Court. It provides categorically that:

> (5) In any proceedings concerning a child, whether instituted under this Act or under any written law, a child's name, identity, home or last place of residence, school shall not, nor shall the particulars of the child's parents or relatives, any photograph or any depiction or caricature of the child, be published or revealed, whether in any publication or report (including any law report) or otherwise.

Contravention of the provisions of Section 76(5) is an offence, upon whose conviction a person is rendered liable to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding three months, or to both.

In addition, Section 75 of the Children Act, vests on the court power to prohibit members of the public to participate in any proceedings in relation to an offence against or by a child. This is also the case in any proceedings where there may be any conduct contrary to decency or morality, a person who, in the opinion of the court, is under eighteen years of age 'is called as a witness, the court may direct that all or any persons, not being members or officers of the court, or parties to the case or their advocates, shall be excluded from the court.'

A similar provision is elaborated in Rule 7 of the Child Offenders Rules, which provides that:

> 'Where in any proceedings in relation to an offence against, or any conduct contrary to, decency or morality, a person who, in the opinion of the court is under eighteen years of age is called as a witness, the court may direct that all or any persons, not being members or officers of the court, or parties to the case or their advocates, or persons otherwise directly concerned in the case, shall be excluded from the court during the taking of the evidence of that witness.'

2490 *Ibid*, Section 74(a).

2491 *Ibid*, Section 74(b).

2492 *Ibid*, Section 74(c).

2493 *Ibid*, Section 74(d).

2494 *Ibid*, Section 74(e).

2495 Section 188 of the Children Act provides that: 'A Children's Court shall have a setting that is friendly to the child offender.'

18.5.4 General Principles with Regard to Proceedings in the Children's Court

Section 76 of the Kenyan Children Act lays down a number of general principles to be observed by the court in the determination of any proceedings involving a child offender. First, subject to the provisions of Section 4,[2496] where a court is considering whether or not to make one or more orders under this Act with respect to a child 'it shall not make the order or any other orders unless it considers that doing so would be more beneficial to the welfare of the child than making no order at all.'[2497]

Second, in any proceedings in which an issue on the upbringing of a child arises, the court 'shall have regard to the general principle that any delay in determining the question is likely to be prejudicial to the welfare of the child.'[2498] Third, where the court is considering whether or not to make an order with regard to a child, it shall have particular regard to the following matters:

(a) the ascertainable feelings and wishes of the child concerned with reference to the child's age and understanding;[2499]

(b) the child's physical, emotional and educational needs and in particular, where the child has a disability, the ability of any person or institution to provide any special care or medical attention that may be required for the child;[2500]

(c) the likely effect on the child of any change in circumstances;[2501]

(d) the child's age, sex, religious persuasion and cultural background;[2502]

(e) any harm the child may have suffered, or is at risk of suffering;[2503]

(f) the ability of the parent, or any other person in relation to whom the court considers the question to be relevant, to provide for and care for the child;[2504]

(g) the customs and practices of the community to which the child belongs;[2505]

(h) the child's exposure to, or use of drugs or other psychotropic substances and, in particular, whether the child is addicted to the same, and the ability of any person or institution to provide any special care or medical attention that may be required for the child;[2506]

(i) the range of powers available to the court under this Act.[2507]

2496 Section 4 of the Kenyan Children Act safeguards the child's right to survival and best interests.

2497 *Ibid*, Section 76(1).

2498 *Ibid*, Section 76(2).

2499 *Ibid*, Section 76(3)(a).

2500 *Ibid*, Section 76(3)(b).

2501 *Ibid*, Section 76(3)(c).

2502 *Ibid*, Section 76(3)(d).

2503 *Ibid*, Section 76(3)(e).

2504 *Ibid*, Section 76(3)(f).

2505 *Ibid*, Section 76(3)(g).

2506 *Ibid*, Section 76(3)(h).

2507 *Ibid*, Section 76(3)(i).

Fourth, the court may, of its own motion or upon application, call any expert witness it shall deem appropriate to provide assistance to the court. This happens where the court considers it imperative for the proper determination of any matter in issue before it to call such expert witness. In that case, the expenses of any such witness shall be determined by the court and shall be defrayed out of monies provided by Parliament.[2508]

18.5.5 Guarantees to a Child Accused of an Offence

In keeping with the spirit of Article 17 of the ACRWC and Article 40 of the CRC, the Kenyan Children Act provides certain guarantees to the child who is accused of having infringed the penal law. These guarantees are laid down in Section 186, which states categorically that every child accused of having infringed the law shall:

(a) be informed promptly and directly of the charges against him;[2509]

(b) if he is unable to obtain legal assistance be provided by the Government with assistance in the preparation and presentation of his defence;[2510]

(c) have the matter determined without delay;[2511]

(d) not be compelled to give testimony or to confess guilt;[2512]

(e) have free assistance of an interpreter if the child cannot understand or speak the language used;[2513]

(f) if found guilty, have the decisions and any measures imposed in consequence thereof reviewed by a higher court;[2514]

(g) have his privacy fully respected throughout the entire proceedings;[2515]

(h) if he is disabled, be given special care and be treated with the same dignity as a child with no disability.[2516]

In addition to the foregoing guarantees, Section 187 of the Children Act emphasizes the importance of consideration of the child's welfare in the criminal justice system. According to this Section, every court in dealing with a child who is brought before it is obliged to consider the best interests of the child. The court is, in a proper case, obliged to 'take steps for removing him from undesirable surroundings and for securing that proper provision be made for his maintenance, education and training.'[2517] In addition, where a child in remand or custodial care is ill, or complains of illness (physical or

2508 *Ibid*, Section 76(4).
2509 *Ibid*, Section 186(a).
2510 *Ibid*, Section 186(b).
2511 *Ibid*, Section 186(c).
2512 *Ibid*, Section 186(d).
2513 *Ibid*, Section 186(e).
2514 *Ibid*, Section 186(f).
2515 *Ibid*, Section 186(g).
2516 *Ibid*, Section 186(h).
2517 *Ibid*, Section 187(1).

mental), he or she has the right to 'be examined promptly by a qualified medical practitioner and treated.'[2518]

18.5.6 Disposition of Criminal Cases against Child Offenders

The Kenyan Children Act contains comprehensive provisions on disposition of criminal cases involving child offenders. Geared towards safeguarding the rights of the juvenile offenders, these provisions prohibit the use of words "conviction" and "sentence"; and restrict the imposition of certain punishments on children, including imprisonment and death penalty. The law also vests the Children's Court with an array of dispositional alternatives as considered below.

(a) Prohibition of the Use of Words "Conviction" and "Sentence"

As is the case with the Ugandan Children Act, Section 189 of the Kenyan Children Act prohibits the use of the words "conviction" and "sentence" in relation to a child dealt with by the Children's Court. In lieu thereof, any reference in any written law to a person convicted, a conviction or a sentence 'shall, in the case of a child, be construed as including a reference to a person found guilty of an offence, a finding of guilt or an order upon such a finding, as the case may be.'

(b) Restrictions on Certain Punishments

Section 190 of the Kenyan Children Act sets out three restrictions on the punishment to be imposed by a court on a child offender. First, it requires that no child shall be ordered to imprisonment or to be placed in a detention camp.[2519] Commenting on this provision, Odongo argues that the Kenyan Children Act 'goes further than the CRC (Article 37) and the African Children's Charter (Article 17), both of which outlaw the use of life imprisonment and not all forms of imprisonment as the Act does.'[2520]

However, in some cases courts have proceeded to impose (contrary to the explicit prohibition) the prison sentences on child offenders for capital and other offences.[2521] A good example is *CKL v Republic*,[2522] where a 17-year-old child offender was charged in a magistrate's court for two counts of arson and assault. The lower court sentenced the child to serve concurrent prisons sentences of 18 months and three years, respectively, for the offences. When the matter was on appeal, the High Court declared the sentences to be illegal and in contradiction of Section 191 of the Kenyan Children Act, which prohibits the imposition of the sentence of imprisonment on child offenders.

The second restriction is that a child shall not be sentenced to death.[2523] However, there are a number of examples where courts have proceeded to impose (contrary

2518 *Ibid*, Section 187(2).

2519 *Ibid*, Section 190(1).

2520 Odongo, G.O., 'Caught between Progress, Stagnation and a Reversal of Some Gains: Reflections on Kenya's Record in Implementing Children's Rights Norms', op. cit, p. 127 (note 54).

2521 *Ibid*, p. 128 (note 56).

2522 High Court of Kenya at Kericho, Criminal Appeal No. 104 of 2004 (Unreported).

2523 Section 190(2) of the Kenyan Children Act.

to the explicit prohibition contemplated in Section 190(2)) the death penalty.[2524] For instance, in *Peter N. Lugulai v Republic*[2525] a magistrate's court sentenced a 16-year-old offender to death upon a finding of guilt in relation to the capital offence of robbery with violence. On appeal, the High Court quashed the conviction of the child on the basis of a lack of incriminating evidence. With regard to the death penalty, the High Court held that Section 190(2) of the Children's Act is explicit to the prohibition of the imposition of death penalty to children found guilty of the offence.

The third restriction imposed on punishment of child offenders is the requirement that a child under the age of ten years shall not be ordered by a Children's Court to be sent to a rehabilitation school.[2526] In addition, Section 191(2) of the Children Act prohibits subjecting a child offender to corporal punishment.

(c) Dispositional Alternatives

In addition to the foregoing restrictions, Section 191 of the Kenyan Children Act sets out methods of dealing with offenders. It requires that, in spite of the provisions of any other law and subject to this Act, where a child is tried for an offence, and the court is satisfied as to his guilt, the court may deal with the case in one or more of the following ways:

(a) by discharging the offender under Section 35(1) of the Penal Code;[2527]

(b) by discharging the offender on his entering into a recognisance, with or without sureties;[2528]

(c) by making a probation order against the offender under the provisions of the Probation of Offenders Act;[2529]

(d) by committing the offender to the care of a fit person, whether a relative or not, or a charitable children's institution willing to undertake his care;[2530]

(e) if the offender is above ten years and under fifteen years of age, by ordering him to be sent to a rehabilitation school suitable to his needs and attainments;[2531]

(f) by ordering the offender to pay a fine, compensation or costs, or any or all of them;[2532]

(g) in the case of a child who has attained the age of sixteen years dealing with him, in accordance with any Act which provides for the establishment and regulation of borstal institutions;[2533]

2524 Odongo, G.O., 'Caught between Progress, Stagnation and a Reversal of Some Gains: Reflections on Kenya's Record in Implementing Children's Rights Norms', op. cit, p. 127 (note 56).

2525 High Court of Kenya at Nakuru, Criminal Appeal No. 363 of 2002 (Unreported).

2526 Section 190(3) of the Kenyan Children Act.

2527 Section 191(1)(a) of the Kenyan Children Act.

2528 *Ibid*, Section 191(1)(b).

2529 *Ibid*, Section 191(1)(c).

2530 *Ibid*, Section 191(1)(d).

2531 *Ibid*, Section 191(1)(e).

2532 *Ibid*, Section 191(1)(f).

2533 *Ibid*, Section 191(1)(g).

(h) by placing the offender under the care of a qualified counsellor;[2534]

(i) by ordering him to be placed in an educational institution or a vocational training programme;[2535]

(j) by ordering him to be placed in a probation hostel under provisions of the Probation of Offenders Act;[2536]

(k) by making a community service order;[2537] or

(l) in any other lawful manner.[2538]

(d) Mental Treatment

Under Section 192 of the Kenyan Children Act, where it appears to the court on the evidence of a medical practitioner that a child requires or may benefit from mental treatment, the court when making a probation order against him, 'may require him to undergo mental treatment at the hand or under the direction of a medical practitioner for a period not exceeding twelve months subject to review by the court, as a condition of the probation order.'

(e) Power to Order Parent to Pay Fine

It is the law that where a child is charged with an offence for which a fine, compensation or costs may be imposed, if the court is of the opinion that the case would best be met by imposition of a fine, compensation or costs, whether with or without any other punishment, the court may in any case order that the fine, compensation or costs imposed or awarded be paid by the child's parent or guardian instead of by the offender.[2539] However, the court may not make such an order if it is satisfied that the parent or guardian cannot be found or that he or she has not induced the commission of the offence, by neglecting to exercise due care in respect of the offender.

In addition to paying fine or compensation, where a child is charged with an offence, the court may order his parent or guardian to give security for his good behaviour.[2540] It is the law that:

> An order under [Section 193] may be made against a parent or guardian who having been required to attend before the court, has failed to do so, but, save as aforesaid, no such order shall be made without giving the parent or guardian an opportunity of being heard.[2541]

Under Section 193(4), the Children Act requires that any sums imposed and ordered to be paid by a parent or guardian under this section, or forfeiture of any such security as aforesaid, 'may be recovered from him or her in a like manner as if the order had been made on the conviction of the parent or guardian of the offender.' However, the

2534 *Ibid*, Section 191(1)(h).
2535 *Ibid*, Section 191(1)(i).
2536 *Ibid*, Section 191(1)(j).
2537 *Ibid*, Section 191(1)(k).
2538 *Ibid*, Section 191(1)(l).
2539 *Ibid*, Section 193(1).
2540 *Ibid*, Section 193(2).
2541 *Ibid*, Section 193(3).

law allows a parent or guardian to appeal to the High Court against an order made under this section by a Children's Court.[2542]

(f) Social Investigation Reports

The law requires that, while considering any question with respect to a child under the Children Act, the court may require to have presented to it a report, either oral or written as the court may direct, on such matters relating to the child as the court may consider necessary.[2543] The court may also direct that such report be prepared by such person or persons as it may designate.[2544] In making any such order, the court may take into account any statement contained in the report;[2545] or any evidence given in respect of the matters referred to in the report, insofar as the statement or evidence is, in the opinion of the court, relevant to the question which it is considering.[2546]

In terms of Rule 11(1) of the Child Offenders Rules, when the Court, after a charge has been admitted and proved, is considering making a detention or probation order, a written social background report shall be prepared by a probation officer and a Children's Officer and shall be taken into account by the Court before making the order. Such report 'shall include among other things, the social and family background, the circumstances in which the child is living and the conditions under which the offence was committed.'[2547] In addition, the court is obliged to 'ensure that the contents of the report are made known to the child and that a copy of the report is provided to the child or his legal representative.'[2548]

18.6 Appeals from the Children's Court

The Kenyan Children Act ensures that a child has the right to appeal against any order or decision of the Children's Court. Ordinarily, in any civil or criminal proceedings in a Children's Court, an appeal lies to the High Court and a further appeal to the Court of Appeal.[2549]

18.7 Rehabilitation of Juvenile Offenders

As is the case under the Ugandan and Tanzanian child laws, the Kenyan Children Act requires that where an offence against a child is proved and the child has been found guilty of an offence, the court has an array of dispositional measures. One of such measures is confining a child in a rehabilitation centre under Section 57 of the

2542 *Ibid*, Section 193(5).

2543 *See* particularly Rule 11(4) of the Child Offenders Rules.

2544 Section 78(1) of the Kenyan Children Act.

2545 *Ibid*, Section 78(2)(a).

2546 *Ibid*, Section 78(2)(b).

2547 Rule 11(2) of the Child Offenders Rules.

2548 *Ibid*, Rule 11(3).

2549 Section 80 of the Kenyan Children Act.

Children Act.[2550] Rehabilitation centres or schools are established by the concerned Minister under Section 47(1) of the Children Act.

In terms of Section 48 of the Children Act, a rehabilitation school 'shall have separate sections for children of different sexes, and age categories, and separate sections for children offenders and children in need of care and protection.'

Once a child is duly committed to the care of the manager of a rehabilitation school, the manager shall be bound to accept every child who is duly sent or transferred to the school or otherwise committed to his care. However, the manager may not receive such a child if the school is an institution for persons of a different religion or of a different sex from that of the child whom it is proposed to send or transfer there;[2551] or if the manager of the school satisfies the Minister that 'it is undesirable that any more children should be admitted to the school or otherwise committed to the manager's care.'[2552]

An order committing a child to a rehabilitation school may be revoked by the Children's Court under Section 53 of the Children Act upon an application by the Director of Children's Services or any other person. This may take place at any time during the period of a child's stay at a rehabilitation school if the Director is satisfied that such child should not remain subject to the applicable committal order.[2553] However, before the court makes a revocation order, it shall call for all the relevant records of the court which made the order, and all relevant records of any court which may previously have considered an application under this Section.[2554]

18.7.1 Treatment of Absconders and Children of Difficult Character at the Rehabilitation School

In order to maintain peace, order and discipline at any rehabilitation school, the Director of Children's Services is given power under Section 55 of the Children Act, to apply to the Children's Court having jurisdiction in the place where the school is situated. This power is exercised only where the Director is of the opinion that a child committed to a rehabilitation school is a persistent absconder, is of difficult character or is exercising inappropriate influence on the other children in the school.[2555] Such an application would seek for either of the following reliefs from the court:

(a) to have the period of committal increased by a period not exceeding six months, if the child is of or below the age of sixteen years;[2556] or

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2550 Section 57 provides that: 'The order committing a child to custody in a children's remand home or ordering him to be sent to a rehabilitation school shall be sufficient authority for his confinement in that place in accordance with the tenor thereof, or in a health institution under Section 56, and a child while confined and while being conveyed to or from a children's remand home or a rehabilitation school to or from a health institution, as the case may be, shall be deemed to be in lawful custody.' Under Section 53(3), 'an order committing a child to a rehabilitation school shall not remain in force beyond the date on which the child attains the age of eighteen years, nor shall any such order remain in force for longer than three years at a time except by order of the court.'

2551 *Ibid*, Section 49(a).

2552 *Ibid*, Section 49(b).

2553 *Ibid*, Section 53(1).

2554 *Ibid*, Section 53(2).

2555 *Ibid*, Section 55(1).

2556 *Ibid*, Section 55(1)(a).

(b) to have the child sent to a borstal institution,[2557] if the child is above the age of sixteen years;[2558] or

(c) to have the child provided with appropriate medical treatment or professional counselling, if the child's conduct is attributable to drug abuse, or if the child is of unsound mind or is suffering from a mental illness.[2559]

When this action is undertaken, the parents of the child or any person who has parental responsibility for the child 'shall be notified of, and afforded an opportunity to be heard in, any proceedings instituted under this Section, unless the court is satisfied that such persons cannot be found or cannot reasonably be expected to attend the proceedings.'[2560] Notably, the expenses incurred in committing a child under this Section shall be borne by the State.[2561] However, a child whose period of committal is increased or who is sent to a borstal institution shall be provided with appropriate professional assistance.[2562]

18.7.2 Transfer to Health Institution

Section 56 of the Kenyan Children Act provides safeguards to a child who falls ill while living in a remand home or a rehabilitation school. It requires that, in the case of serious illness of a child staying in a children's remand home or a rehabilitation school the manager, on the advice of a medical officer or medical practitioner, may make an order for his removal to a health institution.[2563] Whenever the medical officer in charge of a health institution considers that the health of a child removed to a hospital under the provisions of this Section no longer requires treatment therein, 'he shall notify the manager of the remand home or rehabilitation school from which he was removed to hospital, who shall thereupon cause such a child to be returned to the school if he is still liable to be kept therein.'[2564]

In this context, the medical officer in charge of the health institution is obliged to take every reasonable precaution to prevent the escape of any child who is hospitalized therein under this Section. However, 'nothing shall be done under the authority of this Section which in the opinion of the medical officer in charge of the health institution is likely to be prejudicial to the health of the child concerned.'[2565]

2557 Borstal institutions were established for the first time under the UK Prevention of Crime Act in 1908. This law established a national system of juvenile courts in the UK. Borstal schools were penal institutions for inmates aged between 16 and 20 years, staffed by teachers as well as prison officers; and, unlike adult prisons, they provided educational and vocational programmes and military training. Borstal is a name of a village in Kent, UK, where the first institution of this kind was established. See particularly Pitts, J., 'Youth Justice in England and Wales' in Mathews, R. and J. Young (Editions), *The New Politics of Crime and Punishment* Devon, UK: William Publishing, 2003, p. 74.

2558 Section 55(1)(b) of the Children Act.

2559 *Ibid*, Section 55(1)(c).

2560 *Ibid*, Section 55(2).

2561 *Ibid*, Section 55(3).

2562 *Ibid*.

2563 *Ibid*, Section 56(1).

2564 *Ibid*, Section 56(2).

2565 *Ibid*, Section 56(3).

18.8 Diversion Programmes in Kenya

The application of diversion in the administration of juvenile justice in Kenya has to be examined at two epochs: the position before the enactment of the Children Act and the position after the enactment of this law. These eras are very crucial in the evolution of diversion programmes in Kenya, as examined below.

18.8.1 The Position before Child Law Reform in the 1990s

Diversion in Kenya has evolved as a result of developments in the common law and in the context of the CRC, particularly in light of Article 40(3). Therefore, it is trite to argue that diversion in Kenya is fairly recent because, for instance, 'pre-trial referrals of children to diversion were not formally recognised by law up and until the recently enacted new legislation in mid- to end- 1990s.'[2566] In fact, prior to the period after the enactment of or development of the child legislation in Kenya, pre-trial diversions were rarely used, if at all, by the formal juvenile justice system.[2567] Odongo notes that during this period:

> […] only isolated 'ad-hoc' instances of referrals to pre-trial mediation in cases of petty offences by virtue of the 'willingness' of victims of crime, and the discretion of courts and prosecutors have been observed in the past.[2568]

Like in other African countries – like Ghana, Lesotho, Tanzania and Uganda – in Kenya 'there was possibility for the use of post-trial diversions by virtue of wide-ranging alternative sentences which by their nature involved a child's removal from the formal criminal justice system (and detention) into community-based programmes.'[2569] The range of non-custodial or non-formal measures 'included orders for compensation, conditional discharge of a child with a warning, placement into parental care and the possibility of referring children to community service.'[2570]

Although, in keeping with the flexible definition of diversion,[2571] these varieties of alternative sentences would suffice as diversionary practices even at the post-trial phase, 'past juvenile justice practice in these countries reveals the over-reliance on custodial sentences rather than on these alternative sentences.'[2572] In addition, it remains unclear whether the 'diverted' children 'were spared from acquiring a criminal label by the expunging of court or trial records.'[2573]

2566 *Ibid*.

2567 Odongo, G.O., 'Report on the Juvenile Justice System in Kenya in Light of Best Practices and Challenges' (submitted to the Community Law Centre, University of Western Cape), 2003, p. 15.

2568 *Ibid* (referred to in Odongo, G.O., 'The Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context', op. cit, p. 215 (note 82)).

2569 Odongo, G.O., 'The Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context', *Ibid*.

2570 *Ibid*.

2571 The flexible definition of diversion asserts that diversion does not necessarily entail the referral of child offenders into (pre-trial) programmes.

2572 Odongo, G.O., 'The Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context', op. cit, p. 216.

2573 *Ibid*.

18.8.2 The Position after the Child Law Reform in the 2000s

With the enactment of the Children Act in 2001, now the Kenyan juvenile justice system has two levels of diversion: pre-trial and post-trial diversion. Whereas the Kenyan Children Act does not directly make provision for pre-trial diversions,[2574] there are explicit provisions dealing with the orders that a court may impose in the context of diversion of young offenders.[2575] This is to say that, the Kenyan juvenile justice system has "indirect" pre-trial as well as "direct" post-trial diversion programmes, as considered in the sub-sections below.

(a) Indirect Pre-trial Diversion

As noted above, the Kenyan Children Act does not explicitly recognize 'the possibility of a formal referral of children away from the criminal justice (diversion) processes before trial.'[2576] In principle, this approach does not comply with the general spirit of the CRC and other relevant international human rights treaties, which encourage diversion at all stages of the criminal justice process.[2577] However, Odongo proposes two provisions in the Kenyan child law that can "indirectly" be argued to provide a basis for pre-trial diversions. The first provision in this regard 'is the enactment in the Act of the principle in the CRC which calls for the detention of children as a last resort and for the shortest period of time.'[2578] In fact:

> This principle is crucial for the establishment of pre-trial diversion in the new juvenile justice system, since diversion is one of the ways of ensuring the de-institutionalization of children in trouble with the law whenever appropriate.[2579]

The second arm of provisions, which can be argued to provide a basis for pre-trial diversions, is the fact that the Kenyan Children Act establishes the National Council for Children's Services ('the Council') to which it accords wide-ranging powers.[2580] The Council is predominantly charged with the responsibility of ensuring 'the full implementation of Kenya's international and regional obligations relating to children […]'[2581]

In addition, Section 33 vests power on the Council, for the purpose of carrying out its functions, 'to do all such acts and things as appear to it to be requisite, advantageous or convenient for or in connection with the carrying out of its functions or incidental

2574 *Ibid*, p. 225.

2575 Section 191(1) of the Kenyan Children Act provides that upon a finding of guilt, the court may deal with the case involving a child in one or more ways including, making a probation order, committing the child to the care of 'a fit person such as relatives and charitable institutions willing to undertake his care, ordering, compensation, ordering the child to a vocational training programme and making a community service order.

2576 Odongo, G.O., 'Caught between Progress, Stagnation and a Reversal of Some Gains: Reflections on Kenya's Record in Implementing Children's Rights Norms', op. cit, p. 128.

2577 *See* particularly Article 40(3) of the CRC and Rule 11 of the Beijing Rules.

2578 *Ibid*. Expressly included in Article 37(b) of the CRC, this principle is expressly recognised in the Fifth Schedule to the Kenyan Children Act. The Fifth Schedule sets out the Child Offenders Rules, which 'apply to the proceedings with respect to a child who is charged with an offence' (Rule 3).

2579 *Ibid*.

2580 *Ibid*. *See* particularly Part IV (Sections 30-46) of the Kenyan Children Act. The Council's membership is drawn from representatives of government departments, the Attorney General's office, the police, churches and non-government organisations. The Council was gazetted in 2002; and in terms of Section 30 of the Act, the Council's function is to exercise 'general supervision and control over planning, financing and co-ordination of child rights and welfare activities and to advise the government in all respects thereof.'

2581 Section 32(2)(i) of the Kenyan Children Act.

to their proper discharge and may carry out any activities in that behalf alone or in association with other persons or bodies.' In terms of Section 32(2)(q), the Council has power to 'establish Area Advisory Councils to specialize in various matters affecting the rights and welfare of children.' Thus, 'these provisions provide a statutory basis for diversion and an opportunity for the government (in partnership with NGOs and communities) to develop diversion programs at all levels.'[2582]

One of the major challenges of the practice of diversion on Kenya at the pre-trial stage is an approach that 'still gives considerable leeway to prosecutorial authority on access to diversion.'[2583] As a result, there is 'an implicit danger for the abuse or non-exercise of such discretion.'[2584] From this exposition, it is, therefore, apparent that the Kenyan Children Act 'fails to include direct provisions on when pre-trial diversions may be used.'[2585]

(b) Direct Post-trial Diversion

In contrast to the above "indirect" provisions on pre-trial diversions, the Kenyan Children Act has explicit provisions dealing with the orders that a court may impose on a child.[2586] In principle, these orders 'invite the possibility of post-trial diversions through a range of alternative sentences.'[2587] In particular, Section 191(1) of the Kenyan Children Act provides that upon a finding of guilt, the court may deal with the case involving a child in one or more ways including, making a probation order, committing the child to the care of a fit person such as relatives and charitable institutions willing to undertake his care, ordering compensation, ordering the child to a vocational training programme and making a community service order. Therefore, 'the most significant provisions relating to diversion are those providing for an array of measures by which a court may deal with the child upon finding of guilt.'[2588]

Odongo notes that, while these measures would apply in the aftermath of a criminal trial, 'it is submitted that they are no doubt in accordance with the wider definition of diversion, especially where a child is spared from acquiring a criminal record and placed into a diversion programme.'[2589] It is, therefore, significant in this regard that Section 189 of the Children Act specifically prohibits the trial courts' use of the words "conviction" and "sentence"; and, instead it provides for the use of the words "a finding of guilt" and "an order upon such finding", respectively.[2590]

The Kenyan Children Act legislates for the rights of the child and a number of legal safeguards 'both of which, by their general nature, apply to any diversion

2582 Odongo, G.O., 'The Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context', op. cit, p. 226.

2583 Odongo, G.O., 'The Impact of International Law on Children's Rights on Juvenile Justice Law Reform in the African Context', op. cit, p. 154.

2584 *Ibid*.

2585 *Ibid*. p. 155.

2586 Odongo, G.O., 'The Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context', op. cit, p. 227.

2587 *Ibid*.

2588 Odongo, G.O., 'The Domestication of International Law Standards on the Rights of the Child: A Critical and Comparative Evaluation of the Kenyan Example' *The International Journal of Children's Rights* Vol. 12 No. 4, 2004, p. 425.

2589 Odongo, G.O., 'The Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context', op. cit, pp. 227 & 228.

2590 A similar provision is also enshrined in the Ugandan Children Act.

practices.'[2591] Specifically, the provisions of the Act which guarantee the right to obtain legal assistance and the right not to be compelled to give testimony or to confess guilt 'are important to guard against the violation of due process rights of child offenders in the process of diversion.'[2592]

18.8.3 The Need to Strengthen Provisions Relating to Diversion

Of late, the Kenyan Government has been reviewing the Children Act, through the draft Children's (Amendment) Bill (2008), with a view to strengthening provisions for, *inter alia*, diversion of children in conflict with the law.[2593] Originally, it was thought that the amendment would be carried through in 2008, but at the time of writing (June 2013) the amendment has not come to fruition. Nonetheless, the envisaged amendment seeks, *inter alia*, to augment the Kenyan Children Act with the addition of more elaborate provisions on diversion.[2594]

2591 *Ibid*, p. 228. Whereas Sections 3-22 of the Kenyan Children Act catalogue the rights of the child, Section 186 guarantees the legal safeguards of the child.

2592 *Ibid*, Section 186(d).

2593 Hussein, A., Keynote Address at the First African Conference on Child Sexual Abuse, hosted by ANPPCAN, Kenya, 24-26 September 2007 (quoted in African Child Policy Forum, *Harmonisation of Children's Laws in Eastern and Southern Africa: Country Briefs*, op. cit, p. 66).

2594 Odongo, G.O., 'The Impact of International Law on Children's Rights on Juvenile Justice Law Reform in the African Context', op. cit, p. 155.

Chapter Nineteen

Protection of the Rights of Children in Conflict with the Law in Tanzania

19.0 A General Overview

The need to provide legal protection to children in conflict with the law in international law cannot be overemphasised. Similarly, in Tanzania this need has been expressed for a long time now.[2595] This call has been founded in many international human rights instruments, particularly basing on the principle set out in the Universal Declaration of Human Rights (UDHR) of 1948 to the effect that childhood is entitled to special care and assistance.[2596] The UDHR, in particular, has recognized similar provisions in the Geneva Declaration of Human Rights (1924) and the UN Declaration of the Rights of the Child (1959),[2597] which states that: 'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.'

Thus, when the United Nations General Assembly (UNGA) adopted the Convention on the Rights of the Child (CRC)[2598] in 1989 there was already in existence other international instruments protecting the rights of children, particularly those in conflict with the law. Interestingly, the preamble to the CRC refers to the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the "Beijing Rules") in recognition that 'in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration.' According to principle 2 of the UN Declaration on the Rights of the Child: 'The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.'

The United Nations Committee on the Rights of the Child (the "CROC") has regularly emphasised that 'all countries that have ratified the CRC[2599] need to ensure that their legislation is fully compatible with the provisions and principles of the CRC.' In respect of Tanzania, the CROC has, more than once, urged Tanzania to enact legislation that would effectively protect children's rights, including the rights

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2595 *See* particularly Law Reform Commission of Tanzania, 'Report on Laws Relating to Children in Tanzania'. submitted to the Minister of Justice and Constitutional Affairs, April 1994; Legal and Human Rights Centre, *The State of Juvenile Justice in Tanzania* Dar es Salaam: Legal and Human Rights Centre, 2003; and T*ume ya Haki za Binadamu na Utawala Bora, Taarifa ya Ziara za Tume Wilayani na Ukaguzi wa Magereza na Vituo vya Polisi kwa Mwaka 2003/2004* Dar es Salaam: Tume ya Haki za Binadamu na Utawala Bora, 2004, p. 15.

2596 *See* particularly Article 25 of the Universal Declaration of Human Rights.

2597 The Declaration was adopted by the UNGA on 20 November 1959.

2598 The CRC was adopted and opened for signature, ratification and accession by the UNGA resolution 44/25 of 20 November 1989; and entered into force on 2 September 1990, in accordance with Article 49.

2599 African Child Policy Forum, *In the Best Interest of the Child: Harmonizing Laws in Eastern and Southern Africa* Addis Ababa: African Child Forum/UNICEF, 2007, p.3.

of children in conflict with the law.[2600] Emphasising on the need for Tanzania to implement this recommendation, in 2010, the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) recommended that:

> The Committee urges the State Party to work on the Concluding Observations made by the UN Committee on the Rights of the Child aimed at improving the state of juvenile justice in its jurisdiction, by particularly enacting comprehensive provisions in the juvenile justice standards; allocating sufficient human and physical resources; and conduct regular training to juvenile justice personnel to ensure that juvenile justice is administered in consonance with best practices and international standards.[2601]

However, this was not done until 31 July 2009 when the Government of Tanzania introduced in Parliament a Bill to enact the Law of the Child Act (LCA).[2602] This Bill was passed by Parliament into law on 4 November 2009 and assented to by President Jakaya Kikwete on 20 November 2009. Provisions relating to legal protection of children in conflict with the law have been, particularly, contained in Part IX of the LCA.

Therefore, this Chapter examines the provisions relating to the protection of children in conflict with the law in the context of the existing international children's rights instruments. The Chapter looks at the prevalence of, and risk factors for, juvenile delinquency in Tanzania. It also examines the impact of juvenile delinquency in society and how to prevent it. In a detailed account, the Chapter critically examines provisions relating to the treatment of children in conflict with the law as set out in Part IX of the LCA; by particularly scrutinising its salient features – i.e., criminal capacity and minimum age of criminal responsibility; and the exposure of children in conflict with the law to the criminal justice system.

Other salient features relating to juvenile justice examined in this Chapter are the establishment of the Juvenile Court, its jurisdiction and applicable procedures. Methods of securing the attendance of a child in conflict with the law at the preliminary inquiry are also among the features examined in this Chapter. In addition, the Chapter examines the procedure obtained in the release and/or detention of a child in conflict with the law pending his or her processing in the criminal justice system; and the manner of dealing with a child committing an offence in association with adults.

Furthermore, the Chapter critically examines provisions relating to evidence adduced in court by a child as a witness; sentencing of a child; and placement of a

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2600 *See* particularly CROC, 'Concluding Observations of the Committee on the Rights of the Child: United Republic of Tanzania,' 09/07/2001, CRC/C/15/Add.156; CROC, 'Concluding Observations: United Republic of Tanzania.' UNCRC/C/TZA/CO/2, 21 June 2006; CROC, 'Consideration of Reports Submitted by States Parties under Article 12(1) of the Optional Protocol to the Convention on the Rights of the Child on the Sale, Child Prostitution and Child Pornography: Concluding Observations (United Republic of Tanzania).' Consideration of the Initial Report of the United Republic of Tanzania, CRC/C/OPSC/TZA/CO/1, 3 October 2008; CROC, Consideration of Reports Submitted by States Parties under Article 12(1) of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict: Concluding Observations (United Republic of Tanzania).' Consideration of the Initial Report of the United Republic of Tanzania, CRC/C/OPAC/TZA/CO/1, 3 October 2008. *See* also African Committee of Experts on the Rights and Welfare of the Child (ACERWC), 'Concluding Recommendations on the Republic of Tanzania Report on the Status and Implementation of the African Charter on the Rights and Welfare of the Child', 2010.

2601 ACERWC, 'Concluding Recommendations on the Republic of Tanzania Report on the Status and Implementation of the African Charter on the Rights and Welfare of the Child,' *Ibid*, p. 9.

2602 The *Bill Supplement* in respect of this Bill was published in the *Gazette of the United Republic of Tanzania,* Vol. 90 No. 20, on 10 July 2009.

child upon sentencing. In the end, the Chapter analyses the gaps inherent in the LCA in relation to the administration of juvenile justice.

19.1 Prevalence of Juvenile Delinquency in Tanzania

Although there is no nationwide consolidated and disaggregated statistical data, juvenile delinquency is widespread in Tanzania.[2603] Non-availability of statistical information on child offending in Tanzania is common as a result of lack of proper record and data management systems in the juvenile justice institutions: the police, judiciary, prisons and social welfare department. In a recent study[2604] commissioned by the Ministry of Constitutional and Legal Affairs (MoCLA) in collaboration with UNICEF, for instance, researchers sought to collect central level collated data and data from the entries in police log books in all of the sample regions on the number of children who were arrested in a 12-month period, disaggregated by age, gender and type of offence.

Unfortunately, 'researchers were only able to collect quantitative data from the log-books of police stations in three out of the ten study's regions:[2605] Lindi Urban, Dodoma Central and Tanga Urban Police Stations.'[2606] In addition, researchers were unable to collect data on the extent and nature of offending by children at the national level;[2607] although official statistics indicate that offending children mostly commit theft, followed by housebreaking.[2608]

Table 7: Number of persons under 18 who have been arrested by the police due to an alleged conflict with the law (2008 - 2010) in Tanzania Mainland

Reported Cases	Sent to court	Convicted	Acquitted	Under investigation	Closed Undetected	No offence disclosed	No further action	Total arrested
3258	669	428	411	664	774	66	246	3258

Source: *Ministry of Home Affairs, Tanzania Police Force, December 2011.*

Available statistical information indicates that juvenile delinquency is rampant in Tanzania, whereby 50% of the children arrested in a 12-month period in the three police stations under the MoCLA study were arrested for suspected theft or for another suspected minor property offence. Sexual offences were the second most common type of offence for which children were arrested, constituting 21%. As the MoCLA study notes: 'significant proportion of arrests for sexual offences was for statutory rape; that is, sexual conduct that is, in fact, consensual, but where one or both of the parties

2603 *See* Legal and Human Rights Centre, *The State of Juvenile Justice*. Op. cit; Tume ya Haki za Binadamu na Utawala Bora, *Taarifa ya Ziara za Tume Wilayani na Ukaguzi wa Magereza na Vituo vya Polisi kwa Mwaka 2003/2004*. Op. cit, p. 15; and Commission for Human Rights and Good Governance, 'Report on Situational Analysis of Children Deprived of their Liberty in Detention Facilities in Tanzania.' Dar es Salaam, Commission for Human Rights and Good Governance, 2011.

2604 The research was conducted by the National Organisation for Legal Assistance (nola) based in Tanzania and the UK-based Coram Children Legal Centre (Essex University).

2605 These Regions were Arusha, Dar es Salaam, Dodoma, Kigoma, Kilimanjaro, Lindi, Mbeya, Mtwara, Mwanza and Tanga.

2606 See United Republic of Tanzania, 'An Analysis of the Situation for Children in Conflict with the Law in Tanzania.' Dar es Salaam, Ministry of Constitutional and Legal Affairs (MoCLA)/UNICEF, July 2011.

2607 *Ibid*.

2608 Reported in United Republic of Tanzania, 'Consideration of the Second Periodic CRC Report: 1998-2003,' answers to questions raised for additional and updated information considered in connection with the 2nd CRC report to the UN Committee on the Rights of the Child on 15 -19 May 2006.

was below the age of consent at the time of the act.'[2609] According to the MoCLA study:

> It appears that there are no guidelines setting out the circumstances in which the offence of statutory rape should be prosecuted and the circumstances in which there will be a presumption against prosecution, as this will not be in the public interest. These findings were supported by the juvenile justice professionals who were interviewed in all regions. Virtually all reported that theft (e.g. pick pocketing, stealing, particularly of mobile phones) was by far the most common offence for which children were arrested in their district. These professionals also noted that sexual offences (in particular, rape) represented a significant proportion of all offences for which children are arrested. Most professionals also mentioned more serious property offences such as breaking, entering and stealing and armed robbery as being among the offences for which children are typically arrested in their district. Several professionals reported that, where children are arrested for more serious property offences, they are normally being 'used' by adults to commit these offences.[2610]

The data provided in the MoCLA report also indicates that a significant proportion of children are arrested for public disorder offences, such as vagrancy, loitering, touting or for "disrupting passengers".[2611] Juvenile justice professionals across most districts also mentioned that it is not uncommon for children to be arrested for disorder offences, such as "roaming around town", "using abusive language", and so on. The report finds this to be a cause for concern in that: 'Offences such as vagrancy, loitering and truancy are often the result of poverty, lack of parental care and other socio-economic problems. They disproportionately affect vulnerable children, such as children living or working on the street.'[2612] In fact, the CROC has stated that these offences should not be criminalised but rather, dealt with through a State's child protection system, using measures that give 'effective support to parents and/or caregivers and measures which address the root causes of this behaviour.'[2613] According to Article 56 of the Riyadh Guidelines: 'In order to prevent further stigmatization, victimization and criminalization of young persons, legislation should be enacted to ensure that any conduct not considered an offence or not penalized if committed by an adult is not considered an offence and not penalized if committed by a young person.'

At the same time, the juvenile justice system in Tanzania suffers scarcity of detention facilities for offending children. This can be exemplified by the fact that the remand facilities for children are unevenly distributed – located in Arusha, Dar es Salaam, Kilimanjaro, Mbeya and Tanga regions only[2614] – with the central, western and north-

2609 *Ibid*.

2610 *Ibid*.

2611 *Ibid*.

2612 *Ibid*.

2613 UN Committee on the Rights of the Child, General Comment No. 10: 'Children's Rights in Juvenile Justice'. CRC/C/GC/10, 25 April 2007, para. 9.

2614 By the end of 2012 there were established 7 Retention Homes under Section 133(9) of the Law of the Child Act. As per the First Schedule to the Law of the Child (Retention Homes) Rules (2012) GN. No. 151, the existing Retention Homes are located in Arusha, Dar es Salaam, Mbeya, Moshi, Mtwara, Mwanza and Tanga Regions. However, the Mtwara and Mwanza Retention Homes are yet to be operational.

western zones having no separate placements for children.[2615] The first report released on the monitoring of the implementation of MKUKUTA[2616] in December 2006 by Research and Analysis Working Group (RAWG),[2617] also notes that the administration of juvenile justice in the country is 'lagging due to the lack of appropriate facilities; the central, western and north-western zones do not have separate placement for juvenile offenders.'[2618] At the same time, there is only one Approved School (at Irambo in Mbeya region) and one Juvenile Court (at Kisutu in Dar es Salaam region) as illustrated by the table below.

Table 8: Number of institutions specifically for persons under 18 as, accused of, or recognized as having infringed the penal law

Facility	**Number**
Retention Homes[2619]	5
Juvenile Court	1
Approved school	1
Total	**7**

This means that offending children in these zones are processed in the criminal justice system and remanded or imprisoned in facilities with adult offenders,[2620] which has a negative impact on the offending children's well-being and welfare.[2621] This is justified by the number of children (844) who were kept in pre-trial detention in Tanzania Mainland in 2003-2005, which greatly surpasses the required capacity of the available

2615 See particularly United Republic of Tanzania, *Status Report 2006: Progress Towards the Goals for Growth, Social Wellbeing and Governance in Tanzania*. Dar es Salaam: Research and Analysis Working Group/MKUKUTA Monitoring System, Ministry of Planning, Economy and Empowering, 2006, p. 32; and Tume ya Haki za Binadamu na Utawala Bora, *Taarifa ya Ziara za Tume Wilayani na Ukaguzi wa Magereza na Vituo vya Polisi kwa Mwaka 2003/2004*. Op. cit.

2616 This is an abbreviation of Kiswahili words: *Mkakati wa Kukuza Uchumi na Kuondoa Umaskini Tanzania,* whose English version is: National Strategy for Growth and Reduction of Poverty (NSGRP).

2617 RAWGU was under the MKUKUTA Monitoring System, in then the Ministry of Planning, Economy and Empowering (MPEE). Currently, it is under the Ministry of Finance.

2618 *See* United Republic of Tanzania, *Status Report 2006: Progress Towards the Goals for Growth, Social Wellbeing and Governance in Tanzania*. Dar es Salaam, Research and Analysis Working Group, MKUKUTA Monitoring System, 2006, p. 27.

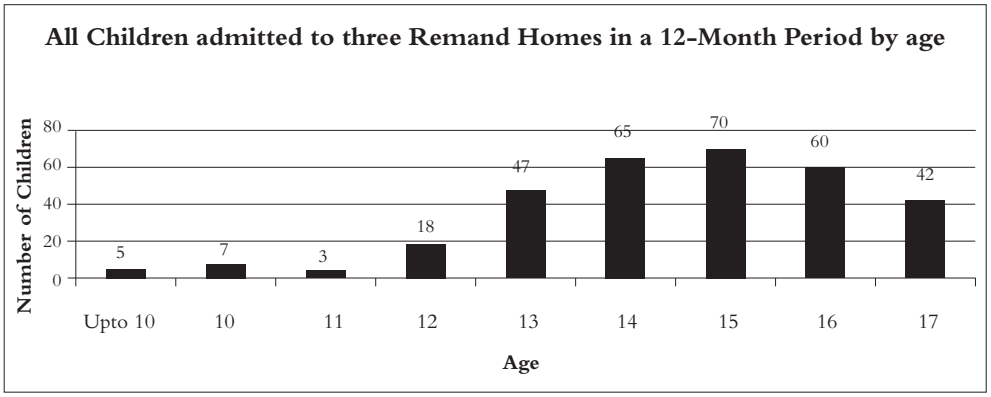
2619 According to the First Schedule to the Law of the Child (Retention Homes) Rules, GN. No. 151/2012, there are two additional Retention Homes established under Section 133(9) and Rule 5(2) of these Rules. These Retetion Homes are to be located in Mtwara and Mwanza Regions; and were not functional at the time of completion of this study.

2620 Legal and Human Rights Centre, *The State of Juvenile Justice*, op. cit; and Tume ya Haki za Binadamu na Utawala Bora, *Taarifa ya Ziara za Tume Wilayani na Ukaguzi wa Magereza na Vituo vya Polisi kwa Mwaka 2003/2004*. *Ibid*, p. 15. This seems to be a common problem even in other East African countries: Kenya and Uganda. In Uganda, for instance, although the country's Constitution provides [in Articles 34(6) and 93(6)] that child offenders kept in lawful custody or detention shall be kept separately from adult offenders and not to be remanded in adult prisons, in practice children in conflict with the law are detained in adult jails due to lack of sufficient child detention facilities. See particularly African Child Policy Forum, *In the Best Interest of the Child: Harmonizing Laws in Eastern and Southern Africa*. Op. cit, p. 87.

2621 For a detailed discussion on this issue see particularly, Legal and Human Rights Centre, *The State of Juvenile Justice in Tanzania*, *Ibid*; Mashamba, C.J., 'Fundamental Principles of Administration of Juvenile Justice and State Compliance with its Obligations under International Human Rights Instruments: The Case of Tanzania', op. cit; and Mashamba, C.J., 'Emerging Issues in Diverting Juvenile Offenders from Criminal Justice System: The Socio-Cultural Realities, Economics and Politics of Administration of Juvenile Justice in Tanzania', op. cit.

child detention facilities in the country (428).[2622] Recent statistical information also confirms this contention as illustrated in the figure below:

Figure 2: Number of Children Admitted to Three Retention Homes in Months (2011)



***Source**: Ministry of Constitutional and Legal Affairs/UNICEF, "Analysis of the Situation for Children in Conflict with the Law." July 2011.*

However, this number is not realistic because, as the recent report of the MKUKUTA Monitoring System notes, the pattern of data relating to juvenile delinquency in recent years is erratic.[2623] The report notes that the Ministry of Home Affairs, which is responsible for maintaining data on detained or arrested juveniles, has no comprehensive data on the number of offending children. Instead, the report observes, the 'number of juveniles detained in remand homes is reported by the Ministry of Health and Social Welfare.'[2624] The report notes further that:

> The number of juveniles in [remand] homes consistently decreased from 913 in 2004 to 728 in 2006, increased to 1,101 in 2007 and decreased again to 880 in 2008. In the absence of further information on the total number of juveniles in detention it is difficult to say whether the trend for juvenile detention is improving. However, the Commission for Human Rights and Good Governance (CHRAGG) has expressed particular concern about the numbers of juveniles who are being detained in facilities with adults.[2625]

The practice of placing offending children in adult remand or prison facilities breaches the principle enacted in Article 17(2)(b) of the ACRWC and Article 37(c) and (d) of the CRC, all of which require that children who are to be placed in detention must be placed in separate facilities from those housing adult offenders. This principle aims at saving offending children from being contaminated with criminal manners by adult offenders when they intermingle in remand or prison facilities.

2622 *See* statistics available at the former Ministry of Home Affairs 2006 (Prisons) reported in United Republic of Tanzania, 'Consideration of the Second CRC Periodic Report: 1998-2003 – Answers to Questions Raised for Additional and Updated Information to be Considered in Connection to Second CRC Report during the UN CRC Committee Session on 15-19 May, 2006, in Geneva, Switzerland,' Ministry of Community Development, Gender and Children; April 2006

2623 United Republic of Tanzania, *Poverty and Human Development Report 2009* Dar es Salaam: Research and Analysis Working Group (Ministry of Finance and Economic Affairs)/Research on Poverty Alleviation (REPOA), 2009, p. 127.

2624 *Ibid*.

2625 *Ibid*. *See* also Commission for Human Rights and Good Governance, *Annual Report for 2006/07* Dar es Salaam: Commission for Human Rights and Good Governance (CHRAGG), 2008.

So, from the available official data, it can be argued that the present criminal justice system in Tanzania does not provide adequate safeguards to children in conflict with the law. Therefore, it is in itself violative of the basic rights of children in conflict with the law, contrary to the established international juvenile justice standards.

The MoCLA study has enlisted several risk factors for children coming into conflict with the law in Tanzania. Basing its findings on interviews with children in conflict with the law and with juvenile justice professionals, the study indicates that, 'across all regions, poverty, lack of parental care (including children who are orphans or who cannot live at home due to economic conditions or exposure to abuse), poor parenting or parental neglect are factors which expose children to a greater risk of coming into conflict with the law.'[2626] According to the report, these factors will often 'lead children into situations which make them more "visible" to police or more vulnerable to being exploited by adults, such as those children who are living on the street or children who are working.'[2627] The report also mentions poor educational attainment to be a risk factor for children coming into conflict with the law.[2628]

Respondents, in another survey conducted by the National Organisation for Legal Assistance (nola) for Plan Tanzania in 2007,[2629] were of the views that juvenile delinquency has adverse effects on the respective offending children leading them to (i) adopting criminal behaviours; (ii) adopting truant behaviours; (iii) undermining the best interests of the child in the child growing stages; (iv) curtailing positive development of the child; (v) child abuse; (vi) subjecting the child to abject poverty and hence miserable future; and (vii) child school dropping-out.

19.2 Lack of Measures for Preventing Child Offending

Although the CRC and the ACRWC do not contain specific provisions addressing the prevention of offending by children, the CROC has emphasized the need for a juvenile justice system to address the social roots of offending, and it has also consistently proposed, that the "Riyadh Guidelines" on Prevention of Juvenile Delinquency 'should be regarded as providing relevant standards for implementation. The Guidelines requires "comprehensive prevention plans" to be instituted at every level of government and proposes that they should be implemented within the framework of the Convention and other international instruments.'[2630]

However, in Tanzania there are no any discernible measures devised, and currently being taken, by the state to prevent child offending in the country. Asked what measures should be adopted to prevent offending by children in their respective communities, respondents in the Plan and MoCLA surveys were of the views, *inter alia*, that: (i) the Government should establish a well-functioning juvenile justice system; (ii) the Government should construct remand homes and approved schools at least in every region; and improve the condition of the existing ones; (iii) the Government and

2626 *See* United Republic of Tanzania, 'An Analysis of the Situation for Children in Conflict with the Law in Tanzania', op. cit.

2627 *Ibid*.

2628 *Ibid*.

2629 Plan Tanzania, 'Report on the Situation of Children's Rights in Dar es Salaam, Kibaha, Kisarawe, Ifakara, Mwanza and Geita' (2007). A report of a survey conducted for Plan Tanzania by nola. This research was conducted by nola on behalf of Plan International.

2630 Hodgkin, R., and P. Newell, Implementation Handbook for the Convention on the Rights of the Child, op. cit, p. 546.

CSOs should ensure that offending children are availed prerequisite legal aid; (iv) the Government should ensure that it expedites the introduction of diversion measures of juvenile delinquents; and (v) the Government should ensure that juvenile justice personnel are specifically trained to enable them to effectively administer the juvenile justice system.

19.3 Lack of a Separate, Comprehensive Legal Framework for Children in Conflict with Law in Tanzania

The Law of the Child Act (LCA) does not provide a separate, comprehensive set of legal provisions and procedures that apply specifically to children in conflict with the law.[2631] The LCA, which 'represents a significant development in establishing a separate criminal justice system for children'[2632] by containing a number of provisions that specifically apply to children in conflict with the law, does not cover all aspects of the criminal justice process relating to children in conflict with the law as compared to the South African Child Justice Act (CJA).[2633] The LCA 'is limited to establishing and regulating proceedings before the Juvenile Court, the application of custodial and alternative sentences, and regulating Approved Schools.'[2634] This omission contravenes the requirement of international children's rights norms, which demand that states should develop separate juvenile justice systems with separate rules of procedure applying for children only.

According to the CROC, the CRC and the UN rules and guidelines together 'call for the adoption of a child-oriented [justice] system that recognizes the child as a subject of fundamental rights and freedoms and stresses the need for all actions concerning children to be guided by the best interests of the child as a primary consideration.'[2635] This call derives its basis from the provisions of Article 40 of the CRC and Article 17 of the ACRWC, which oblige States Parties thereto to put in place policy, legislative and practical/programmatic measures that accord 'special protection for all children alleged as, accused of, or recognised as having infringed the penal law.'[2636] Therefore, Tanzania, being a State Party to these international children rights instruments,[2637] has an obligation to abide by this requirement. Although this

2631 *See* particularly United Republic of Tanzania, 'An Analysis of the Situation for Children in Conflict with the Law in Tanzania.' Op. cit; and Mashamba, C.J., 'A Child in Conflict with the Law under the Tanzanian *Law of the Child Act* (2009): Accused or Victim of Circumstances?' *The Justice Review* Vol. 8 No. 2, 2009.

2632 United Republic of Tanzania, 'An Analysis of the Situation for Children in Conflict with the Law in Tanzania.' *Ibid*.

2633 *See* particularly Mashamba, C.J., 'A Study of Tanzania's Non-Compliance with its Obligation to Domesticate International Juvenile Justice Standards in Comparison with South Africa', Ph.D. Thesis, Open University of Tanzania, 2013.

2634 *See* Legal and Human Rights Centre, *The State of Juvenile Justice in Tanzania*, op. cit; and Tume ya Haki za Binadamu na Utawala Bora, *Taarifa ya Ziara za Tume Wilayani na Ukaguzi wa Magereza na Vituo vya Polisi kwa Mwaka 2003/2004,* op. cit, p. 15. Of late, however, the Minister of Health and Social Welfare has made the Law of the Child (Retention Homes) Rules (2012), GN. No. 151/2012, which were published on 4 May 2012. Amongst other things, the Rules regulate the establishment, functioning and monitoring of the functioning of the retention homes. They also set out a comprehensive child rights that are to be protected by the retention homes in respect of children in these institutions [see particularly Rule 4(1)].

2635 Report on the ninth session, May-June 1995, CRC/C/43, Annex VIII, p. 64.

2636 African Child Policy Forum, *In the Best Interest of the Child: Harmonizing Laws in Eastern and Southern Africa*. Op. cit, p. 79. *See* also Hodgkin, R. and P. Newell, *Implementation Handbook for the Convention on the Rights of the Child*. Op. cit, p. 590.

2637 Tanzania ratified the CRC in 1991 and the ACRWC in 2003.

obligation is enshrined in the long title to the LCA,[2638] it is not well articulated in the same law; thus, a need arises to amend it or have a separate child justice law in the context of the South African CJA.[2639]

19.4 Salient Features of the LCA in Respect of Children in Conflict with the Law

This part critically examines the salient features in the LCA relating to children in conflict with the law. These features include the criminal capacity; the establishment of the Juvenile Court and the administration of juvenile justice in Tanzania; jurisdiction of the Juvenile Court; procedure and proceedings in the Juvenile Court; methods of securing attendance of child at preliminary inquiry; release (on bail or otherwise) and/or detention of a child prior to sentence; and manner of dealing with a child committing an offence in association with adults. Other salient features examined in this part include placement of a child in a retention or remand home; procedure on hearing in the Juvenile Court; procedure where a child is a witness; sentencing and alternative to custodial sentence; and appeal against the decisions of the juvenile court.

The guiding principles for the administration of juvenile justice under the LCA are enshrined in Section 99(1). According to this Section, the procedure for conducting proceedings by the Juvenile Court in all matters is in accordance with rules to be made by the Chief Justice for that purpose.[2640] While the rules are yet to be promulgated by the CJ, in any case involving a child, the following principles are to be observed in the context of this section:

(a) the Juvenile Court should sit as often as necessary;

(b) proceedings in the Juvenile Court should be held in camera;[2641]

(c) proceedings should be as informal as possible, and made by enquiry without exposing the child to adversarial procedures;

(d) a social welfare officer should be present;

(e) a parent, guardian or a next of kin has the right to be present in the proceedings involving a child in the Juvenile Court;

(f) the child has the right to be represented by a next of kin or an advocate;

(g) the right to appeal should be clearly explained to the child; and

(h) the child has the right to give an account and express an opinion.

2638 The long title of the LCA stipulates that this is: 'An Act to provide for reform and consolidation of laws relating to children, to stipulate rights of the child and to promote, protect and maintain the welfare of a child with a view to giving effect to international and regional conventions on the rights of the child; to provide for affiliation, foster care, adoption and custody of the child; to further regulate employment and apprenticeship; to make provisions with respect to a child in conflict with law and to provide for related matters.'

2639 A recent call for the amendment of the LCA to encompass detailed provisions relating to child justice was made at the 15th Family Law Conference in Cape Town. See Mashamba, C.J., 'The Implications of the 2009 Law of the Child Act on Family Law in Tanzania.' A paper presented at the Family Law Conference held at Radisson Hotel, Granger Bay, Cape Town, South Africa, on 15-16 March 2012.

2640 At the time of compiling this research, the Chief Justice had prepared the rules, which were submitted to the Attorney General for publication in the official *Gazette*.

2641 Under Sub-section (2) of Section 99 of the LCA, apart from members and officers of the Juvenile Court, only the following persons may, at the discretion of the Court, attend any sitting of Juvenile Court: first, parties to the case before court, their advocates, witnesses and other persons directly concerned or involved in the case; and, second, any other person whom the court may authorize to be present.

It is, nonetheless, expected that the rules[2642] to be made by the CJ will make a clear provision for the guiding principles and procedures in the administration of juvenile justice in Tanzania.

Unlike the South African Child Justice Act, which is a child-justice specific law, the Tanzanian Law of the Child Act does not have specific objectives for the administration of juvenile justice. Rather, in its long title, the LCA seeks to make provisions with respect to a child in conflict with law. Impliedly, the provisions contained in Part IX of the LCA seek to establish a separate system for dealing with child offenders away from the criminal justice system.

19.4.1 Criminal Capacity of Children

The import of criminal capacity of children both at the international and municipal levels is discussed at length in Chapter Six, whereby it is observed that the CRC has required States Parties to set a minimum age for criminal responsibility (MACR) that, according to the Beijing Rules, should not be too low. In recognition of (and in compliance with) this requirement, the LCA has clearly set out the MACR as discussed herein below.

(a) Definition of a Child

In the previous legal setting there was a chronic problem of defining who a child was. Different laws provided differently as to who was the child, which resulted in more practical controversies.[2643] In order to do away with this glitch, the LAC has provided a single definition of a child. In Section 3(1) the LAC defines a child as a person below the age of eighteen years. This is a very progressive definition, which complies with the definitions of a child in the CRC and ACRWC; and it is hoped that there will be no further controversies as to who is a child in Tanzania.

(b) Minimum Age of Criminal Responsibility (MACR)

In principle, States Parties to both the CRC and ACRWC are obliged to set a minimum age of criminal responsibility (MACR);[2644] that is, an age below which a child cannot be presumed to have the capacity to infringe criminal law.[2645] In General Comment No. 10, the CROC urges that States Parties should be encouraged to increase their

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2642 At the time of writing of this study, there were consultations under way to make rules of procedure for the effective functioning of Part IX of the LCA, particularly in the Juvenile Court.

2643 For a detailed account on this problem, see particularly United Republic of Tanzania, 'Report of Tanzania Law Reform Commission on the Law Relating to Children in Tanzania.' Report submitted to the Minister of Justice and Constitutional Affairs, April 1994; Legal and Human Rights Centre, *The State of Juvenile Justice*. Op. cit; UN CRC Committee, 'Consideration of Reports Submitted by States Parties under Article 40 of the Convention – Concluding Observations of the Committee on the Rights of the Child: United Republic of Tanzania,' CRC/C/TZA/CO/2, dated 2 June, 2006; and Mashamba, Clement J., 'Basic Principles to be Incorporated in the New Children Statute in Tanzania.' In Mashamba, C.J. (Edition), *Using the Law to Protect Children's Rights in Tanzania: An Unfinished Business*. Op. cit.

2644 Article 40(3) of the CRC requires that States 'shall seek to promote the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law'. Similarly, the ACRWC provides that 'there shall be a minimum age below which children shall be presumed not to have the capacity to infringe the penal law.'

2645 Rule 4 of the Beijing Rules states that: 'in those legal systems recognising the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity.

minimum age of criminal responsibility, regarding 12 years as the absolute MACR. In this regard, the CROC has recommended that States Parties should continue to increase their respective MACR to an even higher age level, for instance, 14 or 16 years.[2646]

However, the minimum age of criminal responsibility in Tanzania is low compared to the foregoing international standard.[2647] As set out in the Penal Code, the "absolute" MACR is ten years. However, a child below the age of 12 years is not considered to be criminally responsible 'unless it is proved that at the time of committing the act or making the omission he or she had capacity to know that he or she ought not to do the act or make the omission.'[2648] This appears to offer protection to children between the ages of 10 and 12 years, 'as it provides a presumption that a child aged 10 – 12 years is *doli incapax* (i.e. incapable of committing a crime) and appears to place an obligation on the state to rebut this presumption.'[2649] But it should be noted that the CROC has expressed concern about the practice of *doli incapax* in its concluding observations on States Parties' reports and in its General Comment No. 10,[2650] emphasizing that it 'strongly recommends that States Parties set a minimum age of criminal responsibility that does not allow, by way of exception, the use of a lower age.'[2651] In particular, the CROC, in its Concluding Observations on Tanzania in 2006, urged the government to 'clearly establish the age of criminal responsibility at 12 years, or at an older age that is an internationally accepted standard.'[2652]

The LCA has expressly amended Section 15 of the Penal Code by particularly adding a sub-section, which provides that: 'any person under the age of twelve years who commits an act or omission which is unlawful shall be dealt with under the Law of the Child Act, 2009.'[2653] However, the meaning of this provision is unclear; because the LCA covers many areas and contains provisions that encompass juvenile justice and child protection. This amendment may only serve, therefore, to apply the juvenile justice provisions of the LCA to children in conflict with the law who are aged between 10 and 12 years. This, in effect, does not absolve children aged between 10 and 12 years of criminal liability.[2654]

19.4.2 Determination of the MACR

Unlike the CJA in South Africa, the LCA does not require every juvenile justice agency (police, social welfare/probation services, prosecution, defence and the

2646 General Comment No. 10, paras. 32 and 33.

2647 *See* particularly United Republic of Tanzania, 'An Analysis of the Situation for Children in Conflict with the Law in Tanzania.' Op. cit.

2648 *See* Section 15(2) of the Penal Code, Cap. 16 R.E. 2002.

2649 *See* particularly United Republic of Tanzania, 'An Analysis of the Situation for Children in Conflict with the Law in Tanzania', op. cit.

2650 General Comment No. 10, para. 34, provides that: 'The Committee wishes to express its concern about the practice of allowing exceptions to a minimum age of criminal responsibility which permit the use of a lower minimum age of criminal responsibility in cases where the child, for example, is accused of committing a serious offence or where the child is considered mature enough to be held criminally responsible'.

2651 *Ibid*.

2652 CROC, 'Concluding Observations: United Republic of Tanzania.' UNCRC/C/TZA/CO/2, 21 June 2006, para. 70(b).

2653 See particularly Section 174 of the LCA.

2654 United Republic of Tanzania, 'An Analysis of the Situation for Children in Conflict with the Law in Tanzania.' Op. cit.

judiciary) to determine the age of a child who come into contact with them. Instead, the duty to determine the age of a child accused of committing an offence is vested in the court. It should be noted, nevertheless, that the LCA has cured the mischief of misinterpreting the age of "a child" when such child is before the Juvenile Court or any court. Before the LCA was enacted the practice was for the court to order for medical examination of a child in conflict with the law, which was to be corroborated by other circumstantial evidence such as statement from parents, relatives or guardians. However, in practice, medical evidence as to determination of age was problematic. For instance, in *Sangu Saba and another v R*,[2655] where an x-ray was used to examine the accused as to his age, the East African Court of Appeal held that: 'It is so well known as to be within the judicial knowledge of the court that even with the aid of X-rays, age cannot be assessed exactly.' In similar tone, in *Yusufu Kabonga v R*,[2656] Biron, J (as he then was) held that: 'However high the medical officer's qualifications and the extent of his experience, I am very far from persuaded that a doctor... could give a definite assessment in respect of age... with that degree of certainty required in a criminal law.'

In order to address this anomaly, the practice was as described by George, C.J. (as he then was) in *Francis Mtunguja v R*:[2657] that is, the court should call for additional evidence to corroborate the medical evidence as to age. This was allowed even on appeal so as to elucidate a matter left vague in the trial court. In *Emmanuel Kibona v R*,[2658] the High Court held that: 'Evidence of a parent is even better than that of a medical doctor as regards that parent's child's age. And additional evidence is as vital in sentencing as in the trial itself.' So it allowed the appellants to bring additional evidence in the form of baptism certificates and any other certificates.

Thus, the requirement of determining the age of a child who is brought before the Juvenile Court or any court is now clearly set out in Sections 113 and 114 of the LCA. Accordingly, Section 113(1) provides that where a person, whether charged with an offence or *not*,[2659] 'is brought before any court[2660] otherwise than for the purpose of giving evidence, and it appears to the court that he is a child, the court shall make due inquiry as to the age of that person.'[2661] In determining the age of a person before it, the court has a duty to take into account the "best interests of the child" enacted in Section 4 of the LCA. As the High Court held in the Lulu Case, this principle has to 'be applied presumptively to any person whose age is to be determined.'[2662] In this case, an actress commonly known as Lulu was arraigned at the Kisutu Resident Magistrates'

2655 [1971] HCD No. 385.

2656 [1968] HCD No. 188.

2657 [1970] HCD No. 181.

2658 (1995) TLR 241.

2659 In *Elizabeth Michael Kimemeta @ Lulu v Republic* High Court of Tanzania at Dar es Salaam, Miscellaneous Criminal Application No. 46 of 2012 (Unreported) (herein after, 'the Lulu Case') the High Court held that: 'Section 113(1) may apply even where there are no proceedings pending in a particular Court. However, a person seeking such determination must satisfy the Court that he is not a mere busybody and that the application is made for good purpose. For instance, a social welfare officer who is faced with such a question in the discharge of his functions under the Act, may wish to call upon the aid of a Court of law in order to find out whether a particular person is a child or not. In such a situation, the matter will proceed in accordance with the procedure set out in sub-sections (2),(3), (4) and (5) of Section 113.'

2660 In the *Lulu* Case (*Ibid*) the High Court held that by virtue of the definition of the word "Court" in Section 3 of the LCA, the High Court 'has concurrent jurisdiction with the other Courts mentioned therein to determine the age of a person in trouble with the law.'

2661 This matter has recently been given judicial interpretation for the first time in the Lulu Case, *Ibid*.

2662 *Ibid*, p. 11.

Court for murder of one Steven Charles Kanumba (a renowned actor in Tanzania). Committal proceedings were commenced at the same court, in the course of which the advocates for Lulu applied to the presiding magistrate for an order seeking to stay the committal proceedings; and, instead thereof, commit the said child to the Juvenile Court.

The presiding magistrate declined to grant this prayer, holding, *inter alia*, that the said court had no jurisdiction to entertain such an application and held that 'If the accused has any application to make, the same [could only] be made to the High Court of Tanzania.' Consequent to this holding, the advocates for Lulu applied to the High Court for, *inter alia*, an order that the High Court should order the Kisutu Resident Magistrates' Court to stay the committal proceedings and ascertain the age of the accused with a view to committing her to the Juvenile Court in the context of the LCA.

Although the High Court faulted the procedure used by the advocates for Lulu of making a fresh application instead of an application for revision of the foregoing order, it invoked its supervisory powers under Section 44 of the Magistrates' Courts Act (1984);[2663] thereby revising and quashing the said order. In this context, the High Court held that: 'The decision of the RM's Court to refuse to entertain the applicant's application was an error of law and an abdication of the Court's duty.' Staying the committal proceedings at Kisutu Resident Magistrates' Court pending its determination of the applicant's age, the High Court held that:

> Considering the seriousness of the charge facing the applicant and the urgency of determining whether or not the applicant is entitled to the benefits of the Law of the Child Act, and in the interests of justice, this Court, invoking its supervisory powers under Section 44 of the Magistrates' Court Act, shall proceed to determine the correct age of the applicant now before it, in terms of Section 113 of the Law of the Child Act.[2664]

As it was stated by the High Court in the Lulu Case, Section 113 of the LCA 'does not say under what circumstances it is to be applied.'[2665] According to the High Court

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2663 Cap. 11 R.E. 2002. Section 44(1)(a) of the Magistrate's Court Act provides that:

'(1) In addition to any other powers in that behalf conferred upon the High Court, the High Court–

(a) shall exercise general powers of supervision over all district courts and courts of a resident magistrate and may, at any time, call for and inspect or direct the inspection of the records of such courts and give such directions as it considers may be necessary in the interests of justice, and all such courts shall comply with such directions without undue delay…'

However, this approach was quashed by the Court of Appeal of Tanzania when this matter landed in that court in *DPP v Elizabeth Michael Kimemeta @ Lulu v Republic* Court of Appeal of Tanzania at Dar es Salaam, Criminal Application No. 6 of 2012 (Unreported). In this case, Luanda, JA, held that the High Court has no revisional powers under Section 44(1) of the Magistrate's Courts Act (MCA); rather, it has supervisory powers. Referring to its previous decision in *John Mgaya and 4 others v Edmund Mjengwa and 6 others* Court of Appeal of Tanzania at Dar es Salaam, Criminal Appeal No. 8 of 1997 (Unreported), the Court of Appeal held that the scope of the High Court in Section 44(1) of the MCA is to supervise District and Resident Magistrates' Courts through giving directions; and not to revise their decisions. According to the Court of Appeal, 'to "supervise" is not one and the same thing as to "revise".' The Court of Appeal, therefore, counselled that the High Court ought to have given directions to the Resident Magistrate's Court (Kisutu) to determine the age of the accused person, instead of doing so by itself through the purported revision. It consequently quashed the proceedings in the High Court and remitted the records to the Kisutu Resident Magistrate's Court for continuation of committal proceedings without any direction as to the determination of age. It should be noted that, by so doing, the Court of Appeal of Tanzania failed to use this opportunity to rectify the legal problem associated with the determination of age of an accused person who appears to be under 18 years of age.

2664 See the Lulu Case, op. cit, p. 13.

2665 *Ibid*, p. 8.

this does not, nonetheless, 'deviate from the requirement that there must be a legally acceptable purpose for which that person is brought to Court (other than for giving of evidence).'[2666] Thus, the High Court opined that:

> There must be a reason as to why a person is brought before a Court of law in order for the Court to exercise its powers and determine the age of that person. Otherwise, one could invoke the provision and present a person in any Court, at any time, so long as the Court is one of those envisaged by the Act, and request that an enquiry be made on the age of that person. The legislature could not have intended it to be so wide.[2667]

The procedure to be followed in determining the age of a person brought before a court is set out in sub-section (2) of Section 113, which obliges the court to 'take such evidence at the hearing of the case which may include medical evidence and, or DNA test as necessary to provide proof of birth, whether it is of a documentary nature or otherwise as it appears to the court to be worthy of belief.' To justify the validity of medical evidence or a DNA test as to the age of a child, the court is obliged under sub-section (3) of Section 113 to receive a certificate signed by a medical practitioner licensed under the provisions of the law governing medical practice in Tanzania. However, the court may order otherwise where circumstances warrant departure from this requirement.

It should be noted that an order or judgment of the court 'shall not be invalidated by any subsequent proof that the age of that person has not been correctly stated to the court and the age found by the court to be the age of the person so brought before it shall, for the purposes of this section, be deemed to be the true age of that person.'[2668] It should also be noted that medical evidence and or collection of blood for the purpose of DNA from the child 'shall be conducted in the presence of a social welfare officer.'[2669]

The foregoing rule has an exception embedded in the provisions of Section 114(1), which provide that where it appears to the court that 'any person brought before it is of the age of beyond eighteen years, that person shall, for the purposes of this Section, be deemed not to be a child.' However, where the court has failed to establish the correct age of the person brought before it, 'then the age stated by that person, parent, guardian, relative or social welfare officer shall be deemed to be the correct age of that person.'[2670]

The problem with the foregoing provisions is that they apply to age determination by the court only. This is contrary to the spirit of international juvenile justice law, which requires that age determination of a child who comes into contact should apply to all juvenile justice agencies: police, social welfare and court. The South African CJA is in compliance with this international juvenile justice law requirement and has comprehensive provisions relating to age determination; where there are certain

2666 *Ibid*.

2667 *Ibid*.

2668 Section 113(4) of the LCA.

2669 *Ibid*, Section 113(5).

2670 *Ibid*, Section 114(2). In their Alternative Child Act Bill, CSOs had suggested that: 'Section 71(1) An order or judgment of the court shall not be invalidated by any subsequent proof that the age of the person has not been correctly stated to the court and the age presumed or declared by the court to be the age of that person shall be deemed to be his true age for the purposes of the proceedings.

(2) A certificate signed by a medical officer as to the age of a person under eighteen years of age shall be evidence of that age.'

circumstances in which age can be determined or estimated: estimation by a probation officer, an inquiry magistrate, a child justice court or any other court before which a child is charged.[2671]

In respect of the minimum age of criminal responsibility, the LCA has expressly amended Section 15 of the Penal Code by adding a sub-section providing that: 'any person under the age of twelve years who commits an act or omission which is unlawful shall be dealt with under the Law of the Child Act, 2009.' However, the meaning of this provision has been criticized as unclear. In fact, the LCA covers many areas and contains provisions that 'encompass juvenile justice and child protection. It is unclear whether this changes the minimum age of criminal responsibility in the Penal Code, which is 12 years, or 10 years if criminal capacity can be established.'[2672]

19.4.2 Determination of the MACR

In Chapter Sixteen it has been noted that international children's rights law requires States Parties to set up legal protection mechanisms for the treatment of children who commit criminal activities which may be offences had they been within the MACR. However, the LCA does not contain such legal protection. Accordingly, children below the age of criminal responsibility in some regions in Tanzania are being processed through the criminal justice system. Data from admissions into three Retention Homes over a 12-month period obtained in the MoCLA study shows that 'five children below the age of 10 were admitted into the Homes.'[2673] Similarly, in its recent survey in all prisons of Tanzania, CHRAGG also found a number of children under the age of 10 years in detention. In this study researchers reported that 27 out of 179 children interviewed during visits to detention centres stated that they were under 10 years old.[2674]

Many of these children were detained for disorder or other minor offences. This included a child in Tanga Retention Home who was nine at the time of admission and had been arrested for theft, two children in Dar es Salaam aged four and nine for 'disturbing passengers', and a child aged eight in Mbeya for vagrancy. According to professionals, children below the MACR are sometimes brought by parents or carers to the police station or primary courts. A Primary Court Magistrate in Moshi, for instance, reported that:

> The youngest child I dealt with was eight. Sometimes parents bring their children to court to ask whether they can be sent to the Approved School. In these cases, I need to establish which offence has been committed.

At the Moshi Retention Home a Social Welfare Officer in Charge informed researchers in the MoCLA study that:

> … the youngest child detained in the Retention Home is a boy of nine years. He is being charged for use of abusive language against his mother, together with his brother. He is

2671 This aspect is discussed at length in Chapter Six of this study.

2672 United Republic of Tanzania, 'An Analysis of the Situation for Children in Conflict with the Law in Tanzania', op. cit.

2673 *Ibid*.

2674 Commission for Human Rights and Good Governance. 'Report on Situational Analysis of Children Deprived of their Liberty in Detention Facilities in Tanzania', op. cit, p. 33.

> treated in the same manner as any other juvenile, despite him being below the minimum age of criminal responsibility.

The MoCLA study also found 10 children under the age of 12 placed in the retention homes (most were arrested for theft). In practice, there is no procedure for establishing capacity for children aged between 10 and 12 years. This omission has the effect of exposing children to the formal criminal justice system where they, in fact, have no criminal responsibility.

As noted in the MoCLA study, the reason for processing children who are below the MACR through the criminal justice system is partly attributed to a lack of knowledge of juvenile justice laws on the part of juvenile justice personnel, including lack of knowledge of what the MACR is.[2675] It is also caused by the sheer absence of clear legal provisions relating to procedure or mechanisms of referral for children below the MACR, as opposed to the clear mechanisms in the South African CJA on the treatment of children below the MACR.

It is, therefore, not surprising to note that Police Officers and Magistrates interviewed in this study appear to be 'at a loss for what to do with children below the MACR who engage in criminal behaviour. In Mbeya, for instance, a Police Sergeant, who stated that the minimum age of criminal responsibility is seven, reported that the same procedure is followed for a child under the MACR who engages in criminal behaviour (arrest; interview; draft a charge; bring him before a court of law).'[2676] For instance, one 12-year-old child 'was found in police detention, having been arrested the night before. He had been taken to court that morning, and the Magistrate did not lay charges as he was too young. The child was taken back to the police station and detained.'[2677]

In addition, there is an "acceptable" practice amongst several professionals that children below the MACR who engage in more serious criminal behaviours are detained for their own protection. That is, 'due to anger in the community over, in particular, more serious crimes. In these cases, Police Officers in some regions feel it is necessary to arrest a child below the MACR and process them through the criminal justice system.'[2678] For instance, a Police Officer in Charge in Arusha responded in the MoCLA study that: 'normally [we arrest children] from 10 years. However, due to the gravity of the offence and sentiments from the community, we sometimes arrest such children under 10 for very serious offences.'[2679]

19.5 Exposure of Children in Conflict with the Law to the Criminal Justice System

Although international juvenile justice law requires that specialised units for children in conflict with the law be established within the police, the prosecution, the judiciary, the court administration and social services,[2680] in Tanzania there is yet to evolve a

2675 *See* particularly United Republic of Tanzania, 'An Analysis of the Situation for Children in Conflict with the Law in Tanzania', op. cit.

2676 *Ibid*.

2677 *Ibid*.

2678 *Ibid*.

2679 *Ibid*.

2680 General Comment No. 10, paras 92, 93 and 94.

specialised juvenile justice system.[2681] This contention is concretized by the fact that, although the LCA *de jure* establishes separate juvenile courts to deal with all cases involving children in Tanzania,[2682] there is only one juvenile court at Kisutu in Dar es Salaam that has been established.

Similarly, there are only five specialised Retention Homes[2683] and one Approved School,[2684] which 'only have very limited geographical coverage.';[2685] although the Ministry of Health and Social Welfare has plans to establish two additional Retention Homes, one in Mwanza and another in Singida. Specialised units, procedures and practices within most criminal justice institutions – police, social welfare, legal aid providers and courts – have not been developed; with limited number of juvenile prosecutors specializing in juvenile justice.

19.6 The Establishment of the Juvenile Court and the Administration of Justice in Tanzania

This part examines the Juvenile Court by looking at the legal provisions establishing it, its jurisdiction and procedures in the conduct of proceedings before it.

19.6.1 Establishment of the Juvenile Court

The establishment, jurisdiction of, and proceedings in, the juvenile court are set out in Sections 97 through to 114 of the LCA. The establishment of juvenile courts is set out in Section 97(1) for the purposes of hearing and determining cases relating to child matters. Under sub-section (2) of Section 97, 'the Chief Justice may, by notice in the *Gazette*, designate any premises used by a primary court to be a Juvenile Court.' According to sub-section (3) of Section 97 of the LCA, a 'Resident Magistrate shall be assigned to preside over the Juvenile Court.'

This provision is in tandem with the international juvenile justice law. According to General Comment No. 10 (2007) on "Children's Rights in Juvenile Justice", the CROC emphasises that:

> The laws must provide the court/judge, or other competent, independent and impartial authority or judicial body, with a wide variety of possible alternatives to institutional care and deprivation of liberty, which are listed in a non-exhaustive manner in Article 40(4) of CRC, to assure that deprivation of liberty be used as a measure of last resort and for the shortest possible period of time (Article 37(b) of CRC).[2686]

Under the same General Comment, the CROC 'requires States to develop and implement a comprehensive juvenile justice policy.'[2687] According to the Committee:

> This comprehensive approach should not be limited to the implementation of the specific provisions contained in Articles 37 and 40, but should also take into account the general

2681 United Republic of Tanzania, 'An Analysis of the Situation for Children in Conflict with the Law in Tanzania', op. cit.

2682 *See* particularly Section 97 and Section 98 of the LCA.

2683 The Retention Homes are located in Arusha, Dar es Salaam, Kilimanjaro, Mbeya and Tanga Regions.

2684 The Approved School is located at Irambo, about 40km from the Mbeya City.

2685 United Republic of Tanzania, 'An Analysis of the Situation for Children in Conflict with the Law in Tanzania.' Op. cit.

2686 CROC, General Comment No. 10 (2007) on 'Children's Rights in Juvenile Justice'. CRC/C/GC/10.

2687 Hodgkin, R. and P. Newell, *Implementation Handbook for the Convention on the Rights of the Child*, op. cit, p. 603.

> principles enshrined in Articles 2, 3, 6, and 12 and all other relevant articles of the CRC, such as Articles 4 and 39.[2688]

The establishment of a comprehensive juvenile justice system, by particularly having a separate juvenile court system, is derived from the provisions of Article 40(3) of the CRC, which provides that:

> 3. States Parties shall seek to promote the establishment of laws, procedures, *authorities and institutions specifically applicable to children alleged as, accused of, or recognised as having infringed the penal law*, and, in particular:
>
> (a) the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;
>
> (b) wherever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected. [Emphasis supplied].

This has been given more emphasis by the United Nations Secretary-General's *Study on Violence Against Children*, which reported to the General Assembly in October 2006, recommending that: 'States should establish comprehensive, child-oriented, restorative juvenile justice systems that reflect international standards.'[2689]

Therefore, the establishment of the juvenile court is a positive element of the LCA; and aims at domesticating the foregoing international standards in Tanzania. In support of this progressive element, CSOs had for a long time proposed for the establishment of the Family and Children Courts from the ward on to the High Court levels.[2690] However, there is a general fear amongst CSOs that there might be constructed very few juvenile courts; thus, proposing that the Chief Justice may assist in, or encourage, the construction of the courts through local government authorities.[2691] It should be noted, however, that the construction of the court buildings should be carried out parallel to the increase in the number of requisite expertise on the part of juvenile justice personnel to properly manage these institutions for children.

19.6.2 Jurisdiction of the Juvenile Court

The jurisdiction of the Juvenile Court is set out in Section 98 of the Act. Under this Section, the Juvenile Court has jurisdiction to hear and determine two sets of matters: first, criminal charges against a child; and, second, *applications*[2692] relating to

2688 CROC, General Comment No. 10, op. cit, para 3.

2689 *See* United Nations, 'Report of the Independent Expert for the United Nations Study on Violence against Children.' United Nations General Assembly, sixty-first session, August 2006, A/61/, para. 112(b).

2690 *See* Section 14 of the CSOs Alternative Child Bill submitted to the Minister for Justice and Constitutional Affairs in 2003.

2691 *See* CSOs 'Position Paper on the Bill to enact the Law of the Child Act (2009)' presented to the Parliamentary Standing Committee (Community Development) on 7 and 8 October 2009 at the Karimjee Hall in Dar es Salaam.

2692 CSOs were of the view that the word "applications" limits the scope of litigation as under Order XLIII, rule 2 of the Civil Procedure Code, Cap. 33 R.E. 2002 'Every application to the Court made … shall, unless otherwise provided, be made by a chamber summons supported by affidavit.' As such, they recommended that the word "applications" should be replaced by the word "matters" which is more wide and would allow any other form of court documents (like petitions) to be filed in court in respect of child care, maintenance and protection. See CSOs 'Position Paper on the Bill to Enact the Law of the Child Act (2009)', *Ibid*.

child care, maintenance and protection.[2693] In addition, the Juvenile Court 'shall also have jurisdiction and exercise powers conferred upon it by other written law.'[2694]

Under sub-section (3) of Section 98, the Juvenile Court 'shall, wherever possible, sit in a different building from the building ordinarily used for hearing cases by or against adults.' The legal position before the enactment of the LCA was more or less similar to this one. Under Section 3(1) of the Children and Young Persons Act it was provided that the court 'when hearing charges against children or young persons shall, if practicable, unless the child or young person is charged jointly with any other person not being a child or young person, sit in a different building or room from that in which the ordinary sittings of the court are held.' Then the High Court interpreted this section strictly.

For instance, in *Mukamambogo v R*[2695] the appellant was charged with and convicted of acts intended to cause grievous harm contrary to Section 222(2) of the Penal Code and was sentenced to 12 months' imprisonment by the District Court. However, there was nothing in the record indicating that the proceedings were held in a place different from an ordinary courtroom, nor was there any indication that it was not practicable for the court to sit in a place different from an ordinary courtroom. On appeal the High Court quashed the conviction and set aside the sentence because the District Court was not properly constituted.[2696] Consequently, the case was remitted back for retrial before a properly constituted Juvenile Court.

Currently, however, there is a likelihood of having some practical hurdles when it comes to implementing Section 98(3) of the LCA, as there are few court buildings to serve this purpose. Besides, there is always a limited budget allocated to the Judiciary for this matter as well as there is lack of political will to build sufficient court buildings as opposed to current emphasis on constructing buildings for secondary schools at every ward.[2697]

Interestingly, Section 103(1) of the LCA provides that a 'police officer shall not bring a child to the court unless investigation has been completed or the offence requires committal proceedings.' In addition, sub-section (2) of Section 103 provides that: 'Where a child is brought before the Juvenile Court for any offence other than homicide, the case shall be disposed by that court on that day.'

In this context, therefore, the court has power to dispose the case wherever the circumstances of that case warrant such action, unless in cases of homicide. This provision, if applied objectively by the courts, would prove to be progressive in reducing unnecessary delays of cases involving children.

2693 Section 98(1) of the Act.

2694 *Ibid*, Section 98(2).

2695 (1971) HCD No. 63.

2696 In the main, the High Court was of the view that: 'The appellant was a young person and was not on a joint charge with any adult. In order to comply with the above provision therefore the trial magistrate in hearing the case should, if practicable, have sat in a place different from an ordinary courtroom. It would appear also that this requirement was mandatory by reason of the word "shall" used in the sub-section quoted above [i.e. Section 3(1) of the Children and Young Persons Act].'

2697 *See* Government of the United Republic of Tanzania, 'Initial Tanzania Report on the African Charter on the Rights and Welfare of the Child (1990).' Submitted to the Committee of Experts on the Rights and Welfare of the Child (Addis Ababa, Ethiopia) by the Ministry of Community Development, Gender and Children in December 2006.

19.6.3 Procedure and Proceedings in the Juvenile Court

The procedure and proceedings in the Juvenile Court are set out in Sections 99 and 100 of the LCA. Specifically, Section 99 provides for the procedure in the Juvenile Court. Indeed, the procedure set out in sub-section (1) of this section is not exhaustive, but there is a room for the Chief Justice to make rules for that purpose. Otherwise, the sub-section sets out conditions or fundamental principles[2698] to be observed when the Juvenile Court determines matters before it. These principles are similar to those provided for in Article 40(2)(b) of the CRC, which provides that:

> (b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:
>
> (i) To be presumed innocent until proven guilty according to law;[2699]
>
> (ii) To be informed promptly and directly of the charges against him or her, and, if appropriate through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;[2700]
>
> (iii) To have the matter determined without delay[2701] by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance[2702] and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;
>
> (iv) Not to be compelled to give testimony or to confess guilt;[2703] to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;
>
> (v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;[2704]
>
> (vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;[2705]

2698 These principles are examined in part 7.2 above.

2699 *See* also Article 11 of the UDHR; Article 17(2)(c)(i) of the ACRWC; and Article 14(2) of the ICCPR.

2700 Article 9(2) of the ICCPR requires that anyone who is arrested shall be informed, at the time of arrest, of the reasons for it 'and shall be promptly informed of any charges against him.' According to Article 14(3)(a) of the ICCPR, everyone charged with a criminal offence shall be 'informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.'

2701 General Comment No. 10 (2007) on 'Children's Rights in Juvenile Justice,' the United Nations Committee on the Rights of the Child points out that: 'Internationally there is a consensus that for children in conflict with the law the time between the commission of the offence and the final response to this act should be as short as possible. The longer this period, the more likely it is that the response loses its desired positive, pedagogical impact, and the more the child will be stigmatized.' CROC, General Comment No. 10, 2007 ('Children's Rights in Juvenile Justice') CRC/GC/10, para. 23.

2702 According to Rule 15(1) of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ('the Beijing Rules'), 'Throughout the Proceedings the juvenile shall have the right to be represented by a legal adviser or to apply for free legal aid where there is provision for such aid in the country.' Rule 15(2) of the Beijing Rules provides that: 'The parents or the guardians shall be entitled to participate in the proceedings and may be required by the competent authority to attend them in the interest of the juvenile. They may, however, be denied participation by the competent authority if there are reasons to assume that such exclusion is necessary in the interest of the juvenile.'

2703 Article 11 of the UDHR and Article 14 of the ICCPR require that in the determination of a criminal charge, everyone shall be entitled 'not to be compelled to testify against himself or to confess guilt.'

2704 *See* also Article 17(2)(c)(iii) of the African Charter on the Rights and Welfare of the Child.

2705 *See* also Article 17(2)(c)(ii) of the ACRWC; Article 14(3)(f) of the ICCPR; and United Nations Committee on the Rights of the Child, General Comment No. 9 (2007) on 'The Rights of the Children with Disabilities.'

(vii) To have his or her privacy fully respected at all stages of the proceedings.

Under General Comment No. 10 (2007) the CROC states that 'no information shall be published that may lead to the identification of a child offender because of its effect of stigmatization and possible impact on their ability to obtain an education, work, housing, or to be safe'. It further states that 'the right to privacy also means that records of child offenders shall be kept strictly confidential and closed to third parties except for those directly involved in the investigation, adjudication and disposal of the case.' With a view to avoiding stigmatization and/or prejudgments, the CROC emphasises that 'records of child offenders shall not be used in adult proceedings in subsequent cases involving the same offender, or to enhance some future sentencing.'

Under sub-section (2) of Section 99 of the LCA, there is a prerequisite in relation to persons who are required to appear in a Juvenile Court at its *discretion*.[2706] These persons include: parties to the case before court, their advocates, witnesses and other persons directly concerned or involved in the case; and any other person whom the court may authorize to be present.

In respect of proceedings in the Juvenile Court Section 100(1) of the LCA categorically provides that the Juvenile Court, when hearing a charge against a child 'shall, if practicable, unless the child is charged jointly with any other person not being a child, sit in a different building or room than which the ordinary proceedings of the court are held.'[2707] Where, in the course of any proceedings in a court it appears to the court that the person charged or to whom the proceedings relate is a child, the court 'shall stay the proceedings and commit the child to the Juvenile Court.' in addition, where, in the course of any proceedings in a Juvenile Court 'it appears that the person charged or to whom the proceedings relate is an adult, the court shall proceed with the hearing and determination of the case according to the provisions of Magistrates Court Act[2708] or Criminal Procedure Act,[2709] as the case may be.'[2710]

19.6.4 Methods of Securing Attendance of Child at Preliminary Inquiry

Appearance in the Juvenile Court is governed by Sections 108 and 112 of the LCA. According to Section 108(1), where the child does not admit the offence with which he is charged, or where the court does not accept the statement of the child as amounting to a plea of guilty to that charge, the court 'shall proceed to hear the evidence of the witnesses for the prosecution.' Under sub-section (2) of Section 108 of the LCA:

(2) In all proceedings against a child, where parents, guardian, relatives or social welfare officer attend, any one of them may, with the prior consent of the court, assist the accused

2706 CSOs were sceptical about the requirement for court discretion in allowing appearance of other parties than the child, because the discretion might be abused in practice to the detriment of the child.

2707 Section 100(2) of the LCA.

2708 Cap. 11 R.E. 2002.

2709 Cap. 20 R.E. 2002.

2710 Section 100(3) of the LCA.

> child in the conduct of his case and, in particular, in the examination and cross-examination of witnesses.[2711]

Surprisingly, the provisions of Sections 108(2) and 112 have failed to appreciate the fact that a child is entitled to free legal aid granted by the State, as opposed to its counterpart, the South African CJA.[2712]

Under international juvenile justice law, it is well established that children in conflict with the penal law should be accorded a fair trial, even more specific than adults in such a situation. In order for fair trial for children accused of or found guilty of infringing penal law to be effectively realized there must be adequate guarantee to the right of access to justice.[2713] This so principally because:

> Access to justice is a paramount element of the right of a fair trial. Most accused and aggrieved persons are unable to afford legal services due to the high cost of court and professional fees. It is the duty of governments to provide legal assistance to indigent persons in order to make the right to a fair trial more effective.[2714]

States are thus urged to:

> 'Urgently examine ways in which legal assistance could be extended to indigent accused persons, including through adequately funded public defender and legal aid schemes.'[2715] States are also obliged to 'allocate adequate resources to judicial and law enforcement institutions to enable them to provide better and more effective fair trial guarantee to users of the legal process.'[2716]

However, the Government of Tanzania has failed to come up with provisions in the LCA setting out a comprehensive legal aid scheme and/or allocated adequate resources to judicial and law enforcement institutions to enable them 'to provide better and more effective fair trial guarantee to users of the legal process in Tanzania.'[2717] Nonetheless, the Government of Tanzania has continued to provide legal aid only to persons accused of capital offences such as murder and treason.[2718]

2711 The provisions of Section 108(2) are similar to the provisions of Section 112 of the LCA, which provide that: 'Where a child is charged with any offence, the Juvenile Court may in its discretion require the attendance of his parents, guardian, relative or a social welfare officer and may make such orders as are necessary for procuring the attendance.'

2712 The need for provision of free legal aid to children in conflict with the law is discussed in Part 7.5 of this Chapter. CSOs had suggested, in Section 54(5) of their Alternative Child Bill, that:

> '(5) A child arrested and charged with an offence shall have the right to free legal assistance and court representation [which] shall be accorded to him or her by the state or any other interested person or organization or institution.
>
> (6) A child arrested and charged with an offence shall have the right to free assistance by an interpreter if he or she does not understand or speak the language used at the police or in court.'

2713 *See* Article 17(2)(c)(iii) of the ACRWC and Articles 20, 37(d) and 40(2)(b)(iii) of the CRC.

2714 Article 9 of the Resolution on the Right to a Fair Trial and Legal Assistance in Africa (the *Dakar Resolution*). The Dakar Resolution was adopted by the African Commission on Human and Peoples' Rights in 1999.

2715 *Ibid*.

2716 *Ibid*.

2717 *See* UN Committee on the Rights of the Child, 'Consideration of Reports submitted by States Parties under Article 44 of the Convention – Concluding Observations of the Committee on the Rights of the Child: United Republic of Tanzania.' 02/06/2006. Op. cit, paras. 70 and 71.

2718 *See* particularly the Legal Aid (Criminal Proceedings) Act (1969), Cap. 21 R.E. 2002.

19.6.5 Release or Detention of a Child Prior to Sentence

It is a well-established rule of criminal law that where an accused person is brought before a police station or court, he or she should either be released on bail upon meeting bail conditions prescribed by law or detained where he or she fails to meet the conditions. This part, therefore, examines provisions relating to release and detention of children in conflict with the law as provided for in the LCA as well as other criminal procedural laws.

(a) The Right to Bail for a Child

The right to bail is a well-entrenched principle of many modern criminal law statutes. In Tanzania, Section 148 of the Criminal Procedure Act (1985)[2719] guarantees this right and provides several conditions for an accused person to be admitted to bail. The application of this Section was given judicial consideration in *DPP v Daudi s/o Pete*,[2720] where it was held, *inter alia*, that under Article 15(2)(a) of the Constitution of the United Republic of Tanzania (1977) a person may be denied or deprived of personal liberty under "certain circumstances" and subject to a 'procedure prescribed by law.' Then Section 148(5)(e) of the Criminal Procedure Act did not contain the requisite prescribed procedure for denying bail to an accused person; thus, according to the Court of Appeal, Section 148(5)(e) of the Act therefore violated Article 15(2) of the Constitution. It was, consequently, declared unconstitutional.

In the LCA, the right to bail for offending children is entrenched in Section 101, which provides that:

> 101. Where a child is apprehended with or without a warrant and cannot be brought immediately before a Juvenile Court, the officer in charge of the police station to which he is brought shall–
>
> (a) unless the charge is one of homicide or any offence punishable with imprisonment for a term exceeding seven years;
>
> (b) unless it is necessary in the interest of that child [to] remove him from association with any undesirable person; or
>
> (c) unless the officer has reason to believe that the release of that child would defeat the ends of justice, release such child on a recognizance being entered into by himself or by his parent, guardian, [and] relative or without sureties.

In principle, this provision seems to contain some safeguards to a child brought before a police station.[2721]

2719 *Ibid*.

2720 [1993] TLR 22.

2721 A more progressive proposal to this regard was made by CSOs in their Alternative Child Bill submitted to the Parliamentary Standing Committee (Community Development) in Dodoma on 28 April 2009. In Section 49(1), the Bill states that:

'49.- (1) The police officer shall have the duty to ensure that the juvenile is always free to be granted bail, even if the juvenile does not have a person to bail him or her out, unless the police officer concerned is satisfied that-

(a) It is necessary and in the best interest of the juvenile to remand him or her; or

(b) The child might disappear.'

According to Section 49(2) of the CSO Alternative Bill: 'No child shall be put in detention for more than 24 hours before being made to appear before a magistrate.'

(b) Prevention of a Child to Associate with Adult Offenders

In terms of Section 102 of the LCA, a 'police officer shall make arrangements for preventing, so far as practicable, a child while in custody, from associating with an adult charged with an offence unless he is a relative.' The law requires a child to be removed from custody 'where he is likely to associate with adult offenders and other undesirable influence.'[2722] This provision is concomitant to the provisions of Article 37(c) of the CRC, which provides that: 'every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.'

Under Article 10(2)(b) of the International Covenant on Civil and Political Rights (ICCPR, 1966) it is provided that: 'Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.' Similarly, under Rule 8(d) of the Standard Minimum Rules for the Treatment of Prisoners[2723] it is required that: 'Young prisoners shall be kept separate from adults.' Under paragraph 85 of General Comment No. 10 (2007) on "Children's Rights in Juvenile Justice,"[2724] the CROC states that: 'Every child deprived of liberty shall be separated from adults. A child deprived of his/her liberty shall not be placed in an adult prison or other facility for adults.'

(c) Remanding a Child

Section 104 of the LCA contains provisions regulating the remanding process of a child. In particular, Section 104(1) provides that, where a Juvenile Court remands a child or commits a child for trial before the High Court and the child is not released on bail or is not permitted to go on large, it 'may, instead of committing the child to prison, order him to be handed over to the care of the Commissioner, fit person or institution named in the order.'[2725] When this happens, the child should remain in the custody of that person or institution during the period mentioned in the order or until he or she is further dealt with according to law and shall be deemed to be in legal custody during that period.

Under paragraph 85 of General Comment No. 10 (2007), the CROC emphasises that the arrest, detention or imprisonment of a child must be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;[2726] and, as such, no child shall be deprived of his/her liberty unlawfully or arbitrarily.[2727]

In particular, Article 37 of the CRC contains provisions governing the detention of juveniles outside the juvenile justice system. According to paragraph (b) of Article

2722 *R v Njama Zuberi* (1985) TLR 241.

2723 Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

2724 CROC, General Comment No. 10 (2007): *Children's Rights in Juvenile Justice*, 25 April 2007, CRC/C/GC/10. Available at: http://www.unhcr.org/refworld/docid/4670fca12.html [Accessed on 16 January 2012].

2725 Rule 4 of the Law of the Child (Retention Homes) Rules (2012), GN. No. 151/2012, requires production of a court remand order to the manager before a child is admitted into a retention home.

2726 Paragraph 85(a) of General Comment No. 10 (2007).

2727 *Ibid*, para 85(b).

37 of the CRC, 'No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.' Where it is imperative to detain a child, such child should be entitled to a number of rights, including the rights to be treated with respect and without discrimination of any kind.[2728] Other rights to which a child in a retention home is entitled include the right to be provided with care that takes into account his individual needs, having regard to the child's age, gender, disability, health status and personal circumstances;[2729] the right to be provided with adequate nutrition, clothing and nurturing;[2730] the right to access to adequate preventive and remedial medical care;[2731] and the right to education and training appropriate to his or her age, level of maturity, aptitude and ability.[2732]

In addition, a child placed in a retention home is entitled to the rights to reasonable privacy (including possession and protection of his or her personal belongings);[2733] to be informed of the behaviour that is expected of him or her and the consequences of his or her failure to meet those expectations;[2734] to be protected from all forms of violence, abuse, neglect and exploitation;[2735] and not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment, including any cultural practice which dehumanises or is injurious to his or her physical and mental well-being.[2736] The child in a retention home is also entitled to the rights to a suitable amount of time for daily free leisure, exercise and play;[2737] to be consulted and to express his or her views, according to his or her abilities, about significant decisions affecting him or her;[2738] and to the necessary support and to an interpreter if language or disability is a barrier to consulting with them on decisions affecting his or her custody or care and development.[2739]

19.6.6 Procedure on Hearing in a Juvenile Court

The procedure on hearing of cases in the Juvenile Court is set out in Sections 105-07, 109 and 110 of the LCA. Whereas Section 105 obliges the Juvenile Court on hearing a charge against a child to explain to him, in simple language, the particulars of the alleged offence, Section 106 requires the Juvenile Court after explaining the

2728 The listed grounds of discrimination are gender, race, age, religion, language, political opinion, disability, health status, custom, ethnic origin, rural or urban background, birth, socio-economic status, being a refugee or other status. *See* particularly Section 5 of the LCA and Rule 4(1)(a) of Law of the Child (Retention Homes) Rules (2012), op. cit.

2729 *Ibid*, Rule 4(1)(b).

2730 *Ibid*, Rule 4(1)(c).

2731 *Ibid*, Rule 4(1)(d).

2732 *Ibid*, Rule 4(1)(e).

2733 *Ibid*, Rule 4(1)(f).

2734 *Ibid*, Rule 4(1)(g).

2735 *Ibid*, Rule 4(1)(h).

2736 *Ibid*, Rule 4(1)(i).

2737 *Ibid*, Rule 4(1)(j).

2738 *Ibid*, Rule 4(1)(k).

2739 *Ibid*, Rule 4(1)(l).

particulars of the alleged offence to 'ask the child to make a statement on whether he has a cause to show why he should not be *convicted*.'[2740]

(a) The Problem with the Plea of Guilty in the Law of the Child Act

One of the problematic provisions relating to the procedure in the Juvenile Court is Section 107 of the LCA, which simply states that: 'Where the statement made by the child amounts to a plea of guilty the court may convict him.' If not applied carefully by the courts due to their tender age and ignorance of the legal consequences of the sanctions relating to the offences with which they are charged, many children may find themselves being summarily convicted by the courts. It would be expected that this section ought to have set out some pre-requisites for such summary conviction. This would include the court warning and satisfying itself if – given the age and level of knowledge the child possesses as well as the circumstances of the case – the offending child possesses sufficient knowledge to know the impact of such plea of guilty.

This argument is backed up by the principles of conviction upon a plea of guilty as were enunciated by the High Court of Tanzania in *Buhimila Mapembe v R*,[2741] where Chipeta, J (as he then was), *inter alia*, held that, in any case in which a conviction is likely to proceed on a plea of guilty, it is most desirable not only that every constituent of the charge should be explained to the accused but that he should be required to admit or deny every element of it unequivocally. His Lordship was of the view that the words "it is true" when used by an accused person may not necessarily amount to a plea of guilty, particularly where the offence is a technical one.

In that case, His Lordship observed that the facts given by the public prosecutor could not be reasonably said to have amounted to full disclosure of the ingredients or elements of the offence, rather they appeared to be more of an allegation that the appellant had possession of the lion skin.

So, Section 107 of the LCA ought to have taken into account the likely danger of the court to rely on the child's plea of guilty without taking into account the above prerequisites. This provision is likely to be abused by the courts as was the case in a case decided by the Magu District Court in 1999[2742] where a nine-year-old boy was convicted for life imprisonment on a plea of guilty. In that case, the accused was on 15 June 1999 charged in the Magu District Court with the offence of rape contrary to Section 130(1) and (2)(e) and Section 131(2)(a) of the Penal Code[2743] as repealed and replaced by the Sexual Offences Special Provisions Act (1998).[2744]

2740 Reference to the word "convicted" in this section is somewhat contrary to the spirit of the international standards on the administration of juvenile justice, which discourages reference to legal terms that may lead to labelling the child as a criminal. The word "conviction" is, thus, fit for adult offenders. It is accepted in international juvenile justice law that such a child should only be referred to as a child who has been found to have violated the penal law; not as convicted. This would augur well with the spirit of Section 119(1) of the LCA which prohibits sentencing a child found to have committed an offence to imprisonment. At this stage, it is important that a juvenile justice law should reinforce the need for a child to be held accountable and understand the implications of the harm caused by his or her criminal activity; rather than convicting and punishing him or her. *See* particularly Section 69(1) of the South African Child Justice Act. In particular, Section 189 of the Kenyan Children Act prohibits the use of the words "conviction" and "sentence" in respect of a child found guilty of an offence.

2741 [1988] TLR 174.

2742 *R v Mohamed Abdullah*, District Court of Magu, Criminal Case No. 116 of 1999.

2743 Cap. 16 R.E. 2002.

2744 Cap. 101 R.E. 2002.

At that time the accused was living with his parents at Nyalikungu Village, in Magu District. When the charge and facts were read by the prosecution before Hon. DMF Kamalamo (DM) the accused replied to the allegations thus: 'I have heard the facts they are true and correct." On that basis, the court erroneously pronounced that: 'Accused has been convicted on his plea of guilty to the charge.'

Thereafter, on the same date, the court, instead of pronouncing its sentence, Hon. Kamalamo (DM) ordered that:

> After read (sic) the Act, which it is contradictory (sic) sentence has been reserved till after consultation with high level authority. In such circumstances sentence will be delivery (sic) after received (sic) report from High Court Mwanza (sic).

Upon that order, the court adjourned the case until 22 June 1999 and admitted the accused to bail. When the case, once again, came up in court on 22 June 1999 before the same Magistrate the prosecutor, one Assistant Inspector Komba, prayed the court to pass the sentence as previously ordered by the court. Asked to mitigate the sentence, the accused child simply said: 'I have nothing to say about the sentence.' Consequently, the court passed the sentence in the following terms:

> I have taken into consideration that accused person (sic) is first offender (sic) regarding the gravity of the offence as it has been prescribed under the sexual offences special provision (sic) my hands are tied up I can't fold them on my head thinking about (sic) sentence to be imposed to the accused. Further this court had (sic) nothing to do other than imposing the sentence which has been prescribed by the statute which it (sic) is life imprisonment. In such circumstances under Section 131(3) of the sexual offences special provisions (sic) Act No. 4 of 1998, (sic) Accused is hereby sentenced to life imprisonment.

This conviction and sentence were, however, reversed by the High Court on revision,[2745] basically on the fact that the accused child was below the MACR and that the plea of guilty was equivocal.

(b) Examination of Witnesses in the Juvenile Court

Examination of witnesses in both civil and criminal proceedings is a very crucial stage whereby parties are required to prove their respective cases through presentation of evidence in the form of testimony by their witnesses under oath/affirmation or presentation of relevant documents. Where witnesses are required to testify orally, they must either take oath or affirmation – i.e. swearing for Christians or affirming for Muslims (depending on their religious beliefs) to tell the truth and nothing but the truth.[2746]

In both criminal and civil proceedings, the examination of witnesses has three stages. First, after taking the oath, the witness is examined first by the party for whom the witness is called to testify or his advocate (i.e. examination-in-chief). At this level, the witness should not be asked leading questions. The primary object of examination-in-chief is to let the witness adduce material facts which he knows and which the case of the party calling him wholly depends. Thus, the party calling the witness must extract as much of the material facts in his favour as the witness knows or remembers.

2745 This case (and its implications) is discussed at some considerable length in Legal and Human Rights Centre, *The State of Juvenile Justice in Tanzania*, op. cit, pp. 14-16.

2746 *See* particularly *Busegi Kulwa v Celtel Tanzania Ltd*. High Court of Tanzania (Labour Division) at Dar es Salaam, Labour Revision No. 33 of 2009 (Unreported).

Second, the witness is cross-examined by the opposite party (i.e. cross-examination), whereby questions relevant to the dispute are asked by the opposite party. At this level, the other party may obtain additional information from the witness or challenge any aspect of the evidence given by the witness.[2747] As a general rule of practice on cross-examination in civil procedure, a party who fails to cross-examine a witness is rendered incompetent to ask the court to do so later.[2748] The main purpose of cross-examination is to test the accuracy and truthfulness of the witness, to destroy or weaken his evidence or show that the witness is unreliable, or to extract evidence that favours the cross-examining party.[2749]

Third, the witness may be re-examined by the party calling the witness (i.e. re-examination), whereby the calling party has a further opportunity to ask questions to the witness relating to issues dealt with during cross-examination. The purpose of re-examination is to repair the damage done by cross-examination.[2750] This is the last opportunity a witness has to clarify on vague statements or apparent contradictions revealed in cross-examination.

Section 109 of the LCA sets out the procedure for cross-examination of witnesses[2751] before the Juvenile Court. The section provides that at the close of the evidence of each witness, the Juvenile Court 'shall put to the witnesses such questions as appears to be necessary or desirable, either for the purpose of establishing the truth or the facts alleged or to test the credibility of the witness.' This section introduces the civil law procedure (as opposed to the common law adversarial procedure) of cross-examination where the court plays the role of the defence by asking the witnesses questions on behalf of the child. However, the section ought to have left a room for the child, if he or she possesses sufficient knowledge to be able to put questions to the witnesses, to do so; or to the child's advocate or parent, guardian or relative in accordance with Section 108(2) of the LCA. This would guarantee the principle of equality of arms in the trial before the Juvenile Court.[2752]

Under paragraph 59 of its General Comment No. 10 (2007), the CROC states that the guarantee in Article 40(2)(b)(iv) of CRC 'underscores that the principle of equality of arms (i.e. under conditions of equality or parity between defence and prosecution) should be observed in the administration of juvenile justice.' In the context of this

2747 *Ibid*. Rule 25(1)(b)(ii).

2748 See particularly, *Paul Yustus Nchia v National Executive Secretary, CCM and another* Court of Appeal of Tanzania at Dar es Salaam, Civil Appeal No. 85 of 2005 (Unreported).

2749 See generally Chipeta, B.D., *Civil Procedure in Tanzania: A Student's Manual* Dar es Salaam: Dar es Salaam University Press Ltd., 2002.

2750 Rule 25(1)(c) of the Mediation and Arbitration Guidelines.

2751 In law, "cross-examination" is the interrogation of a witness called by one's opponent. It is preceded by "direct examination" or "examination-in-chief" and may be followed by a "re-direct" or "re-examination" of the same witness by the party who has called before the court such witness.

2752 Indeed, one of the elements of the broader concept of a fair trial is the principle of equality of arms, which requires each party to be given a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage *vis-à-vis* his opponent. See, among many authorities, *Niderost-Huber v Switzerland* [1997] ECHR 18990/91 at para 23, 18 February 1997. That right means, in principle, the opportunity for the parties to a trial to have knowledge of and comment on all evidence adduced or observations filed, with a view to influencing the court's decision (see particularly *Lobo Machado v Portugal* [1996] ECHR 15764/89 at para 31, 20 February 1996). This position is not altered when the observations are neutral on the issue to be decided by the court. (*See* particularly *Goc v Turkey* [2002] ECHR 36590/97 at para 55) or, in the opinion of the court concerned, they do not present any fact or argument which has not already appeared in the impugned decision. *See* also *SH v Finland* (App No 28301/03) [2008] ECHR 28301/03.

paragraph, the term "to examine or to have examined" refers 'to the fact that there are distinctions in the legal systems, particularly between the accusatorial and inquisitorial trials. In the latter, the defendant is often allowed to examine witnesses although he/she rarely uses this right, leaving examination of the witnesses to the lawyer or, in the case of children, to another appropriate body.' However, the UNCROC notes, 'it remains important that the lawyer or other representative informs the child of the possibility to examine witnesses and to allow him/her to express his/her views in that regard, views which should be given due weight in accordance with the age and maturity of the child (Article 12).'[2753]

In practice, however, the right to "equality of arms" between the prosecution and defence can be said to be often honoured only in the breach. First, most of the international and local courts or tribunals simply allocate far more resources – financial, material, and human – to the prosecution than to the defence.[2754] To address this anomaly, most international tribunals, for instance the Special Court for Sierra Leone (SCSL), have embraced the idea that "equality of arms" means equality of *resources*, whereas the International Criminal Tribunal for Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) have said, following the latter's decision in *Prosecutor v Kayishema*,[2755] "equality of arms" means only equality of *rights* between the prosecution and the defence.

Under Section 110 of the LAC, it is provided that where after the prosecution witnesses have given evidence and the Juvenile Court is satisfied that the evidence before it established a *prima facie* case against the child the Juvenile Court 'shall hear the witnesses for the defence and any further statement which the child may wish to make in his defence.' This principle is, to a larger extent, in line with the provisions of Article 12(2) of the CRC, which requires that a child be provided with the opportunity to be heard in any judicial or 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.[2756]

(c) Child as a Witness

Under the law of evidence in Tanzania, before a child is allowed to give evidence, two main matters must be considered. First, She 'should be examined to find out whether or not she understands the nature of an oath; second, if the child does not understand the nature of the oath then the court should proceed to discover whether or not the child is sufficiently intelligent to understand the duty of speaking the truth.'[2757] This reasoning is gleaned from the provisions of Section 127(2) of the Evidence Act (1967),[2758] which provides categorically that:

> (2) Where in any criminal cause a child of tender age called as a witness does not, in the opinion of the court, understand the nature of an oath his evidence may be received

2753 Op. cit.

2754 For a detailed discussion on the application of the principle of equality of arms visit Http://Lawofnations.Blogspot.Com/2006/02/Inequality-Of-Arms-At-International.Html (Accessed on 26 January 2012).

2755 Case No. ICTR-95-1-T, decided on 21 May 1999.

2756 *See* also para 43 of General Comment No. 10 (2007) on 'Children's Rights in Juvenile Justice,' UN Committee on the Rights of the Child.

2757 *Babu v R* [2012] 1 EA 8, at p. 11. See also *Kibangeny Arap Kolil v R* [1959] 1 EA 92.

2758 Cap. 6 R.E. 2002.

> though not given on oath or affirmation, if in the opinion of the court while opinion shall be recorded in the proceedings, he is possessed of sufficient intelligence to justify the reception of his evidence, and understands the duty of speaking the truth.

Elaborating the import of the foregoing provisions in *Elias Joakim v R*,[2759] Katiti, J. (as he then was) held that competency in giving evidence in so far as the child of tender years is concerned, is not a matter of age, but of understanding; and that where a child of tender years gives evidence sworn after a successful *voire dire* test, and that he understands the nature of the oath, his evidence so given is as good as that of an adult. In *Babu v R*, Nsekela, J.A. opined that:

> 'The court must investigate in order to ascertain whether the child understands the nature of an oath, that is, there must be a record of investigation to that effect, not necessarily detailed. The investigation should precede the swearing.'[2760]

The LCA has brought forth a very progressive element regarding the protection of the rights of a child who testifies in a court of law. According to Section 115(1) of the LCA, where in any cause or matter a child called as a witness does not, in the opinion of the court, understand the nature of an oath, the evidence 'may be received if in the opinion of the court, which opinion shall be recorded in the proceedings, the child is possessed of sufficient intelligence to justify the reception of the laws of evidence and understands the duty of speaking the truth.' Under sub-section (2) of Section 115 of the LCA, where evidence received by virtue of sub-section (1) is given on behalf of the prosecution is not corroborated by any other material evidence in support of it implicating the accused the court 'may after warning itself, act on that evidence to convict the accused if it is fully satisfied that the child is telling the truth.'

In the LCA there is a significant departure from the rules of evidence relating to the admissibility of evidence of a child of tender age. Under sub-section (3) of Section 115 of the LCA it is provided that:

> (3) Notwithstanding the provisions of this section, where in any criminal proceedings involving sexual offence[2761] the only independent evidence is that the child or victim of sexual offence, on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict for reasons to be recorded in the proceedings, if the court is satisfied that the child is telling nothing but the truth.

Under the rules of evidence, the evidence of a "child of tender age"[2762] requires corroboration before it can be acted upon.[2763] This rule was given judicial consideration in *Said Hemed v R*.[2764] In that case, the principal witness for the prosecution was a child of tender years. In the learned High Court Judge's estimation of his age, at the time he appeared in the witness box in August 1986 the witness was between 9 and 10 years.

2759 [1992] TLR 220 (HC).

2760 Op. cit, pp. 11-12.

2761 In terms of sub-section (4) of Section 115 of the LCA, 'For the purposes of this Section and any other written laws, "sexual offence" means any sexual offence as created by the Penal Code.'

2762 Under Section 127(5) of the Evidence Act (1967), Cap. 6 R.E. 2002, a "child of tender age" means a child whose apparent age is not more fourteen years. This definition was confirmed by the Court of Appeal in *Hassani Hatibu v R* Court of Appeal of Tanzania at Dar es Salaam, Criminal Appeal No. 71 of 2002 (Unreported).

2763 In *Hassani Hatibu v R*, *Ibid*, it was held that 'it is imperative for the trial judge or magistrate when the witness involved is a child of tender age to conduct a *voire dire* examination. This is to be done in order for the trial judge or magistrate to satisfy himself or herself that the child understands the nature of an oath.'

2764 [1987] TLR 117 (CA).

Therefore, the witness was aged between 5 and 6 years at the time the offence (killing) took place. He gave unsworn evidence, the judge having got the impression, upon a *voire dire*,[2765] that he was sufficiently intelligent to justify the reception of his evidence, though he did not understand the nature of oath. However, the Court of Appeal was of a different opinion that,

> As observed above, P.W.1 was aged between 5 and 6 years at the time of the killing. He came to give evidence in the High Court four years after the event when he had attained the age of 9 or 10 years. He was then schooling in Std. III. But this is the child who told the court that he did not know the names of his parents, and that he was not aware of the fact that his sister Esta has died. We are amazed in our judgement we are not satisfied that P.W.1 was possessed of sufficient intelligence. We therefore entertain serious misgivings about his recollection of the event.
>
> We are fully apprehensive of the fact that we are sitting on appeal and that we have not had the opportunity of seeing or hearing the witness. But on the materials on record we strongly feel that the finding of the learned judge in respect of P.W.1's intelligence was not reasonably open to him and we are, therefore, obliged to disturb it. We take the view that as a matter of prudence the evidence of P.W.1 required corroboration before it could be acted upon.

Under paragraph 56 of its General Comment No. 10 (2007), the UNCROC urges that a child should not be 'compelled to give testimony or to confess or acknowledge guilt.' This is in line with Article 14(3)(g) of the ICCPR.

19.6.7 Procedure upon Conviction

The procedure upon conviction of a juvenile in the Juvenile Court is set out in Section 111 of the LCA. Under sub-section (1) of this Section it is provided that, where the child admits the offence and the Juvenile Court accepts its plea or after hearing the witnesses the Juvenile Court is satisfied that the offence is proved, the Juvenile Court 'shall convict the child and then, except in cases where the circumstances are so trivial as not to justify such a procedure, obtain such information as to his character, antecedents, home life, occupation and health as may enable it to deal with the case in the best interests of the child, and may put to him any question arising out of that information.' According to sub-section (2): 'For the purpose of obtaining information or for special medical examination or observation, the Juvenile Court may remand the child or may release him on bail.'

Under paragraph 52 of its General Comment No. 10 (2007), the CROC 'recommends that States Parties set and implement time limits for the period between the commission of the offence and the completion of the police investigation, the decision of the prosecutor (or other competent body) to bring charges against the child, and the final adjudication and decision by the court or other competent judicial body.' This recommendation is in line with the provisions of Article 37 of the CRC, which requires that children should be detained only as a measure of last resort and for the shortest appropriate period of time. This requirement is affirmed in Article

2765 The judicial consensus on this matter is that where 'in a criminal case involving the evidence of a child of tender age, the trial court does not conduct a *voire dire* examination in terms of Section 127 of the [Evidence] Act, the reception of such evidence is improper.' per Lubuva, J.A. (as he then was) in *Hassani Hatibu v R*. *See* also *Jonas Raphael v R* Court of Appeal of Tanzania at Dar es Salaam, Criminal Appeal No. 42 of 2003 (Unreported).

107A(2)(b) of the Constitution of Tanzania (1977), which obliges courts to expedite determination of cases as a general rule. In South Africa, Section 66 of the CJA gives effect to the constitutional right to a speedy trial contained in Section 35 of the Constitution of South Africa (1996),[2766] by providing that 'all trials must be concluded as speedily as possible with as few postponements as necessary.'[2767]

However, the LCA does not provide for a timeframe within which trials involving children would be finalised and sentence handed down. This timeframe would guarantee expeditious and certain disposition of cases in the Juvenile Court, particularly in a judicial system fraught with inordinate delays in determination of cases like in Tanzania.[2768] For instance, in its first report[2769] released in December 2006, the Research and Analysis Working Group (RAWG), MKUKUTA Monitoring System, which was then under the Ministry of Planning, Economy and Empowering (MPEE), observed that:[2770]

> Administration of justice should be expedited. There is a backlog of unresolved criminal and civil disputes, and the number of trained legal personnel is insufficient. Data indicates that the percentage of people held in remand for more than two years is 15.7 percent in 2005. The target is 7.5%. Given the overcrowding in prisons, reducing this number could help to ease congestion.[2771]

The fixing of a certain timeframe within which a case is disposed of has been embedded in the current labour law regime in Tanzania – within 30 days for mediation[2772] and arbitration[2773] – and it has proved to be quite useful in expeditious determination of labour cases both in the Commission for Mediation and Arbitration (CMA) and the High Court (Labour Division).[2774] In the absence of a fixed timeframe for disposal of cases in the Juvenile Court one expects to see inordinate delays in determination of cases in the Juvenile Court as it is the case in the ordinary courts.

2766 *See* also Section 28(1)(g) of the Constitution of South Africa.

2767 *See* particularly Gallinetti, J., *Getting to Know the Child Justice Act* Bellville: Child Justice Alliance, 2009, p. 51.

2768 For a detailed account of the magnitude of the problem of delays of cases in Tanzanian courts, see particularly United Republic of Tanzania, '*Financial and Legal Sector Upgrading Project (FILMUP) – Legal Sector Report*' Dar es Salaam: Government Printer, 1996; United Republic of Tanzania, *Legal Sector Reform Programme: Medium Term Strategy (2005/06-2007/08)* Dar es Salaam: Government Printer, 2004; Ministry of Justice and Constitutional Affairs, *A Vision of Accessible and Timely Justice for All in the New Millennium* Dar es Salaam: Government Printer, 2004; Mashamba, C.J., 'Access to Justice and State Policy Considerations in Tanzania.' The Justice Review. Vol. II No. 2, 2006; United Republic of Tanzania, *Status Report 2006: Progress Towards the Goals for Growth, Social Wellbeing and Governance in Tanzania* Dar es Salaam: Research and Analysis Working Group, MKUKUTA Monitoring System (then under the Ministry of Planning, Economy and Empowering), 2006; and Mashamba, C.J., 'Overview of the Implementation of Cluster III of MKUKUTA: Governance and Accountability' *The Justice Review* Vol. IV No. 5, 2007.

2769 This report aimed at providing an analysis using national set of indicators revised in 2005/06 under Tanzania's National Strategy for Growth and Reduction of Poverty (better known in Kiswahili, *Mkakati wa Kukuza Uchumi na Kuondoa Umaskini Tanzania*, MKUKUTA).

2770 *See* United Republic of Tanzania, *Status Report 2006: Progress Towards the Goals for Growth, Social Wellbeing and Governance in Tanzania,* op. cit.

2771 *Ibid*, p. 27.

2772 *See* particularly Sections 86 of the Employment and Labour Relations Act (Act No. 6 of 2004), Cap. 366 R.E. 2002.

2773 *Ibid*, Section 88(9), which provides that: 'Within thirty days of the conclusion of the arbitration proceedings, the arbitrator shall issue an award with reasons signed by the arbitrator.' See also Rules 18(3) and 22 of the Labour Institutions (Mediation and Arbitration Guidelines) Rules (2007), GN. No. 67 dated 23 Mach 2007.

2774 *See* particularly *Buzwagi Project v Antony Lameck* High Court of Tanzania (Labour Division) at Mwanza, Revision No. 297 of 2008 (Unreported); and *21st Century Food & Packaging Ltd. v Emmanuel Mzava Kimweli* High Court of Tanzania (Labour Division) at Dar es Salaam, Revision No. 158 of 2008 (Unreported).

19.6.8 Disposition of Cases and Placement of a Child

Section 116 of the LCA sets out procedure for committing a "convicted" child to custodial sentence. On the face of the Section – particularly from the reading of the title of the Section, i.e. "custodial sentence" – it seems that custodial sentence is the most preferred sentence. This would seem to be contrary to Article 37(b) of the CRC, which emphasizes that in the disposition phase of the proceedings, deprivation of liberty must be used only as a measure of last resort and for the shortest appropriate period of time. Under paragraph 28 of General Comment No. 10 (2007), the CROC requires that when judicial proceedings are initiated by a competent authority against the juvenile: 'the juvenile justice system should provide for ample opportunities to deal with children in conflict with the law by using social and/or educational measures, and to strictly limit the use of deprivation of liberty, and in particular pre-trial detention, as a measure of last resort.'

According to paragraph 28 of General Comment No. 10: 'This means that States Parties should have in place a well-trained probation service to allow for the maximum and effective use of measures such as guidance and supervision orders, probation, community monitoring or day report centres, and the possibility of early release from detention.' However, the provisions of Section 116 actually provides for alternative or diversionary measures to deal with "convicted" offending children. The Section provides for such alternative sentences like conditional discharge and probation.

(a) Conditional Discharge

Section 116(1) of the LCA vests powers in the Juvenile Court to make an order of conditional discharge, instead of committing the offending child to custodial sentence. This Section requires that where a child is convicted of an offence other than homicide, the Juvenile Court 'may make an order discharging the offender conditionally on his entering into recognizance, with or without sureties, to be of good behaviour during such period not exceeding three years, as specified in the order but if a child has demonstrated good behaviour then that child shall be presumed to have served the sentence.'

(b) Probation Orders

Another provision that can be used as one of the diversionary measures at the stage of disposition of a case in the Juvenile Court is the one relating to the grant of a probation order. This is provided for in Section 116(2) of the LCA, which categorically stipulates that:

> 116(2) A recognizance entered into under [sub-section (1) of] this section shall, if the court so orders, contain a condition that the child be under the supervision of parent, guardian, relative or social welfare [officer] as may be named in the order during the period specified in the order, if that person is willing to undertake the supervision, and such other conditions for securing the supervision as may be specified in the order.

Under sub-section (3) of Section 116 of the LCA, the person named in the probation order 'may at any time be relieved of his duties and, in that case or in the case of the death of a person so named, another person may be substituted by the Juvenile Court

before which the child is bound by his recognizance to appeal for conviction or sentence.'

In principle, the probation order means that the child is not put in a penal institution, under the condition that he/she will behave well and regularly report to a probation officer. If the child fails to behave well, the court may later decide to detain him/her in a child penal institution. Before making a probation order, the court should be advised by a social welfare officer. If the court finds a child guilty of an offence, it should be able to place the child under custody of some other person or family instead of prison custody. If the court finds a child guilty of an offence, it should be able to place that child under supervision of: a probation officer, or a 'fit person/institution' so appointed by the court, or a village authority (i.e., the village/area executive officer).

At the time of the enactment of the LCA, it was also proposed that a child should not be separated from his or her parents, unless the circumstances of the case make this necessary.[2775] It was proposed further that the placement of a child in an institution in any case should be a disposition of last resort; and where it is imperative to place the child in an institution, it shall be for a minimum period.[2776]

(c) Procedure Relating to a Child's Failure to Observe Release Conditions

As noted above, Section 116 of the LCA sets out circumstances in which the court may release a child on prescribed conditions. Such release may be in the form of conditional discharge or on a probation order. Where a child so released fails to observe the release conditions imposed by the court under Section 116 he or she may face sanctions set out in Section 117 of the LCA. As such, where the Juvenile Court is satisfied by information on oath that the child has failed to observe any of the conditions of his recognizance, it should issue summons to the child or young person and his sureties, if any, requiring him or them to attend at such court and at such time as may be specified in the summons.[2777] Upon summoning the child or his sureties, the Juvenile Court before which a child is bound by his recognizance to appear for sentence, on being satisfied that he has failed to observe any condition of his recognizance, may forthwith deal with a child as for the original offence.[2778]

(d) Power to Order Parent to Pay Fine Instead of a Child

The LCA empowers the Juvenile Court, upon convicting a child of any offence, to impose an order for payment of a fine, compensation or costs; instead of committing the child to custodial placement. This is particularly done where the court is of the opinion that the case would be best disposed of in the best interests of the child by the imposition of a fine, compensation or costs, whether with or without any other punishment. Considering the fact that a child is legally incapable of possessing property, including those in monetary form, the LCA vests power in the Juvenile Court to order a parent, guardian or relative of the convicted child to pay fine, compensation or costs instead of the child.[2779] However, a parent, guardian or relative may not be compelled

2775 Section 60(3) of the CSO Alternative Bill.

2776 *Ibid*, Section 60(4).

2777 Section 117(1) of the LCA.

2778 *Ibid*, Section 117(2).

2779 In *Marcela Barthazar v Hussein Rajab* (1986) TLR 8 (HC) the High Court held that a compensation order in respect of a convicted juvenile may in an appropriate case only be made against a parent or guardian of the child or young person. It cannot be made against the juvenile.

to pay fine where the court is satisfied that he or she cannot be found; or where it is satisfied that he or she has not contributed to the commission of the offence by neglecting to exercise due care of the child.[2780]

Before the Juvenile Court issues an order for fine, compensation or costs, it must give the concerned parent, guardian, or relative an opportunity of being heard.[2781] Where parent or guardian is aggrieved by the order, he or she may appeal against such order.[2782]

The provisions are similar to Section 27(3) of the Penal Code, which allows the court to order that a convicted person should pay fine as an alternative to custodial imprisonment. This Section provides that: 'A person liable to imprisonment may be sentenced to pay a fine in addition to, or instead of, imprisonment.' In *Salum Shaaban v R*.[2783] Mtenga, J (as he then was) stated the rationale for paying fine instead of custodial imprisonment, explaining that fine:

> […] is an option given by the legislature which therefore means that in imposing a sentence, the court must ascertain that a sentence of fine should first be imposed and in default of payment of such fine, then a sentence of imprisonment can be given … In imposing a sentence of fine the court must ascertain that the fine can be paid rather than impose a sentence which cannot be paid and as a result the accused goes to jail.[2784]

In *Nyakulima d/o Chacha v R*.[2785] Mohan, J (as he then was) observed that: 'The principle is that a fine should be one which an accused person can reasonably be expected to pay.'

However, the problematic provision in Section 118 is sub-section (3) which entails recovery of the imposed fine, compensation or costs by any means, including by distress against, or imprisonment of, the defaulting parent, guardian or relative. The sub-section categorically provides that:

> (3) Any sum imposed or ordered to be paid by a parent, guardian, or relative may be recovered from him by distress or imprisonment in like manner if the order had been made on the conviction of the parent, guardian or relative of the child with [which he] was charged.

2780 *Ibid*. Section 118(1). Before the enactment of the LCA, compensation in respect of convicted juveniles was governed by Section 21 of the Children and Young Persons Act, Cap. 13. In *Marcela Barthazar v Hussein Rajab*, *Ibid*, the respondent's child sustained some injury at the hands of the child of the appellant. The trial court found the appellant's child liable and, *inter alia,* ordered the respondent to pay compensation. The High Court found to be 'undesirable to order the appellant to pay any compensation.' According to the High Court, the parties' children, who were neighbours, were attending school and, at the material time, 'they were coming from school together with other school children. There was no evidence or indication from the evidence that the appellant in any way contributed to the commission of the offence by neglecting to exercise due care of her offending child. The incident was a result of common trivial school children's playful squabbles for which it is wrong, of itself, to hold parents or guardians responsible by way of payment of compensation. It is neither conducive to, nor shall it promote, good and amicable neighbourly relations.'

2781 Section 118(2) of the LCA. In *Marcela Barthazar v Hussein Rajab*, *Ibid*, reinforcing this provision, which is similar to Section 21(2) of the repealed Children and Young Persons Act, the High Court held that: 'a court may not order a parent to pay a fine or compensation or costs without giving the parent an opportunity to be heard.' In *Ramadhani Mwenda v Republic* 1989 TLR 3 the High Court held that if a sentencing court is minded to impose a sentence of fine as an option to a custodial sentence, such court should take pains to inquire into the financial means of the accused. See also *Ally and others v R* [1972] HCD No. 115.

2782 *Ibid*. Section 118(4).

2783 [1985] TLR 71.

2784 *Ibid*, at p. 73.

2785 1 T.L.R. 341.

This offends the international juvenile justice standards. Under paragraph 55 of its General Comment No. 10 (2007), the CROC 'regrets the trend in some countries to introduce the punishment of parents for the offences committed by their children.' The CROC also elaborates that: 'Civil liability for the damage caused by the child's act can, in some limited cases, be appropriate, in particular for the younger children (e.g. below 16 years of age).' But the CROC discourages criminalizing parents of children in conflict with the law, because it will 'most likely not contribute to their becoming active partners in the social reintegration of their child.' So, the provisions of sub-section (3) of Section 118 of the LCA ought to be reconsidered with a view to being amended in the context of paragraph 55 of General Comment No. 10.

19.6.9 Alternative Sentences

The LCA progressively prohibits the imposition of the sentence of imprisonment on a child found guilty of an offence.[2786] As the High Court held in *R. v Asia Salum and another*,[2787] as a rule, youthful offenders should not be sentenced to terms of imprisonment, where there is an opportunity to mix with and learn bad habits from more seasoned criminals.[2788] According to the High Court, the imprisonment only serves to bring the child 'into contact with hard core criminals and make him more of a criminal by the time he left the prison than when he entered it.'

Similarly, in *R v Uswege Bukuku*,[2789] Mackanja, J (as he then was) held that in sentencing juveniles, the objective should be rehabilitation, not punishment; and that the court should take into account that those of tender age can be channelled away from long term criminal behaviour by not sending them to jail where they meet hard core criminals. His Lordship was of the further view that, in considering an appropriate punishment for a juvenile the court should examine the personal characteristics of the accused, his age, health, prior criminal behaviour, background and upbringing. The Court was of the view that, as the accused in this case was an epileptic who had lost both parents, a custodial sentence was not the best punishment. His Lordship remarked lucidly that:

> What purpose then, can be served in sending a person of such health to prison? He will benefit from neither corrective measure nor is he likely to be trainable by reason of his disease of the mind. These circumstances should be considered because, invariably, social background of a delinquent juvenile sometimes is influenced by the environment in which the child has grown. Lack of filial love, neglect and cruelty may account a lot in moulding behavioural inclination during this formative stage.

This judicial position is reflected in sub-section (2) of Section 119 of the LCA, which provides that, where a child is convicted of any offence punishable with imprisonment, the court may impose any other alternative order,[2790] which may be made under the

2786 Section 119(1) of the LCA.

2787 [1986] TLR 12.

2788 The principle that youthful offenders should not be sentenced to terms of imprisonment is also evident from the decision of this court in *R. v Teodosio s/o Alifa* [1967] HCD No. 216.

2789 [2001] TLR 337 (HC).

2790 This provision is more progressive than the provisions of Section 22(2) of the repealed Children and Young Persons Act, which provided that: 'No young person shall be sentenced to imprisonment, *unless the court considers that, none of the other methods in which the case may be legally dealt with, by the provisions of this or any other Ordinance, is suitable.*' (Emphasis supplied). The highlighted phrase gave an opportunity for many trial magistrates to sentence children to imprisonment. *See* particularly *R v John s/o Gilied* [1984] TLR 273.

LCA.[2791] Such alternative orders include: discharging the child without making any order;[2792] ordering the child to be repatriated, at the expense of the Government, to his or her home or district of origin if it is within Tanzania;[2793] or ordering the child to be handed over to the care of a fit person or institution named in the order, if the person or institution is willing to undertake such care.[2794]

This provision is more or less similar to the provisions of Article 37(b) of the CRC, which provides that: 'No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.' Essentially, these principles would provide guidance to the sentencing Juvenile Court to deal with the matter in the best interests of the child.

The LCA also contains provisions that regulate the procedure relating to the commitment of a convicted child to an approved school established under Section 121 of the LCA. This is particularly set out in Section 120(1) of the LCA, which requires that where a child is convicted of an offence which if committed by an adult would have been punishable by a custodial sentence, the court may order[2795] that child be committed to custody at an approved school. However, an order committing a convicted child to an approved school 'shall not be made unless the patron of the approved school to which the child is to be committed has informed the Juvenile Court that he has a vacancy which may be filled by the person in respect of whom it is proposed to make the order.'[2796]

19.7 Provision of Legal Assistance to Children in Conflict with the Law in Tanzania

As of now the Government of Tanzania has not set out any comprehensive legal aid scheme or allocated any adequate resources to judicial and law enforcement institutions to enable them 'to provide better and more effective fair trial guarantee to users of the legal process in Tanzania,'[2797] except only for persons accused of capital offences such as murder and treason. The right is guaranteed and granted, by virtue of the provisions of Section 310 of the Criminal Procedure Act (1985).[2798]

According to Section 3 of the Legal Aid (Criminal Proceedings) Act (1969),[2799] the Chief Justice or a judge of the High Court may certify that a certain accused person should be extended free legal aid throughout the proceedings facing him or

2791 In *R. v Fidelis John* [1988] TLR 165, the accused child was convicted on his plea of guilty for escaping from lawful custody and was sentenced to six months' imprisonment and six strokes of the cane. On revision, the High Court held, *inter alia*, that the trial court had no legal justification to sentence the accused to 6 months' imprisonment. The trial court ought to have resorted to the alternative forms of punishment provided for juvenile offenders. Accordingly the sentence of 6 months' imprisonment was quashed and set aside; and the accused child was set at liberty forthwith. However, the High Court blessed the trial court's sentence of 6 strokes of the cane imposed on the accused, saying that it 'meets the justice of the case.' Although corporal punishment is allowed in the Tanzanian juvenile justice system, international children's rights law prohibits it. *See* particularly, Article 37 of the CRC; and Article 17(1) and (2)(a) of the ACRWC.

2792 *Ibid*. Section 119(2)(a).

2793 *Ibid*. Section 119(2)(b).

2794 *Ibid*. Section 119(2)(c).

2795 Under sub-section (3) of Section 120 of the LCA, the order made under this Section is referred to as 'an approved school order'.

2796 *Ibid*. Section 120(2).

2797 *See* UN Committee on the Rights of the Child, 'Consideration of Reports submitted by States Parties under Article 44 of the Convention – Concluding Observations of the Committee on the Rights of the Child: United Republic of Tanzania.' 02/06/2006. Op. cit, paras. 70 and 71.

2798 Act No. 9 of 1985 (Cap. 20 R.E. 2002).

2799 Act No. 21 of 1969 (Cap. 21 R.E. 2002).

her where it appears to the certifying authority that 'it is desirable, in the interest of justice that an accused should have legal aid in preparing and conduct of his defence or appeal and that his means are insufficient to enable him to obtain such aid.'[2800]

Due to this serious omission, the CROC has urged the Government of Tanzania, *inter alia*, to first: 'Ensure that persons under 18 years of age in conflict with the law have access to legal aid as well as independent and effective complaints mechanisms.'[2801] Second, to: 'Improve child-sensitive court procedure in accordance with the United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (annexed to Economic and Social Council resolution 2005/20 of 22 July 2005).'[2802]

From the foregoing explanation, where states are incapable of fulfilling their obligation to provide legal aid to the indigent and vulnerable persons, like children, the 'contribution of the judiciary, human rights NGOs and professional associations should be encouraged.'[2803] In Tanzania, though, most of the legal aid NGOs that exist provide legal assistance to persons having civil cases,[2804] not criminal cases. In this case, thus, children in conflict with the penal law are not yet included in the schemes of existing legal aid providers. It would be important for any meaningful child's rights-centred approach to assisting children, like the one undertaken by many children's rights and legal aid NGOs, to take initiatives to providing legal assistance to juveniles in conflict with the penal law in Tanzania. This would help to minimize the inherent sufferings of juvenile delinquents in the country's criminal justice system, as elaborated in this Chapter.

19.8 Inherent Gaps in the LCA Relating to Protection of Children in Conflict with the Law

Although it has been hailed as one of the greatest achievements of the fourth phase Government in protection of children's rights in Tanzania,[2805] the LCA has several gaps in relation to the protection of children in conflict with the law. This aspect was noted by some circles during the public hearing on the Bill to enact the LCA, but the Government paid a deaf ear to this plea.[2806] Notably, one of the serious gaps is lack of a

2800 This provision was determined in *The Judge i/c High Court (Arusha) and A.G. v N.I. Munuo Ng'uni*, Court of Appeal of Tanzania at Arusha, Civil Appeal No. 45 of 1998 (Unreported). *See* also *N.I. Munuo Ng'uni v The Judge i/c High Court (Arusha) and the Attorney General,* High Court of Tanzania at Arusha, Civil Cause No. 3 of 1995 [Unreported].

2801 CROC, 'Consideration of Reports submitted by States Parties under Article 44 of the Convention – Concluding Observations of the Committee on the Rights of the Child: United Republic of Tanzania.' 02/06/2006. Op. cit, para. 71.

2802 *Ibid*.

2803 Article 9 of the *Dakar Declaration*, op cit.

2804 *See* generally ST Associates-Process Consultants & Facilitators, 'Final Report for Baseline Survey on Tanzania Mainland and Zanzibar for Legal Service Facility: ID: LSF 001 BLST CSTA.' Dar es Salaam, Legal Service Facility, 2012.

2805 *See* for instance the statement of UNICEF's Tanzania Representative, Heimo Laakkonen, made at the public hearing on the Bill to enact the Law of the Child (2009) organised by the Parliamentary Standing Committee (Community Development) at Karimjee Hall in Dar es Salaam on 7 and 8 October 2009. 'This is a huge step forward,' said the UNICEF Representative after witnessing the passage of the bill through Parliament on 4 November 2009 following two days of deliberation. 'With the 20th anniversary of the Convention on the Rights of the Child just around the corner, this gives us, and Tanzania's children, two monumental achievements to celebrate!' he said. This statement is available at http://www.unicef.org/infobycountry/tanzania_51662.html (Accessed on 18 December 2012).

2806 *See* particularly 'CSOs' Addendum Position Paper presented to the Parliamentary Standing Committee (Community Development)' at Dodoma Bunge Premises on 3 November 2009.

clear list enumerating the standards constituting the best interest of the child.[2807] Unlike the LCA, the Zanzibar Children's Act (2011)[2808] and the South African Children's Act (2005)[2809] contain a clear enumeration of factors constituting the best interests of the child.

There is also lack of a clear listing of the diversion measures at each stage of the administration of juvenile justice (as enumerated in the South African CJA); as well as lack of the obligation of the government to provide legal assistance to children in conflict with the law.[2810] The law also has failed to provide explicit provisions regarding the establishment and functioning of the Juvenile Court in every region of Tanzania Mainland. In this regard, the law has failed to address the question of seriousness in establishing Juvenile Courts around and across the country, now that the country has only one Juvenile Court at Kisutu in Dar es Salaam. Further, the law does not abolish corporal punishment imposed on children, particularly in the administration of the juvenile justice system. The LCA also does not establish a central body to coordinate the work and functions of the juvenile justice agencies and actors: the police, judiciary, (the prisons department[2811]), the social welfare department as well as civil society organisations working with and for children in the country.[2812]

2807 *Ibid*.

2808 *See* particularly Section 4 of the Zanzibar Children's Act (2011).

2809 *See* particularly Section 7 of the South African Children's Act (2005).

2810 *See* particularly Mashamba, C.J., 'Introduction to the Tanzanian Law of the Child Act (2009).' A paper presented at a training of Legal and Human Rights Centre (LHRC) Staff on the Child Law Organized by the Directorate of Advocacy and Reforms of the LHRC, held in Dar es Salaam on 23 June 2010.

2811 The prisons department is included here as a juvenile justice agency as it currently holds most of the remanded and imprisoned children in Tanzania as a result of lack of Retention Homes and Approved School as discussed in part 7.1 above.

2812 Only recently a loose Child Justice Forum (CJF) was set up under the coordination of the Ministry of Constitutional and Legal Affairs (MoCLA). The CJF, which is a result of the recommendations made in two studies (on juvenile justice and on access to justice for under 18's) conducted by nola and Coram Children Legal Centre (Essex University, UK) under UNICEF funding, adopted a five-year Strategy in February 2012 that would ensure, *inter alia*, that activities and programmes undertaken by stakeholders are adequately improved and coordinated.

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