



SPOTLIGHTING THE INVISIBLE

JUSTICE FOR CHILDREN IN AFRICA

ACPF

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THE AFRICAN CHILD POLICY FORUM (ACPF)

The African Child Policy Forum (ACPF) is an independent, not for profit, Pan-African Institute of policy research and dialogue on the African child.

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

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

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LIST OF ACRONYMS

ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACPF	African Child Policy forum
ACRWC	African Charter on the Rights and Welfare of the Child
ARRS	Arrest, reception and referral service
AU	African Union
CLPC	Children's Legal Protection Centre
CRC	United Nations Convention on the Rights of the Child
CYCC	Child and youth care centre
Danida	Danish International Development Agency
DCI	Defence for Children International
DCS	Department of Correctional Services
DOVVSU	Domestic Violence and Victims Support unit
DPP	Director of Public Prosecutions
DRC	Democratic Republic of Congo
FSU	Family Support Unit
HIV/AIDS	Human immunodeficiency virus/acquired immune deficiency syndrome
IDR	Informal dispute resolution
INGO	International non-governmental organisation
IOM	International Organisation for Migration
JDLs	United Nations Rules for the Protection of Juveniles Deprived of their Liberty
NCJF	National Child Justice Forum
NGO(s)	Non-governmental organisation(s)
OMCT	World Organisation against Torture
SDGs	Sustainable Development Goals
SLP	Sierra Leone Police
SOCA	Sexual Offences and Community Affairs Unit
UN	United Nations
UNDP	United Nations Development Programme
UNICEF	United Nations Children's Fund
UNICEF ESARO	UNICEF Eastern and Southern Africa Regional Office
UNODC	United Nations office on Drugs and Crime
WACPS	Women and Children Protection Section

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PREFACE

This publication is prepared both to advance our knowledge of the important but complex subject of child Justice in Africa and to inform the discussions at the 2nd Global Conference on Child Justice in Africa to be held in Addis Ababa in May 2018. This conference, organised by the African Child Policy forum (ACPF) and Defence for Children International (DCI) is a follow-up to the first such conference that took place in Kampala, Uganda, in November 2011. That conference resulted in the ***African Guidelines on Action for Children in Justice Systems in Africa*** which were endorsed by the African Committee of Experts on the Rights and Welfare of the Child at its March 2012 meeting. ACPF also published a continental study on children and justice systems in that year.

The current study updates and extends that earlier study, seeking to examine the progress that has been made, and the challenges that remain, since the 2011 conference in achieving child-friendly justice in African justice systems. Given that children come in contact with justice system in different ways – through the formal and informal justice systems, in religious justice systems in some parts of the continent, and in both the criminal and civil justice systems – this study charts the continuum of experiences that children undergo in their contact with these systems.

The situations in which children are involved in the justice system fall into four categories: the criminal justice system (when in conflict with the law or as victims and witnesses); the civil justice system (such as when they are in need of care and protection, or during judicial review of removal or placement; in custody and access disputes; in guardianship issues; and as unaccompanied or separated foreign children); the administrative justice system (such as school disciplinary proceedings and aspects the alternative care and; and through the customary /traditional through mechanisms of justice.

Using that fourfold framework and focusing on marginalised groups and their access to justice systems, this study provides information on law reform, case law and good practices with regard to children in the justice system from a range of African countries. It draws on field studies that were conducted in seven such countries (Egypt, Ethiopia, Liberia, Mauritania, Nigeria, Sierra Leone and Tunisia) and on key informant interviews, especially with regard to southern and eastern Africa.

In order to highlight the benchmark standards for a rights-based assessment of child-friendly justice in Africa, the study also discusses the fundamental principles (such as the best interests of the child, dignity, non-discrimination, and the rule of law) and general elements of a child-friendly justice system (for example, information and advice, protection of privacy, special preventive measures, and training of professionals), as envisaged in international and regional instruments that deal with children in the justice system.

This study provides substantive information that will serve as a useful tool for advocacy on, research into, and practical implementation of the laws, policies and standards for dealing with

children in the justice system. In this regard, it brings to the fore areas of concern where improvements are required. Furthermore, based on discussions at a validation workshop held in Addis Ababa on 13 and 14 March 2018, the study identifies future areas of research and interventions that could be pursued with the aim of securing children's rights in Africa.

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EXECUTIVE SUMMARY

1. Background to the report

‘Access to justice for children’ concerns the full spectrum of circumstances under which children come into contact with the law. This includes their interaction with the justice system as children in conflict with the law, as children seeking redress for violation of their rights, and as children giving evidence in a justice process. Access to justice is among the fundamental rights of all human beings, children included. Indeed, the ability to access justice is one of the requirements for protecting the other rights of children. The right to access to justice is, unfortunately, also one of the more neglected rights in Africa, with there being significant barriers to its realisation.

Children access justice through a variety of mechanisms, both formal and informal. While a lot of investment has gone into ensuring that the formal justice mechanisms adhere to child-rights protection standards, there are immense gaps in knowledge of the existence and use of the informal justice systems in African countries. There is an equal scarcity of information about the disproportionate difficulties that vulnerable groups of children face in the justice system.

What is needed, furthermore, is a coherent policy approach on the African continent to ensure that the right of children to access justice is attained. The Guidelines on Action for Children in the Justice System in Africa (which were endorsed by the ACERWC in 2012) provide substantive guidance on some of these issues. However, much still needs to be done to enable these rights to be realised as far as reasonably possible.

It is thus imperative to take stock of the milestones that have been reached in enhancing the protection of children in the context of access to justice and to respond to the abovementioned gaps in knowledge, policy and practice. Accordingly, the main objective of this study is to provide a representative account of the current status of access to justice for children in Africa in order to inform policy actions for accelerating the realisation of children’s right to access to justice.

Specifically, the study seeks to;

- provide a representative and up-to-date overview of the norms and standards applicable to access to justice for children in Africa;
- shed light on the extent of the utilisation, regulation and documentation of informal child justice mechanisms and processes (including traditional, administrative and religious ones), taking particular note of the challenges faced in safeguarding the rights and best interests of affected children in these contexts; and
- highlight the extent to which children use traditional and informal mechanisms and the obstacles that vulnerable groups of children encounter when trying to access justice.

2. Summary of findings

This study makes three key findings:

- There has been significant progress in the adoption of norms and standards for promoting access to justice for children in Africa.
- Despite increased use of formal justice mechanisms, informal justice mechanisms are still both prevalent and relevant in many African countries.
- Certain groups of children considered particularly vulnerable have a disproportionately harder time in accessing justice through both the formal and informal justice mechanisms.

2.1 Findings on norms and standards for children's access to justice

Normative and policy frameworks provide the basis for a child-friendly justice system. Such a system adheres to fundamental principles that require

- children's meaningful participation in the judicial process in all matters that affect them;
- the determination and protection of the child's best interests throughout the course of his or her involvement with a justice system;
- respect for the dignity of children and treating them with full regard both for their specific needs as a children and for their physical and psychological integrity;
- non-discrimination against children on any of the listed grounds, and full benefit of, and protection in accordance with, the principles of the rule of law, including providing the necessary support to facilitate the participation of particularly vulnerable children;
- ensuring that the principles of the rule of law apply equally to children as to adults, including guaranteeing that effective, independent complaints mechanisms are available to children; and
- the adaptation of child justice systems and institutions to children, including physical structures and justice personnel.

These principles inform practical measures taken to enhance access to justice for children. Such practical measures include:

- providing information and advice to children about their rights, their role, the procedures followed, and other matters pertinent to their engagement with the justice system;
- protecting, in accordance with national law, the privacy and personal information of children involved in justice processes;
- ensuring that children's involvement in the justice system does not endanger their person or wellbeing;
- training professionals in the justice system on the rights and needs of children of different

age groups to enable them to engage with children in a way that protects and advances the best interests of the children;

- adopting a multidisciplinary approach to ensure that the legal, psychological, social, emotional, physical and cognitive needs of children in contact with the law are addressed;
- ensuring that children are deprived of liberty only as a measure of last resort and then only for the shortest time possible;
- establishing alternatives to judicial proceedings for children, such measures including mediation, diversion and other alternative dispute resolution mechanisms, all of which must guarantee basic legal safeguards for children;
- ensuring that child-friendly processes are followed and that children are treated with dignity during their interaction with law enforcement institutions, including by the police;
- eliminating barriers to access to the justice system – such as statutory limitations of time for pursuit of justice by children, constraints on the recognition of the capacity of children to seek justice or to provide evidence as necessary – and removing procedural obstacles that make it difficult for children to engage with or benefit from the justice system;
- availing legal representation to children at no cost, and providing separate counsel when children are affected by proceedings involving parties such as their parents or guardians;
- adapting the judicial process to enable children to provide evidence and participate in the proceedings as far as possible;
- informing a child once a decision has been reached in a judicial matter affecting or relating to him or her, including with regard to the implications of the decision and the options available to him or her following the completion of the process; and
- conducting regular monitoring of the child justice system to ensure adherence to standards set in regulations and instituting reforms as necessary and as far as possible, taking into account all new developments that emerge from the monitoring.

Significant progress has been made in putting relevant norms and standards into place, efforts which include the domestication of child justice standards set out in the ACRWC and CRC. There is also evidence of increasing implementation of these standards, for instance through the establishment in various African countries of child-friendly structures such as courts and dedicated law enforcement units; however, in a majority of countries these trends are only at an early, nascent stage, and in some cases the practices precede, or lack, legislative backing.

A further positive development is that a growing number of African countries recognise the right and need of children to be provided with independent legal counsel in their engagement with the justice system. Moreover, using diversion services to ensure that child offenders do not necessarily end up with criminal records is a practice that is on the rise, albeit that the services are led mainly by non-governmental sectors and provided only in a selected number of countries.

Examination of normative and policy frameworks shows, then, that, in most African countries, there is a sufficient network of laws and standards to guarantee protection of the best interests

of children in justice systems. Nonetheless, disparities are clearly evident in the norms and standards that are set out in one country to the next; similar disparities are also noted between, on the one hand, the standards at regional and international levels, and, on the other, those at the national level. In sum, while commendable progress has been made towards attaining a universal standard of protection of the rights of children in justice mechanisms, the progress is neither consistent nor uniform across African countries.

2.2 Findings on the use of informal mechanisms of justice

Informal justice systems are mechanisms and processes that exist separately from formal state-based justice institutions and procedures for access to justice. They include traditional, religious and administrative systems, and characteristically rely on customary law and oral traditions, as well as religious texts, as their normative reference points. Although calling them informal justice systems implies that they exist entirely apart from the formal systems, certain informal practices and structures are recognised in national laws, regulations and jurisprudence, making them semi-formal in status. In some cases, they may also be granted jurisdiction to deal with specified disputes relating to personal and family law matters. The coexistence of, and the interplay between, formal, semi-formal and informal systems operating along a continuum of integration with the formal justice system gives rise to the situation termed ‘legal pluralism’.

Informal justice mechanisms form the backbone of access to justice for the majority of African citizens, but while they undoubtedly affect children, there is little documented research on this. These mechanisms should be understood in both the historical and contemporary context. During the colonial era, informal justice systems were regarded as backward and an impediment to development; it was assumed that, with the introduction of formal justice systems and the eventual ‘civilisation’ of African communities, they would simply die out. It is hence significant that recourse to informal mechanisms of justice has largely defied the trend towards urbanisation in Africa. Instead, these mechanisms, rather than disappearing, have generally evolved to adapt to modern contexts, one example being the use of representatives’ committees as opposed to councils of elders. In some cases, informal mechanisms are linked to formal administrative structures such as local chiefs and commissioners, while in rural communities the traditional system of justice continues to play an even bigger role than in urban ones.

Despite their recognition of plural legal systems, a number of African countries do not regulate the interaction of children with informal justice mechanisms, which predominantly apply customary or religious laws. There is thus an urgent need to interrogate the nature and extent of protection of children’s rights in the informal justice systems. The persistence of community, religious and traditional justice systems – and, by extension, of legal pluralism – is fostered by the inaccessibility of the formal justice system, especially in rural areas. That is to say, certain factors related to the formal justice mechanisms encourage the use of informal justice systems. These include limited infrastructure and resources; inordinate delays in case resolution; the perception that the system is tilted in favour of those who can afford legal representation; and the punitive nature of remedies, which can make them incompatible with communal living.

Communities therefore prefer informal mechanisms because these

- resolve disputes without damaging relationships on which social harmony and economic interdependency relies;
- are based on cooperation, communitarianism, strong group cohesion, social obligations, consensus-based decision-making, social conformity, and strong social sanctions;
- are accessible, especially to the rural poor and the illiterate;
- are flexible and rely on voluntary participation;
- foster relationships and provide restorative justice outcomes;
- give parties some level of autonomy in their participation;
- regard justice processes as an integral part of social life; and
- are located in the specificities of the circumstances of those seeking a resolution.

However, there are concerns about the protection of human rights (and hence the rights of children) in informal justice systems, particularly in regard to the right to fair trial. The areas of concern include:

- the absence of the right to an appeal;
- the possibility of gender discrimination, given the power imbalances and inequalities in traditional societies generally;
- the possibility of conflict between, on the one hand, the need within traditional justice processes for the acceptance of responsibility, and, on the other, the universal principle of the presumption of innocence – a conflict especially relevant if there is a likelihood for the matter to end up in the formal justice system;
- the absence of a right to, and requirement of, legal representation;
- punishments that violate human rights, for example corporal punishment;
- trial procedures, such as trial by ordeal, that contravene universal human rights principles;
- the failure to observe the concept of a minimum age of criminal responsibility, given that there is no minimum age for participation in the proceedings;
- the denial of children's agency, given that customary justice operates according to the notion of collective rather than individual responsibility; and
- the absence of specialised child justice systems within the mechanisms, given that the same arbitrators deal with children and adults alike and that hearings for adjudication are commonly held in or open to the public.

2.3 Findings on access to justice by vulnerable groups of children

Certain groups of children encounter greater barriers to access to justice than do others. These groups include girls; children with disabilities; children accused of witchcraft; children living on the streets; child victims of sexual offences; children with albinism; children in rural areas; refugee, migrant and asylum-seeking children; trafficked children; and orphans. It is evident from the research underlying this study that, in most African countries, the mechanisms of justice as well as the applicable normative standards tend to be blind to these particular vulnerabilities. As a result, the affected children are not provided with the support which is necessary to ensure their right to access to justice.

The discussion below outlines the particular needs of the various groups of children.

i) Girls

The absence or inadequacy of information about the experiences of girls in the justice system renders their needs invisible and results in a failure to develop the accommodations and support necessary for the protection of their rights. The fact that few numbers of girls are in conflict with the law leads to the failure as well to create separate facilities for them. Consequently, girls end up in adult detention facilities and face an increased risk of being held in isolation, being detained far away from home, or suffering violence, including sexual violence. Girls who are victims of trafficking and prostitution are at an even higher risk of deprivation of liberty and ill-treatment, sexual abuse and rape.

ii) Children with disabilities

Children with disabilities encounter physical barriers to accessing justice facilities as well as non-physical ones relating to the substance of the proceedings. In addition, children with behavioural disorders and mental health challenges are overrepresented in the population of children in conflict with the law, given that justice systems often neither understand nor make provision for their specific vulnerability. Children with intellectual or behavioural disorders also tend to record relatively high rates of recidivism. In the absence of reasonable accommodation and support, these children are constantly moved between mental health facilities, schools of industry, and children's homes. As for children with albinism, they have vulnerabilities that derive both from the biological condition itself and their exposure to an increased risk of physical violence. No measures are being taken to enhance justice for these children, even when their rights are frequently violated. The challenges for children with disabilities are exacerbated in contexts where a systems approach to child protection is not established.

iii) Children accused of witchcraft

Some African countries have seen a documented increase in the accusation and persecution of children for alleged witchcraft. The affected children are subjected to multiple violations, including abandonment, targeting for violent acts, and ritual killings. However, because most formal legal systems neither recognise the existence of witchcraft nor criminalise accusation of children as witches, such children often have no legal recourse. The failure or reluctance of justice systems to address this violation exposes child victims to unjust and demeaning treatment in the form of traditional remedies that are ultimately harmful to them.

iv) Children living on the streets

Children living on the streets are more likely than others to be arrested, criminalised and end up in the juvenile or adult justice systems. They are also less likely to benefit from diversion services or programmes, be availed with alternatives to detention, or benefit from restorative practices, because they are often unable to afford bail and lack guardians or legal representatives to make their case or secure their release. The imbalance of power between law enforcement agencies and children living on the streets invariably means that the children are not able to enforce their rights through the justice system when these are violated.

v) Child victims of sexual offences

Child victims of sexual offences experience difficulty in accessing justice due to social and cultural taboos, gender discrimination, and the pressure to safeguard family honour. These factors make it difficult to report sexual violation. Sexual offences against children are sometimes trivialised, and the testimony or experience of the victims, discredited; the accepted use of certain terms in law to describe sexual violation, such as the term ‘deflowering’, has the potential to further negate the gravity of the offence. All these factors grossly undermine the capacity of the victims to obtain redress through the justice system.

vi) Children living in rural areas

Children in rural areas face difficulties in accessing justice due to the unavailability of specialised facilities, including specialised children’s courts, most of which are concentrated in urban areas. The lack of facilities also means that when deprived of their liberty, the children are likely to be detained in facilities far from their families and communities and be unable to maintain contact.

vii) Refugee, migrant and asylum-seeking children

The absence of an adult caregiver or guardian compounds the vulnerabilities of child refugees or otherwise displaced children. When unaccompanied, children on the move are exposed to exploitation by those who assist them on the journey, or to sexual and other forms of violence. Such children often lack documents, such as birth certificates and identity books, that are the basis for proof of age and for access to other services, making it even more difficult for them to enforce their rights.

viii) Child victims of trafficking

The vulnerability of child victims of trafficking is magnified by their invisibility. The insidious nature of human trafficking is such that the coercion or exploitation of victims may not be apparent to a majority of those who interact with them. Consequently, child victims of trafficking are often treated as perpetrators rather than victims, and are vulnerable to violence or other violations. Trafficking uproots children from protective environments of care and disconnects them from systems that would otherwise afford them a remedy. This makes it difficult for the victims to trigger the instruments of justice through, for instance, reaching out to law enforcement agencies. Unfortunately, there is little to no accurate data on the extent of child trafficking in many African countries. Although many have adopted anti-trafficking legislation, the implementation of these laws in a child-friendly manner remains unsatisfactory.

ix) Orphans

Orphaned children face severe constraints in accessing the justice system, whether they be in conflict with the law, or children in need of alternative care. Orphans who are in conflict with the law face a higher likelihood of deprivation of liberty, as they lack an adult guardian into whose care they can be released. They are less likely to receive a community-based sanction due to lack of a surety or a verifiable place of abode, and therefore are at greater risk of sentences involving deprivation of liberty. They are also at a higher risk of institutionalisation for care purposes.

3. Conclusion and recommendations

It is evident from the research that

- despite significant progress in enhancing access to justice for children in Africa, a vast amount still needs to be done;
- a positive development in many countries is the increase in alternatives to formal criminal proceedings;
- children's access to legal representation has improved, although it is a concern that NGO-led legal aid services are vulnerable to funding cuts and are thus not sustainable;
- there is limited specialisation in justice systems to address the needs of child victims and witnesses;
- promising models are emerging for training law enforcement officers in dealing with children in all the capacities in which they come into contact with the law; and
- the paucity of research on informal systems undermines the capacity of African countries to ensure that children are protected in their efforts to access the justice system.

Based on these findings, the report makes the following recommendations:

1. Specialised units for children, such as dedicated reception or one-stop centres for child offenders and child victims, should be established and equipped to ensure that children, especially the most vulnerable, enter the system with the protection and assistance of a multidisciplinary team of professionals.
2. Where they do not yet exist, specialised courts should be established and other measures adopted to facilitate access to justice for vulnerable groups of children.
3. Efforts should be intensified to eliminate inhuman punishments, such as judicially sanctioned corporal punishment, from all child justice systems on the continent, both in law and in practice.
4. Continuous and appropriately adapted training on the elements of child-friendly justice should be provided to law enforcement authorities, forensic analysts in sexual offence cases, the judiciary and other stakeholders involved in the child justice process. Although there have been some promising initiatives on the continent in this regard, there is still scope for curriculum development through information-sharing between countries.

5. A multidisciplinary approach to children's access to justice should be integrated into the regulation and operationalisation of the justice system in all African countries.
6. The informal justice sector should be included in rule of law programmes and made integral to the funding and infrastructure of the justice system.
7. The coordination of formal and informal justice systems should be integrated in national access-to-justice policies in a conscious and purposive, rather than ad hoc, manner.
8. In-depth research should be undertaken on informal justice mechanisms and their use by children, with a view to understanding how these mechanisms impact on the rights and welfare of children and to providing a basis for constructive engagement with the mechanisms to take forward their positive aspects, such as their proximity to the people they serve, their speedy nature, and their use predominantly of non-custodial sentencing.
9. Referral pathways should be established between, and linkages created among, service providers in order to coordinate their responses for child survivors of violence, exploitation, abuse and neglect.
10. Efforts should be accelerated to implement legislative provisions prohibiting deprivation of liberty of children except as a last resort and for the shortest appropriate period of time, and to monitor the application of these provisions to especially vulnerable children.
11. Gender considerations should be mainstreamed into child-friendly justice initiatives, including consciously articulating the position of girls in all programming; training programmes for role-players in child-friendly justice should include a specific component to foster gender-sensitivity.
12. Efforts should be made to entrench disability-sensitivity and responsiveness in justice systems and in the implementation of child-friendly justice initiatives.
13. Specialised responses should be developed for children in conflict with the law who have demonstrable mental health, developmental or other behavioural difficulties that aggravate deviance.
14. The relevant stakeholders should invest in community education to diminish the risk that children accuse of witchcraft face and to facilitate their access to justice systems.
15. Efforts should be intensified to improve birth registration systems and integrated information management systems in order to prevent the denial of key benefits and safeguards to children who would otherwise be deprived of these protections.
16. Attention should be given to the specific needs that children living on the streets have in their quest to access child-friendly justice; this includes measures to strengthen child protection systems in order to eliminate the need for them to be on the streets.

17. There should be greater awareness of the prevalence of violence against children, including sexual violence; informal systems should be discouraged from adjudicating on sexual violence cases; and appropriate training should be given to frontline personnel involved in receiving reports of sexual abuse and investigating them.
18. The capacity of rural populations to access justice should be strengthened through programmes and initiatives for promoting the rule of law, including by way of establishing specialised facilities in proximity to the communities and by increasing their accessibility for children living in rural areas.
19. The particular needs of child victims of trafficking, as well as those of refugee, migrant and unaccompanied children, should be identified and catered to, including by means of strengthened child protection systems.
20. Alternative care systems should be improved throughout the continent; this includes improving governmental oversight of existing facilities and extending social protection and poverty alleviation projects for children deprived of a family environment.

CHAPTER I: INTRODUCTION

1.1 Background and rationale of the study

This study was commissioned by the African Child Policy Forum (ACPF) and Defence for Children International (DCI). The background to it is the acknowledgement that children come into contact with the justice system in many ways. First, they may be involved in criminal proceedings because they are either accused of committing offences, or are victims of or witnesses to crimes. Secondly, they may be involved in civil proceedings – for example in family law or care and protection proceedings, or as complainants where their rights have been violated. In countries with dual legal systems where customary law is applicable, these processes may be formal or informal. Many countries also have administrative processes that affect children, such as school disciplinary procedures.¹

However, despite the frequency with which children are involved in justice processes, many justice systems around the world do not cater for the specific needs of children and are still largely adult-oriented. This study aims to chart the progress made, and the challenges remaining, with regard to justice for children in Africa; it also aims to share information on law reform, case law and good practices from a range of African countries. Furthermore, the study explores the various dimensions of the contact children have with informal and customary/traditional justice systems, as well as noting the existence in some parts of the continent of religious justice systems that deal with matters involving children. Finally, it highlights the difficulties that certain vulnerable groups of children have in accessing justice.

An initial version of this study, entitled *Achieving Child-Friendly Justice in Africa*, was prepared as a background document for the Global Conference on Child Justice in Africa (Kampala Conference), held in Kampala, Uganda, on 7-8 November 2011. That study and conference contributed to the development of the African Guidelines for Action for Children in the Justice System, which were endorsed by the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) in March 2012. The current study updates the one of 2011, and takes into account the findings of seven country studies, commissioned by the ACPF and DCI, on Egypt, Ethiopia, Liberia, Mauritania, Nigeria, Sierra Leone and Tunisia.

A note on terminology in this study: the field of children's access to justice has a specialist vocabulary that can be confusing at times. Certain terms recur in the relevant literature, policy and practice, among them 'child justice', 'child-friendly justice', 'justice for children', and 'access to justice for children'. Of these, the term 'child justice' is particularly common. While it is usually understood to refer only to children in conflict with the law, in some quarters it covers a wider range of issues than this and is synonymous with 'justice for children'. To clarify the use of terms in this study,

- 'justice for children' refers to all scenarios where children might be involved in both criminal and civil justice systems, including administrative or informal justice mechanisms; and

- ‘child-friendly justice’ refers to justice systems that are designed or have been adjusted to be sensitive to the particular issues that children face when, for any reason, they come into contact with the law and courts (or proceedings).

1.2 Situations where children are involved in justice systems

‘Justice for children’ pertains to any situation where children come into contact with justice systems, including courts (formal or informal) and administrative forums. These situations fall into four broad categories, allowing that particular cases may fit into more than one of them: criminal justice; civil justice; administrative procedures; and customary/traditional or religious justice procedures.

The subsections below provide an overview of each of the categories, the details of which are examined in greater depth in subsequent chapters.

1.2.1 Criminal justice

1.2.1.1 Children in conflict with the law

Children may be involved in the criminal justice system as persons who are accused of or are recognised as having infringed the penal law. They are often referred to as child offenders (although some may be innocent) or ‘children in conflict with the law’.

The criminal justice process has a large number of facets, which cover prevention; arrest and alternatives to arrest; pre-trial alternatives such as diversion; detention, both pre-trial and during trial; the trial (courts *in camera*, protection of children’s identity); pre-sentencing procedures; sentencing; and reintegration.

Key issues include the minimum age of criminal capacity;² criminal records; the protection of children’s privacy; and the treatment of children in detention. An important guiding principle is that children’s deprivation of liberty should be a measure of last resort and for the shortest possible period of time.

1.2.1.2 Child victims and witnesses

Children may also be involved in the criminal justice system as child victims of crime or as child witnesses to crime. For both groups of children, procedures need to be put in place relating to interviewing them; the possible use of video recording; preparation for court; special protective measures for giving evidence in court; and laws relating to the evaluation of children’s evidence by the court.

In addition to these general measures, child victims require a full range of services, including mechanisms for reporting the offence; access to information; psychosocial support; appropriate medical examinations; and sensitive management by trained officials. Privacy and confidentiality are important and should be safeguarded by way of measures such as closed courts and non-disclosure of identifying information.

1.2.2 Civil Justice

1.2.2.1 Care and protection

Children who may be in need of care and protection can be separated from their parents through the intervention of social welfare authorities. Such removals are subject to judicial review, at which point the courts therefore become involved.

The rationale for this is that, for a system to be fully protective of children's rights, it should include court oversight of placement decisions in care and protection proceedings. Although certain decisions regarding care and protection are made administratively (for example by a social worker), these should be reviewable by a court. Foster care, adoption and placement in residential care are all far-reaching decisions that ideally ought to be made by a court. Intercountry adoption is a further issue related to care and protection proceedings, and courts are usually involved in decisions in such measures in the countries where they are concluded.

Increasingly, child protection are modelled on a systems-strengthening approach that recognises that the formal system (as outlined immediately above) is often predicated on the interaction with informal protection systems at community level. These are all systems which, for optimal results, should work together in enhancing child protection.

In this regard, the ACERWC embarked in 2016 on a process of elaborating on the systems-strengthening approach in its General Comment on General Measures of Implementation, a development which is set to be adopted in 2018.

1.2.2.2 Family law matters

In family law matters, children may be caught up in proceedings relating to custody (care) and access (contact) when their parents are divorced; if their parents were never married; or if one parent has died and the grandparents on the side of the deceased parent are seeking custody of or access to the child or children.

Sometimes these disputes become international, such as when a child is taken to (or retained in) another country. Countries that have ratified the Hague Convention on the Civil Aspects of International Child Abduction would have identified a Central Authority and established rules for courts to deal with these matters.

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

In addition, many children in Africa have their family disputes steered through religious or traditional justice structures when caregivers turn to the latter for adjudication. These structures use religious customary norms to decide on family law matters.³

1.2.2.3 Unaccompanied children

Conflicts and other crises that result in the displacement of people also lead to the movement of children who in some cases are unaccompanied. They inevitably interact with public authorities in the receiving country. Although there are international protocols stipulating how children in such circumstances should be managed, many justice and immigration systems are poorly equipped to deal with them in a child-friendly manner. In particular, they may be held in immigration detention and denied access to systems of care and protection. As such, unaccompanied children are a particularly vulnerable group in the context of access to justice.

1.2.3 Administrative procedures

Children can be subjected to administrative procedures of various kinds. Common examples of these procedures are the actions of school disciplinary bodies that are able to suspend or expel pupils from schools. In some countries, administrative procedures go much further to encompass matters of child care and protection, such as removal of children, discharge from the care system, leave of absence to visit families, transfers from one form of care to another, and extensions for remaining in the system beyond the age of 18. Foster care and adoption are other areas where administrative procedures play a role.

Children are also affected by these processes when accessing social assistance (particularly so in the case of children with disabilities) and applying for birth certificates, and when decisions are made regarding migrant children and their asylum claims or applications for permanent residence.

Administrative procedures should be subject to – at the very least – internal review procedures, and, failing that, to review by the courts. International best practice guidelines highlight the need to take into account certain general principles to protect and advance administrative justice for children. In particular, emphasis is placed on ensuring the integration or mainstreaming of children's issues in all rule of law initiatives, and ensuring effective and meaningful child participation.⁴

1.2.4 Customary/traditional courts and other informal alternatives

In many African countries, customary law operates in parallel to the formal justice system, where it is sometimes recognised, at least partially, by the formal system provided it does not breach constitutional principles. There are also instances where the informal system operates in isolation from formal justice processes. In either event, these informal systems are close to the people and inexpensive, and as a result children are often involved with them.

Some countries have made efforts to harmonise informal systems with the formal system by giving legal recognition to them. It is important that approaches to justice for children should include these alternative ways of doing justice and involve stakeholders and decision-makers in discussion and consideration of child-friendly justice. This can be challenging, because some traditional and informal structures do not allow for participation by children and may produce outcomes that are incompatible with the principles of children's rights. However, customary law is not static and can continue to be developed.

In various countries in Africa, religious tribunals deal with child-related matters, especially ones involving personal law issues such as care and custody. These tribunals or mechanisms base their decisions on religious texts and beliefs; the relevant issues surrounding the use of such mechanisms are discussed in further detail in the course of this study.

1.3 Vulnerable groups

By virtue of the nature of childhood, all children are by definition vulnerable. However, certain categories of them are regarded as particularly vulnerable because there is a heightened risk that their rights may be abused. Vulnerability is contextually defined and varies from country to country, but certain factors – whether intrinsic to the child or arising from the child’s environment – have the potential to exacerbate vulnerability no matter in which country the child happens to live.

As such, groups of children that are considered vulnerable in Africa include girls; children with disabilities; children in rural areas; refugee, migrant and asylum-seeking children; trafficked children; children living on the streets; children accused of witchcraft; children who lack birth certificates or whose birth has not been registered; victims of sexual offences; and orphaned children.

These vulnerable groups are accorded a separate chapter in this publication to highlight needs that are specific to them and to indicate the barriers they face in meeting those needs.

The catalogue above is, however, not an exhaustive list of all the categories of children who may be considered vulnerable. Indeed, further groups could easily be added to the list. For instance, where vulnerability is caused or compounded by macro factors such as armed conflict, the delivery of justice to children tends to be irregular. In these cases, wider, more nuanced research is necessary, but the depth and specialisation required for such exploration is beyond the scope of the present study.



CHAPTER II: INTERNATIONAL AND REGIONAL INSTRUMENTS RELATED TO CHILDREN IN JUSTICE SYSTEMS

Human rights norms and standards relevant to ensuring access to justice for children are set out in a series of legally binding and non-binding international and regional human rights instruments. All core international human rights treaties are relevant in this regard.⁵

2.1 Introduction

Various international and regional human rights laws and standards recognise the particular needs of children in the context of access to justice, with the emphasis tending to be on children in conflict with the law. Such frameworks include the United Nations Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child, and the CRC Committee General Comment on Children's Rights in Juvenile Justice (2007).

These norms and standards are outlined below broadly in chronological order, with the discussion highlighting aspects of theirs that are directly relevant to justice for children.

2.2 The Beijing Rules (1985)⁶

The first international instrument to pay dedicated attention to justice for children was the United Nations (UN) Standard Minimum Rules for the Administration of Juvenile Justice (1985), referred to generally and hereafter as the Beijing Rules. The Rules thus set the pace for the recognition of the need for special measures for children in the justice system. They provide a framework of elements deemed essential for a good system to deal with child offenders, and contain the following tenets:

- Countries need to set a minimum age of criminal capacity; that age should not be too low and should consider the emotional and mental capacity of children.
- The aim of juvenile justice is to emphasise the wellbeing of the child and ensure that any reaction in law will be proportionate to the offender and the offence.
- Officials at all stages of the justice system processes should be granted a high degree of discretion to allow for alternative measures, but this discretion is to be exercised in an accountable and judicious manner.
- Diversion is encouraged.
- Specialisation in the police is encouraged.
- Children who are not diverted must be dealt with by a competent authority, in an atmosphere of understanding.

- Sentencing must be proportionate and must ensure that detention is a measure of last resort.
- Corporal punishment as a sentence is prohibited.

2.3 The UN Convention on the Rights of the Child (1989) and its Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (2000) and the Optional Protocol on a Communications Procedure (2011)

All countries on the African continent have ratified the UN Convention on the Rights of the Child (CRC) (1989),⁷ a wide-ranging instrument that covers many issues. The following articles of the CRC are those of direct relevance to this study:

- Article 3 provides that 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.
- Article 9 requires that children shall not be separated from their parents against their will, except when competent authorities, subject to judicial review, determine, in accordance with applicable law and procedures, that the separation is necessary for the best interests of the child.
- Article 12 provides that in any judicial and administrative proceedings affecting them, children shall be afforded the opportunity to be heard, either directly or indirectly through a representative or appropriate body.
- Article 19, which deals with abuse and neglect, specifically mentions procedures for reporting, referral to investigation, and – where appropriate – judicial involvement. There is also reference to law, procedures and competent authorities in relation to care and protection, adoption, refugee children, sexual abuse and sale or trafficking.
- Article 37 focuses on freedom from cruel, inhuman or degrading treatment, and article 40, on the administration of juvenile justice. These articles include strong and detailed provisions on issues of justice for children.

The CRC is complemented by an Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, which has also been ratified by many African countries. As its name indicates, the Optional Protocol calls on States Parties to prohibit the sale of children, child prostitution and child pornography.

An important provision in relation to the protection of child victims appears in article 8, which calls on States Parties to adopt appropriate measures to protect – at all stages of the criminal justice process – the rights and interests of child victims from the practices prohibited under the Protocol.

In particular, States Parties are called on to adapt procedures to recognise the special needs of children as witnesses; inform child victims of their rights and roles and of the scope, timing and

progress of the proceedings and the disposition of their cases; allow the views, needs and concerns of child victims to be presented and considered in proceedings where their personal interests are affected; provide appropriate support services to child victims throughout the legal process; protect the privacy and identity of child victims; provide for the safety of child victims, as well as that of their families and witnesses on their behalf, from intimidation; and avoid unnecessary delay in the disposition of cases and execution of orders or decrees granting compensation to children.

Article 3 of the Optional Protocol requires States Parties to ensure that, in their treatment in criminal justice systems, the best interests of children who are victims of the offences described in the Protocol shall be a primary consideration.

The Optional Protocol also covers a range of obligations that a State Party must meet to curb and punish the sale of children, trafficking, sexual exploitation and child pornography. The relevant measures include establishing domestic and extra-territorial jurisdiction for offences committed against children, such as where an alleged offender is a national or is habitually resident in that state, or when the victim is a resident, or when the alleged offender is not a national but is not going to be extradited.

The Optional Protocol includes several provisions aimed at securing inter-state cooperation. These might entail informal bilateral and multilateral negotiations between African signatory states, including within regional economic communities.

The Optional Protocol on a Communications Procedure (commonly referred to as OP3) entered into force on 14 April 2014. It reinforces national and regional complaints mechanisms⁸ through which children can allege a violation of their rights. Communications may be submitted by, or on behalf of, an individual or group of individuals within the State Party's jurisdiction claiming to be victims of a violation by that State Party of any of the rights set forth in any of the following instruments to which that state is a party: the CRC; the Optional Protocol to the Convention on the Sale of Children, Child Prostitution and Child Pornography; and the Optional Protocol to the Convention on the Involvement of Children in Armed Conflict.

As of November 2017, the Committee on the Rights of the Child had given four decisions on complaints filed with it. Many more complaints are awaiting its consideration. At the time of this writing, only one African state had ratified the Optional Protocol on a Communications Procedure (Gabon), although several are signatory states (which means they have indicated their intention to ratify it at some stage).⁹

In 2007, the CRC Committee issued General Comment No. 10 on Children's Rights in Juvenile Justice.¹⁰ According to Part IV thereof, the core elements of a comprehensive child justice policy are

- the prevention of juvenile delinquency;
- interventions without resorting to judicial proceedings and interventions in the context of judicial proceedings;
- setting the minimum age of criminal responsibility and the upper age limits for juvenile justice;
- guarantees of a fair trial; and
- setting out circumstances for deprivation of liberty, including pre-trial detention and post-trial incarceration.

The General Comment set new standards in matters such as the minimum age of criminal responsibility, which, according to the CRC Committee, should not be set at an age lower than 12 years and which should be progressively raised. The practice of having a ‘split’ age of criminal responsibility, with a rebuttable presumption that children below a certain age are presumed to lack capacity, came in for strong criticism on the grounds that it leads to discrimination and discretionary decision-making.

The General Comment also strongly advocates abolition of status offences (that is, offences that would not be criminal if they were committed by adults, such as truancy or sexual promiscuity). Moreover, the General Comment contains advice regarding all stages of the criminal justice process involving children.

The CRC Committee is reviewing General Comment No. 10 in 2018, with a view to releasing an updated version of it.

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

The African Charter on the Rights and Welfare of the Child (ACRWC) was adopted in 1990 and entered into force in 1999. Like the CRC, it is a comprehensive instrument that covers a wide range of children’s rights. Its special significance in the African context is that, with 48 States Parties,¹¹ it is the premier regional standard.

The articles that are particularly relevant to justice for children are article 4 (the best interests of the child and consideration of the views and wishes of children); article 17 (administration of juvenile justice); article 16 (protection against child abuse and torture); article 18 (protection of the family and the protection of children in the dissolution of marriage); article 19 (parental care and protection); article 23 (refugee children); article 24 (adoption); article 25 (separation from parents); article 29 (sale, trafficking and abduction); and article 30 (children of imprisoned mothers).

Article 1(1) of the ACRWC enjoins States Parties to adopt the legislative and other measures that are necessary to give effect to its provisions. Although the ACRWC does not provide a lot of detail that is helpful in defining measures specific to justice for children, articles 4, 17 and 30 do provide stronger wording than the CRC on the best interests of the child and on privacy in juvenile justice. One of the unique aspects of the ACRWC is its provisions on children in prison with their mothers, a pertinent issue that is not dealt with at all in the CRC.

The ACRWC’s monitoring body, the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), has fostered development of children’s access to justice in numerous ways in recent times. Examples include a continental report on the impact of armed conflict on children (a report which, among other things, criticises the impunity that perpetrators frequently enjoy).¹²

In particular, the report highlights the risk of sexual violence, abuse and exploitation of boys and girls, which is increasing alarmingly in the context of conflicts and crises. The ACERWC calls for strong commitment from member states to establishing effective and functioning mechanisms to address the impact of conflict and crises on children and provide for the care and protection of children affected by armed conflict. The Committee supplements its report with a comprehensive array of recommendations to address the particular vulnerabilities that children in armed conflict face in accessing justice for rights violations.

The ACRWC provides for a communications mechanism, and currently seven communications submitted to the Committee have been finalised. One of them, brought against the Government of Malawi concerning the upper age for constitutional protections for children in conflict with the law (set at 16, rather than 18 years as provided for in the definition of a child in the Charter), resulted in a friendly settlement between the applicants and the Government of Malawi. This in turn led to an amendment of the Constitution of Malawi in February 2017 to bring its definition of a child in line with the ACRWC.

Recent communications have concerned the treatment of children in conflict with the law. One of the communications was brought by Ahmed Bassiouny, represented by advocates Dalia Lotfy and Amal, against the Government of the Arab Republic of Egypt. The complainants alleged that Ahmed Bassiouny, who was 15 years at the time of arrest, was detained unlawfully and underwent torture as well as ill-treatment in correctional facilities. This communication was declared inadmissible by the Committee on the ground that the complainants had not exhausted local remedies. A second communication which was brought by Sohaib Emad, represented by advocate Dalia Lotfy and Samar Emad, was concerned with his unlawful detention, ill-treatment and torture as a 15-year-old child. This communication was likewise declared inadmissible by the ACERWC on the ground that the complainants did not first exhaust local remedies.

The opportunity for further communications relevant to the field of access to justice for children remains a potentially useful option (provided that local remedies are first exhausted).

The Committee also has a mandate to conduct investigative missions. The investigative mission to the Great Lakes region in Tanzania to study the position of children with albinism in temporary holding facilities¹³ led to several recommendations – short-, medium- and long-term – concerned with access to justice for affected children.

The first General Comment of the Committee¹⁴ concerns the interpretation and application of article 30 of the Charter, which relates to the deprivation of liberty of primary caregivers of children. It contains a range of standards applicable when a decision to incarcerate a primary caregiver of children is taken, be it by arresting authorities or judges and sentencing courts. The General Comment also establishes the measures that should be put in place once a decision is taken to imprison a primary caregiver of a child, including how correctional authorities should treat such a child and what facilities should be made available for the proper care of the child or children.

As mentioned in Chapter 1 of this study, a General Comment on General Measures of Implementation of the Charter is under preparation by the ACERWC, for possible release in 2018. This General Comment includes substantive guidance on juvenile justice and strengthening child protection systems, along with other implementation advice for member states seeking to enhance children's access to justice.

2.5 The UN Guidelines for the Prevention of Juvenile Delinquency (1990)¹⁵

As the name indicates, the UN Guidelines for the Prevention of Juvenile Delinquency (also known as ‘the Riyadh Guidelines’) are preventive in nature. Focusing on the child, the family and involvement of the community, the Guidelines deal with socialisation, education, youth participation in community structures, the role of the media, and socio-economic circumstances. As such, the notion of prevention is located squarely within a broader development context.

2.6 The UN Rules for the Protection of Juveniles Deprived of their Liberty (1990)¹⁶

The UN Rules for the Protection of Juveniles Deprived of their Liberty (also referred to as the JDLs) focus on conditions of detention in pre-trial detention, detention during trial, and detention as a sentence. The scope of the document is sufficiently broad to cover not only prisons and police detention but any facility from which children cannot leave at will. The Rules are founded on the understanding that detention should be avoided where possible but, where it occurs, each child must be treated as an individual and have his or her needs met as far as possible. The emphasis overall is on preparing the child for return to society from the moment of entry into a facility.

The Rules deal with the management of facilities, including their administration, the physical environment and services they offer, disciplinary procedures, compliance monitoring through regular and unannounced inspections, and an independent complaints procedure.

2.7 The UN Guidelines for Action on Children in the Criminal Justice system (1997)¹⁷

The purpose of this document is to promote the effective use of existing child-related international instruments through practical guidelines for action. Notably, it was the first UN document to cover child offenders, child victims and child witnesses within its ambit.

More specifically, the aims of the Guidelines for Action are to provide a framework for achieving the objectives of the CRC and related instruments, and to facilitate the provision of assistance to States Parties to ensure the effective implementation of these instruments (for example, through technical assistance). The Guidelines are based on the principle that the responsibility to implement the CRC rests clearly with its States Parties. As such, the document emphasises the importance of improved cooperation between governments, UN agencies, non-governmental organisations (NGOs), professional groups, the media, academic institutions, other members of civil society, and children themselves.

2.8 The UN Guidelines on Justice in Matters involving Child Victims and Witnesses (2005)¹⁸

These provide a useful framework to assist countries in enhancing the protection of child victims and witnesses in the criminal justice system. The Guidelines aim to support governments, international organisations, public agencies, non-governmental and community-based

organisations and other interested parties in designing and implementing legislation, policy, programmes and practices that address issues related to child victims and witnesses of crime.

Additionally, the Guidelines can assist those caring for children in dealing sensitively with child victims and witnesses. The Guidelines state, too, that they can be applied to processes and matters in informal and customary systems of justice, such as restorative justice, custody, divorce, adoption, child protection, mental health, citizenship, immigration and refugee law.

The Egyptian lawmakers state explicitly in article 116-bis(d) of the Child Law that '[c]hild victims and witnesses of crime, at all stages of arrest, investigation, trial, and implementation, shall have the right to be heard, and to be treated with dignity and sympathy with full respect for their physical, psychological, and moral safety, and shall have the right to protection, to health, social and legal assistance, to rehabilitation, and integration in society, in accordance with the United Nations Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime.'¹⁹

2.9 UN Convention on the Rights of Persons with Disabilities (2006)²⁰ and the Optional Protocol

The Convention on the Rights of Persons with Disabilities was negotiated between 2002 and 2006 in eight sessions of an ad hoc committee of the UN General Assembly, making it the UN's fastest-negotiated human rights treaty.²¹ In its preamble, the Convention recognises that – both within and outside the home – women and girls with disabilities are often at a greater risk than other people of violence, injury or abuse, neglect or negligent treatment, maltreatment, and exploitation; and that children with disabilities should have full enjoyment of all human rights and fundamental freedoms on an equal basis with other children.

The Convention also recalls the obligations undertaken by States Parties to the CRC. Article 7 of the Convention is 'child-specific' and calls on States Parties to take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms, on an equal basis with other children. Furthermore, the Convention stipulates that, in all actions concerning children with disabilities, the best interests of the child shall be a primary consideration.

The Convention calls on States Parties to ensure that children with disabilities have the right to express their views freely on all matters affecting them, that their views be given due weight in accordance with their age and maturity, on an equal basis with other children, and that they be provided with disability- and age-appropriate assistance to realise that right.

The Convention also provides for the establishment of the Committee on the Rights of Persons with Disabilities, which is tasked with monitoring implementation of the Convention by receiving reports from, and making recommendations to, States Parties.²²

2.10 The Hague Conventions, including the Child Support Convention (2007)

These Conventions are issued by the Hague Conference on Private International Law.²³ Countries that become members of the Hague Conference accede to specific Conventions;²⁴ countries that are not members may also accede to particular ones. Crucially, the Hague Conventions come into operation vis-à-vis a particular country only if that country has ratified the Convention and made it part of its domestic law.

The two most important Hague Conventions relating to children are:

- The Hague Convention on the Civil Aspects of International Child Abduction (1980): it is aimed at preventing the removal of children from the country where they usually live with a parent or caregiver without the consent of the other parent or caregiver, and provides mechanisms for speedy return of children who have been abducted.²⁵
- The Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption (1993): it provides a framework for the safe adoption of children from one country to another, in accordance with the principles of subsidiarity (that is, care options must first be explored domestically prior to intercountry adoptions) and the best interests of the child. The Convention sets out detailed procedures for working agreements and aims to prevent illegal adoptions or trafficking in children.²⁶

Two further Hague Conventions are, first, the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (the Protection Convention),²⁷ and, secondly, the so-called Child Support Convention of 2007, which has not been ratified yet by any African countries.

The Protection Convention covers an extremely wide range of civil measures of protection relating to children – from orders concerning parental responsibility and contact, to public measures of protection or care, and from matters of representation to the protection of children's property. It has uniform rules determining which country's authorities are competent to take the necessary measures of protection in cross-border situations. These rules, which avoid the possibility of conflicting decisions, give the primary responsibility to the authorities of the country where the child has habitual residence, but also allow any country where the child is present to take necessary emergency or provisional measures of protection. The Convention determines which country's laws are to be applied, and it provides for the recognition and enforcement of measures taken in one Contracting State in all other Contracting States.

In addition, the cooperation provisions of the Convention provide the basic framework for the exchange of information and necessary degree of collaboration between administrative authorities (in this context, child protection authorities) in the different Contracting States. In the context of widespread migration of children between African countries, the Protection Convention could thus play a useful role in securing cooperation between child protection authorities and providing enhanced recognition of protection measures across borders.²⁸

The Child Support Convention provides for the cross-border recovery of child support or maintenance owed in respect of children. Complemented by a Protocol, it provides modern tools for the recovery of maintenance where the duty-bearer resides in a different country from the child requiring the payment of support. Given the increasing mobility of citizens on the continent, States Parties in Africa would benefit from ratifying this Convention and using its mechanisms to assist children in obtaining the support they need.

2.11 The UN Guidelines on the Alternative Care of Children (2009)²⁹

These Guidelines deal with children in alternative care and aim to support efforts to keep children in, or return them to, the care of their family, or, failing this, to place them in another appropriate and permanent solution, including adoption or *kafala*. The Guidelines seek to ensure as well that while such permanent solutions are being sought, the most suitable forms of alternative care should be identified and provided. The Guidelines also suggest measures to promote their application within the framework of development cooperation.

With regard to the justice system, the following aspects of the Guidelines are highlighted:

- Guideline 46 provides that any decision to remove a child against the will of his or her parents must be made by competent authorities, in accordance with applicable law and procedures, and be subject to judicial review, with the parents being assured the right of appeal and access to appropriate legal representation.
- Guideline 56 provides that decision-making on alternative care should take place through a judicial, administrative or other adequate and recognised procedure, with legal safeguards including (where appropriate) legal representation.
- Guidelines 100–103 focus on legal responsibility for a child who is in alternative care.

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

2.12 The UN Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders ('the Bangkok Rules') (2010)³⁰ and the UN Standard Minimum Rules for the Treatment of Prisoners (2015) ('the Mandela Rules')

The Bangkok Rules are the first international instrument to address the needs of children in prison with their parent(s). Given that prisons and their regimes – from their architecture and security procedures to their health care, family contact and training opportunities – are usually designed for men, the Rules recognise that because women and girls represent less than a tenth of the prison population, their characteristics and needs have remained unacknowledged and largely unmet by the criminal justice system. The Rules thus explicitly address the particular needs that women and girls have and the different situations in which these needs arise.

Accordingly, prison services must provide for the full range of needs of children in prison with their mothers, whether medical, physical or psychological. As these children are not prisoners, they

should not be treated as such. The Rules also require special provisions to be made for mothers prior to admission so that they can arrange alternative child care for children left outside.

The Mandela Rules³¹ revised and replaced the 1955 Standard Minimum Rules for the Treatment of Prisoners. Because they outline the minimum standards that should be applied in prisons from admission to release, these Rules are useful for policy-makers developing national prison management standards and guidelines, and for prison authorities and personnel putting them into practice on a day-to-day basis.

Rules 1-5 provide the following basic principles:

- Prisoners must be treated with respect for their inherent dignity as human beings.
- Torture or other ill-treatment is prohibited.
- Prisoners should be treated according to their needs, without discrimination.
- The purpose of prison is to protect society and reduce re-offending.
- The safety of prisoners, staff, service providers and visitors at all times is paramount.

Further Rules cover such diverse issues as categorisation (certain groups of prisoners must be housed separately as a means of protection and to facilitate adequate individual treatment, with this applying to men and women, pre-trial and convicted prisoners, and children and adults); the allocation of prisoners upon admission (the Rules require prisoners to be housed close to their homes to facilitate social rehabilitation); and the special needs of children (the decision on whether children are accommodated in prison with their parent(s) should be based on the best interests of the child, in addition to which provision needs to be made for pre- and post-natal care, child care facilities and health-care services for children).

2.13 Principles and Guidelines on the Right to a Fair Trial and Legal assistance in Africa,³² and Guidelines on Action for Children in Justice Systems in Africa (2011)³³

At its 26th session in November 1999, the African Union resolved to prepare principles and guidelines on the right to a fair trial and legal assistance. These were approved in 2003 and updated in 2011. The Principles also formed the basis for drafting the Guidelines for Action on Children in Justice Systems in Africa.

Most of the first-mentioned AU document enunciates general principles and procedures for all persons in the criminal justice system. Of particular importance to this study is section o, which deals with ‘Children and the right to a fair trial’ and covers child offenders and, to a lesser extent, child victims and witnesses.

With regard to child offenders, the document sets out detailed guidelines on numerous of the issues included in the international instruments. What is notable is that the guidelines address many of the gaps in the ACRWC; similarly, there are respects in which this document is more progressive than the CRC. For example, it contains a provision requiring legal assistance for the child from the moment of arrest, and protection during questioning by police. Notably, it sets a recommended minimum age of criminal capacity of 15 years, which is considerably higher than

the now generally accepted international norm of 12 years. It is commendable too that the document includes child victims and witnesses within its ambit.

The Guidelines on Action for Children in Justice Systems in Africa were adopted in Kampala in 2011. Thereafter they were endorsed in March 2012 by the ACERWC, which has used them in support of its Concluding Observations.³⁴ The Guidelines recognise that all decisions and actions pertaining to children should be taken in a ‘child-friendly’ manner, noting that the justice system must be cognisant of the child’s family life as well as his or her increasing capacity and developing maturity.

The Guidelines recognise the variety of kinship and family ties in Africa by extending the definition of ‘parent’ beyond biological parents to an individual caregiver, extended family member or any person performing a parental role. As for the right to participation, as defined in the Guidelines it entails the child accessing information in a manner that facilitates his or her participation, the information being provided by a competent authority, such as a prosecutor or legal representative. Participation includes proper consideration of the child’s views and opinions.

Acting in the best interests of the child should be the highest priority in all matters concerning children in the justice system. The child in conflict with the law is to be treated with care, sensitivity, and respect at all stages of proceedings in the child justice system, ‘regardless of his/her legal status or of the manner in which they have come into contact with the justice system’. The Guidelines make provision for every accused child to have legal assistance, and, if appropriate and in the best interests of the child, his or her parents, a family relative or legal guardian, should be present during the proceedings.

Before trial, a child may be detained only as a measure of last resort and for the shortest possible period of time, and he or she must be kept separate from adults. As a sentence, detention should be imposed by a court only upon a finding of guilt for a serious offence involving the use of violence, on a persistent child offender, or where there is no other sentencing option for the child.

The Guidelines contain an entire section dedicated to traditional justice relating to child justice proceedings, and provide a list of minimum factors to be implemented in traditional justice systems in Africa. The principle of non-discrimination should apply in these systems, as should gender equality and the child’s rights to dignity, liberty and security. Awareness of the vulnerability of female children is essential; so, too, is giving due consideration to the rights of parents, legal guardians and caregivers of children in conflict with the law before traditional courts. States are to guarantee the impartiality of traditional courts, where decisions are to be safeguarded against improper influence, inducements, pressure, threats or interference, be these direct or indirect, from any external party.

To implement the Guidelines fully, it is important that states develop specialised courts in support of child-friendly justice, along with a well-trained social services workforce. Inter-governmental assistance will help strengthen weak national justice institutions and build good relations especially between neighbouring countries which assist each other.³⁵

2.14 UN Guidance Note on Justice for Children (2008) and Human Rights Council Resolution on the Administration of Justice, in particular Juvenile Justice (2011)

The 2008 UN Guidance Note of the Secretary-General: UN Approach to Justice for Children stresses the importance of a systems approach (see below). The Note provides the guiding principles and framework for UN activities on justice for children at the national level. The goal of the justice-for-children approach is to ensure that children are better served and protected by justice systems, including therein the security and social welfare sectors. It aims specifically at ensuring full application of international norms and standards for all children who come into contact with justice and related systems as victims, witnesses and alleged offenders, as well as for those needing judicial, state, administrative or non-state adjudicatory intervention, for example regarding their care, custody or protection.

The Guidance Note is premised on

- ensuring that the best interests of the child are given primary consideration;
- guaranteeing fair and equal treatment of every child, free from all kinds of discrimination;
- advancing the right of the child to express his or her views freely and to be heard;
- protecting every child from abuse, exploitation and violence;
- treating every child with dignity and compassion;
- respecting legal guarantees and safeguards in all processes;
- preventing conflict with the law as a crucial element of any juvenile justice policy;
- using deprivation of liberty of children only as a measure of last resort and for the shortest appropriate period of time; and
- mainstreaming children's issues in all rule of law efforts.

In 2011, the UN Resolution on human rights in the administration of justice, in particular juvenile justice, was adopted.³⁶ It emphasises that the right to access to justice for all is an important basis for strengthening the rule of law through the administration of justice. It reaffirms the principle that deprivation of liberty should be a last resort and for the shortest appropriate period of time, and reinforces the importance of social rehabilitation of persons deprived of their liberty as an essential aim of the criminal justice system. The Resolution refers to the best interests of the child, in relation to both the deprivation of liberty of children and the sentencing of parents. The resolution emphasises the systems approach (see below), and encourages the state to foster close cooperation between the justice sector and other sectors involved in juvenile justice service delivery, such as social welfare and education.

The Resolution urges states

to develop and implement a comprehensive juvenile justice policy to prevent and address juvenile delinquency as well as with a view to promoting, inter alia, the use of alternative measures, such as diversion and restorative justice, and ensuring compliance with the principle that deprivation of liberty should only be used as a measure of last resort and for the shortest appropriate period of time, as well as to avoid, wherever possible, the use of pre-trial detention for children.³⁷

The Resolution calls on states to take measures to prevent and respond to violence against children in the juvenile justice system, and reiterates the call in the CRC Committee's General Comment No. 10 for them to set a minimum age for criminal responsibility at no less than 12 years of age.³⁸

2.15 UN Reports on Violence against Children in the Juvenile Justice System (2012) and on Restorative Justice (2013) and the UN Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice (Model Strategies on VAC) (2014)

According to the report of the UN Secretary-General's Special Representative on Violence against Children in the Juvenile Justice System, there are a number of reasons why such children are exposed to the risk of violence. One of them is that the children are perceived as anti-social or criminals; another is the prevalence of approaches to juvenile justice that stress physical or psychological punitiveness. The report analyses the systemic factors that contribute to violence, and recommends strategies to prevent and respond to them. These strategies include legislative action and policies to prevent institutionalisation – in particular through the proper application of the principle of 'last resort' and the prioritisation of alternative measures to deprivation of liberty.

Preventing and protecting children from violence in the justice system was identified as one of the priority areas of concern in the follow-up to the study on Violence against Children, due to, among other things, the fact that children are vulnerable to violence at the hands of staff and adult detainees in detention centres and that they also endure violence as a form of punishment or sentencing.³⁹

In 2013 the Special Representative published a thematic report on restorative justice for children. The report provides the international legal framework for restorative justice, sets out restorative justice models, addresses the key questions in promoting restorative justice for children, highlights the benefits of restorative justice, and considers how to overcome challenges in developing and implementing restorative justice for children.

By placing a special focus on children's protection from violence, the Model Strategies on Violence against Children (adopted by the UN General Assembly in October 2014) bring together, by means of an integrated and child-centred approach, the relevant measures previously adopted under a range of UN standards. The Model Strategies on Violence against Children provide essential guidance on how to prevent and respond to the violence and abuse faced by children in the criminal justice system. In particular, they address three important dimensions:

1. general prevention strategies to address violence against children as part of broader child protection and crime prevention initiatives;
2. strategies and measures to improve the ability of the criminal justice system to respond to crimes of violence against children and protect child victims effectively; and
3. strategies and measures to prevent and respond to violence against children in contact with the justice system.

The Model Strategies encourage UN member states to develop and implement a multisectoral and coordinated crime prevention and justice system policy for children, and to make use of alternative measures to detention such as diversion and restorative justice. The Model Strategies also urge member states to introduce reintegration strategies for former child offenders.

Specific challenges facing girls are addressed in various sections of the Model Strategies on Violence against Children. These challenges include the need to criminalise gender-based violence against children and, in particular, the gender-based killing of girls, and to address the distinctive needs of girls in places of detention and their vulnerability to gender-based violence.

2.16 Model Law on Juvenile Justice (2013)⁴⁰

Along with the related Commentary, this Model Law is designed to provide legal guidance to states in the process of juvenile justice reform and assist them in drafting juvenile justice legislation. It translates international juvenile justice standards and norms into the national context, and aims at harmonising national legislation with international requirements. It is based on core juvenile justice principles that need to be taken into consideration by states when drafting juvenile justice legislation, and establishes due process guarantees for any child in conflict with the law.

Furthermore, the Model Law has provisions on the minimum age of criminal responsibility, including guidance on how to conduct age and personality assessments. It proposes the establishment of children's courts (or juvenile/youth courts) where independent, specially trained judges have exclusive jurisdiction over children in conflict with the law. It also proposes the establishment of specialised prosecution offices, police units and social services.

The Model Law covers all phases of the juvenile justice process, starting with the pre-trial phase, including the crucial moment of the apprehension and arrest of the child as well as his or her subsequent treatment in police custody and pre-trial detention. It then contains provisions regarding the trial phase, custodial and non-custodial sentences, and conditions of detention and institutional treatment, as well as provisions relating to after-care and reintegration. The Model Law recognises alternatives to judicial proceedings (diversion) and, in particular, restorative justice as key requirements.

The text notes that law reform is not sufficient in and of itself. What is also indispensable is to establish a clear framework for child-sensitive services and service delivery mechanisms with competent human resources, sufficient financial resources, and adequate physical resources to protect the rights and respond to the needs of children in conflict with the law. Moreover, because the mechanisms of juvenile justice systems are heavily influenced by cultural and societal norms, communication and advocacy measures aimed at promoting the engagement of media and civil society in the child protection process are essential in advancing positive change.⁴¹

2.17 The Sustainable Development Goals (2015)⁴²

The Sustainable Development Goals (SDGs) were adopted on 25 September 2015 by the UN General Assembly to end poverty, protect the planet, and ensure prosperity for all as part of a new sustainable development agenda.⁴³ There are 17 goals and, within each goal, specified targets (making a total of 169 targets). Setting out to build on the Millennium Development Goals and complete what the latter did not achieve, the SDGs seek to realise the human rights of all and to achieve gender equality and the empowerment of all women and girls. The SDGs are integrated and indivisible, and balance the three dimensions of sustainable development – the economic, the social and the environmental.

Beyond Goal 16, which recognises peaceful and inclusive societies and access to justice as essential to sustainable development, a number of other goals have a bearing on various aspects of children and justice systems. These include Goals 2, 3 and 6 on hunger, health and water and sanitation, matters that are all related to the basic needs of prisoners and which few prison systems in the world succeed in meeting. Goals 1, 4 and 8 on poverty, education and economic growth and work are closely linked to preventing crime and reducing recidivism through the social reintegration of offenders. Finally, given that inequalities in society are mirrored in criminal justice systems, Goals 5 and 10 – on gender equality and inequality within and among countries – are also directly relevant.⁴⁴

2.18 Human Rights Council Report on Non-Discrimination and Protection of Persons with Increased Vulnerability in the Administration of Justice (2017)⁴⁵ and the appointment of a Special Representative of the UN Secretary-General on Children Deprived of their Liberty

This report of the UN High Commissioner for Human Rights focuses on vulnerability in the context of deprivation of liberty and, in particular, on the causes and effects of over-incarceration and overcrowding. It refers specifically to the over-incarceration of children, noting that this problem may be a consequence of the minimum age of criminal responsibility, of laws which have increased the maximum time children may be sentenced to imprisonment, and of the duration children's pre-trial detention. The report notes, too, that detention is overused and that children are targeted for minor offences and status offences.⁴⁶

In addition, the report refers to the discriminatory application of penal law in the case of women and girls,⁴⁷ as well as to the over-incarceration of poor and minority populations, including children.⁴⁸ The lack of alternatives to detention results in unnecessary detention, which has a particularly marked impact on groups with heightened vulnerabilities, such as children.⁴⁹ The latter are seldom provided with legal assistance, and, even when they are, it may be of poor quality, thereby denying them access to justice.⁵⁰

Among its numerous recommendations, the report proposes that when they give account of their progress in meeting commitments under the 2030 Agenda for Sustainable Development, states should consider the causes and effects of over-incarceration and overcrowding with regard to non-discrimination and persons with increased vulnerability in the administration of justice. Goal 10 (which aims to ensure equal opportunity and reduce inequalities of outcome) and Goal 16 (which requires equal access to justice) are specifically mentioned.⁵¹

On 26 October 2016, the UN Human Rights Office welcomed the selection of Professor Manfred Nowak to lead a new global study on the situation of children deprived of their liberty.⁵² The scope of study, mandated by the UN General Assembly in Resolution 69/157 in December 2014, includes identifying good practices and making recommendations to effectively realise all relevant rights of the child.

The impetus for the study lies in the fact that, inasmuch as most countries lack data on the number of children deprived of liberty, the reasons for their detention, and the length and places of detention, it has been concluded that children deprived of liberty often remain invisible and forgotten. In the absence of robust child protection systems, countless children throughout the world are deprived of liberty, purportedly for their care and protection but with severe consequences both for the person and for society as a whole.⁵³

To address this pressing situation, the UN General Assembly invited the Secretary-General to commission the in-depth Global Study on Children Deprived of Liberty. It is to cover all forms of deprivation of liberty, including that in prisons, juvenile institutions, mental health facilities, police custody, and immigration detention. At the time of writing, the Global Study had found funds to undertake its work, which commenced in 2018.

2.19 Systems-strengthening and child-friendly justice

The CRC and ACRWC are general in nature and as such lack specificity about systems. Child protection responses in the past have been developed around particular issues, such as the protection of juveniles deprived of liberty or matters relating to child victims and witnesses. This diffused approach has often resulted in fragmentary child protection responses marked by inefficiencies and pockets of unmet need.⁵⁴ In recent years, though, the trend internationally has been towards ‘systems approaches’.

All systems entail a nested structure. In the case of child protection, for instance, children are embedded in families or kin and live in communities, which exist in turn within a wider societal system. Given the nested nature of systems, attention needs to be paid specifically to coordinating the interaction of these subsystems, such that the work of each is mutually reinforcing of the purposes, goals and boundaries of the others. Well-functioning systems place emphasis on cultivating acts of cooperation, coordination and collaboration among all levels of stakeholders, including those managing key activities and those performing key functions.

A systems approach entails then that, rather than treating each child-safety concern in isolation, one adopts a holistic view of children and child protection as constituting a system that requires engagement with the full range of actors involved in protecting children’s rights. A systems approach is, furthermore, deliberately fashioned to draw both on formal contexts as well as informal local ones.

As mentioned, the ACERWC has endorsed systems-strengthening as the desired approach to building resilient and locally appropriate child protection responses,⁵⁵ and it is currently deliberating upon a General Comment on General Measures of Implementation of the ACRWC and systems-strengthening.

There have been a number of other developments that promote ‘child-friendly justice’ and which are in keeping with the systems-strengthening approach. Notably, the Committee of Ministers of

the Council of Europe has formulated Guidelines on Child-friendly Justice.⁵⁶ This document provides the following useful definition:

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

The next section of the study examines the fundamental principles of child-friendly justice.

*These principles [of child-friendly justice] relate to all actions in child-friendly justice systems, whether they are criminal, civil or administrative, and regardless of whether they are formal or informal processes. Where they do not currently apply, for example in traditional/ customary law processes, commitment should be made to making them progressively applicable.*⁵⁷

CHAPTER III: FUNDAMENTAL PRINCIPLES OF CHILD-FRIENDLY JUSTICE

3.1 Participation

3.1.1 Basic concepts

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

3.1.2 Contextual analysis

Numerous countries in Africa recognise the child's right to participation and have made legislative provision for it. However, countries vary from one to the other in terms of when a child is considered of sufficient age and maturity to participate. Some also make participation subject to age and maturity or understanding, whereas others allow for any child capable of forming his or her views to participate in decisions that affect him or her.

3.1.3 Examples

Below are examples of how these principles are applied at the national level:

- The Children's Act of Uganda provides for child participation in section 16(1)(e), which states that a child has a right to legal representation in the Children's and Family Court. Section 20(4) provides that where a child in respect of whom a welfare report is made is of sufficient age and understanding, he or she shall be interviewed by the social welfare officer.
- Section 158 of the Child Rights Act of Nigeria requires that proceedings in court be conducive to the best interests of the child and be conducted in an atmosphere of understanding, allowing the child to express him- or herself and participate in the proceedings.
- Section 11 of the Law of the Child Act of 2009 of Tanzania states that a child shall have a right of opinion, and that no person shall deprive a child capable of forming views of the right to express an opinion, to be listened to, and to participate in decisions that affect his or her wellbeing.

- Section 11 of the Children's Act 560 of 1998 of Ghana states that a person shall not deprive a child capable of forming views of the right to express an opinion, to be listened to, and to participate in decisions that affect the child's wellbeing, the opinion of the child being given due weight in accordance with his or her age and maturity.

Looking more closely at the example of Zimbabwe, in 2013 it adopted a new constitution granting strong recognition to human rights. Specifically, the Constitution makes provision for children's rights through section 81, thereby domesticating child rights as provided for by the CRC and the ACRWC. With regard to access to justice for children, section 81(1)(a) states that 'every child has a right to equal treatment before the law, including the right to be heard'. It has been argued that this provision

clearly domesticates children's right to be heard as provided for by the CRC in Article 12 and the ACRWC in Articles 4(2) and 7. As far as access to justice is concerned, this right means that children who are affected by judicial proceedings in civil and criminal matters should be afforded an opportunity to air their views and opinions and to have those views given due weight in accordance with their age and maturity. This is profound in that it creates an opportunity for children to speak out directly in court processes and to be heard through representatives such as legal practitioners and probation officers.⁵⁸

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

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

Furthermore, sections 6 and 31 both stipulate that the child's views and wishes must be obtained prior to making a decision that causes a significant change in the child's life, and the child's views must be given due consideration. The duty to ensure the child's participation is such that a presiding officer in the Children's Court must formally record the reasons on the court record if the child did not participate in the children's court proceedings.⁵⁹

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

- 1) Every child who is of such an age, maturity and level of understanding as to be able to participate in decisions which have a significant impact on that child's life shall have a right to do so.*
- 2) For the purpose of ensuring that the child is able to participate in the decision-making process, the child shall be given —*
 - a) Adequate information, in a manner and language that the child understands, about*
 - i. The decision to be made,*
 - ii. The reasons for the involvement of persons or institutions other than his or her parents, other relatives or guardian,*
 - iii. The ways in which the child can participate in the decision-making process, and,*
 - iv. Any relevant complaint or review procedures;*
 - b) The opportunity to express the child's wishes and views freely, according to the child's age, maturity and level of understanding;*
 - c) Any assistance that is necessary for the child to express those wishes and views;*
 - d) Adequate information regarding how the child's wishes and views will be taken into account;*
 - e) Adequate information about the decision made and a full explanation of the reasons for the decision; and*
- 3) An opportunity to respond to the decision made.*

3.2 Best interests of the child

3.2.1 Basic concepts

Protection of the best interests of the child is one of the pillars of children's rights. In the context of access to justice, protection of the best interests of the child requires as follows:

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

3.2.2 Contextual analysis

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

3.2.3 Examples

Section 2 of the Children's Act of Ghana states that the best interests of the child shall be paramount in a matter concerning a child.

The Law of the Child Act of Tanzania (section 4(2)) states that the best interests of the child shall be the primary consideration in all actions concerning a child, whether undertaken by public or private social welfare institutions, courts, or administrative bodies.

Section 4(2) of the Children's Act of Kenya requires that in all actions concerning children, whether undertaken by the public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child should be a primary concern.

The best interests of the child are at the heart of all legal provisions relating to children in Tunisia, and are expressly enshrined and implemented by article 4 of the Child Protection Code, particularly with regard to all decisions taken by legislative, judicial and administrative authorities concerning the child.

Section 3(1) of the Child Rights Act of Sierra Leone states: 'The fundamental principle to be applied in the interpretation of this Act shall be that the short- and long-term best interests of the child shall be a *primary consideration in any decision or action that may affect the child or children, as a group.*'⁶⁰

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

5. *A person or the court performing a function or exercising a power under this Act shall regard the best interests of the child as the paramount consideration.*
6. (1) *The following factors shall be taken into account in determining the best interests of the child —*
 - a) *The need to protect the child from harm*
 - b) *The capacity of the child's parents, other relative, guardian or other person to care for and protect the child*
 - c) *The child's spiritual, physical, emotional and educational needs*

- d) *The child's age, maturity, sex, background, and language*
- e) *The child's cultural, ethnic or religious identity*
- f) *The likely effect on the child of any change in the child's circumstances*
- g) *The importance of stability and continuity in the child's living arrangements and the likely effect on the child of any change in, or disruption of, those arrangements*
- h) *Any wishes or views expressed by the child, having regard to the child's age, maturity and level of understanding in determining the weight to be given to those wishes or views; and*
- i) *Any other factor which will ensure the general wellbeing of the child.*

2. *The provisions of subsection (1) shall not be construed as limiting the factors that may be taken into account in determining what is in the best interests of the child.*⁶¹

The Constitution of Mozambique states in article 47(3) that 'all acts carried out by public entities or private institutions in respect of children shall take into account, primarily, the paramount interests of the child'. The principle of the best interests of the child is included too in the Constitution of Angola of 2010,⁶² notably in relation to policies on the family, health and education.

Due to the emphatic nature of South Africa's constitutional provision on children's best interests as the paramount consideration, several judgments in the country have examined the ambit and limits of the principle and were highly commended for doing so by the ACERWC in its Concluding Observations to the country's State Party report in 2014.⁶³

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

[t]he ambit of the provisions is undoubtedly wide. The comprehensive and emphatic language of section 28 indicates that just as law enforcement must always be gender-sensitive, so must it always be child-sensitive; that statutes must be interpreted and the common law developed in a manner which favours protecting and advancing the interests of children; and that courts must function in a manner which at all times shows due respect for children's rights.⁶⁴

In *AD and another v DW and others (Centre for Child Law as Amicus Curiae; Department of Social Development as Intervening Party)* the Court examined the best interests principle in relation to intercountry adoption and the rule of subsidiarity, which requires resort to intercountry adoption only if other care options are not available or suitable to the child. The Court interpreted the interrelationship between legal requirements and the best interests principle as follows:

Child law is an area that abhors maximalist legal propositions that preclude or diminish the possibilities of looking at and evaluating the specific circumstances of the case. The starting-off point and overall guiding principle must always be that

there are powerful considerations favouring adopted children growing up in the country and community of their birth. At the same time the subsidiarity principle itself must be seen as subsidiary to the paramountcy principle. This means that each child must be looked at as an individual, not as an abstraction. It also means that unduly rigid adherence to technical matters such as who bears the onus of proof, should play a relatively diminished role; the courts are essentially guarding the best interests of a child, not simply settling a dispute between litigants.⁶⁵

In Tunisia, in decision no. 7286 of 2 March 2001, the Court of Cassation held in essence that ‘the Tunisian legislature - in accordance with the provisions of the Convention on the Rights of the Child of 20 November 1989, which had been ratified by Tunisia – has considered the child’s best interest in matters regarding the award of care’, in so doing finding that ‘Tunisian public policy is in no way disturbed by the foreign court’s decision to give care of the child to the foreign mother since the sole criterion that must prevail here is that of the best interest of the child’.⁶⁶

In the *Mudzuru* case concerning the ruling that child marriage was unconstitutional, the Constitutional Court of Zimbabwe held that

[r]esistance to the liberation of the girl child from the shackles of child marriage and its horrific consequences based on conceptions of sex discrimination is against the best interests of the girl child served by the enforcement of the fundamental rights enshrined in ss 78(1) and 81(1) of the Constitution.⁶⁷

3.3 Dignity

3.3.1 Basic concepts

The third general principle of child-friendly justice entails that children should be treated with care, sensitivity and respect throughout any procedure or case, with special attention to their wellbeing and particular needs, and with full respect for their physical and psychological integrity. This treatment should be guaranteed, no matter what the reason for their coming into contact with the judicial or non-judicial proceedings is, and regardless of their legal status or capacity.

3.3.2 Contextual analysis

In most African countries, legislation has provided for the respect of children’s dignity in specific instances, while in certain countries this is a constitutional principle that applies to children’s rights.

3.3.3 Examples

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

Section 26(2) of the Child Rights Act of Sierra Leone states that ‘every child has the right to life, dignity, respect, leisure, liberty, health, including immunisation against diseases, education and

shelter from his parents'. Furthermore, it states in section 30 that 'no person shall treat a disabled child in an undignified manner'.

Section 15(1) of the Children's Protection and Welfare Act of Lesotho gives children the right to be protected from torture or other cruel, inhuman or degrading treatment or punishment, including any cultural practice that dehumanises or is injurious to the physical, psychological, emotional and mental wellbeing of a child.

The recently adopted Namibian Child Care and Protection Act 3 of 2015 provides thus in section 228:

- (1) A person who has control of a child, including a person who has parental responsibilities and rights in respect of the child, must respect the child's right to dignity conferred by Article 8 of the Namibian Constitution.*
- (2) Any legislative provision and any rule of common or customary law authorising corporal punishment of a child by a court, including the court of a traditional leader, is repealed to the extent that it authorises such punishment.*
- (3) A person may not administer corporal punishment to a child at any residential child care facility, place of care, shelter, early childhood development centre, a school, whether a state or private school or to a child in foster care, prison, police cell or any other form of alternative care resulting from a court order.*
- (4) The Minister must take all reasonable steps to ensure that –*
 - a) education and awareness-raising programmes concerning the effect of subsections (1), (2) and (3) are implemented in all the regions in Namibia; and*
 - b) programmes and materials promoting appropriate discipline at home and in other contexts where children are cared for are available in all the regions in Namibia.*

Building on earlier case law that abolished corporal punishment as a juvenile sentence and as a disciplinary sanction in state schools, sections 228(2) and (3) serve to clarify some of the identified uncertainties that arose, for example in relation to private schools and to corporal punishment imposed by traditional courts. It also applies to persons acting *in loco parentis*, such as caregivers and foster parents.

In Zimbabwe, corporal punishment of children has also been the subject of constitutional litigation. The judgment in *S v C (a minor)* came before the Harare High Court on review in December 2014. The accused had been convicted and sentenced to a moderate whipping of three strokes with a rattan cane, which was a lawful punishment for juvenile offenders under an exception to the prohibition on torture or cruel, inhuman and degrading treatment or punishment under the previous Zimbabwean constitution.

Under the 2013 Constitution, however, the right to freedom from torture or cruel, inhuman or degrading treatment or punishment is provided for under section 53 (without exceptions), and section 86(3)(c) lists this right as one of those in respect of which 'no law may permit such torture

or cruel, inhuman and degrading treatment or punishment to occur’ and in respect of which ‘no person may be permitted to violate it’.

The Harare High Court viewed this as leading to the conclusion that corporal punishment as a sentence was now unconstitutional, a conclusion strengthened if regard is had to further provisions in the new Constitution that protect the rights to personal security, equality and non-discrimination. The Court relied heavily on international instruments which had been ratified by Zimbabwe, including the key children’s rights texts, with the most detail accorded the ACRWC.⁶⁸

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

Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them. The unusually comprehensive and emancipatory character of section 28 presupposes that in our new dispensation the sins and traumas of fathers and mothers should not be visited on their children.⁶⁹

3.4 Non-discrimination

3.4.1 Basic Concepts

At the core of the principle of non-discrimination is the recognition that all children ought to be protected equally and to have the benefit of their rights without distinction, on the basis of factors set out in international and regional human rights instruments. Specific protection and assistance may be necessary to ensure that groups of children who are considered more vulnerable than others do not experience discrimination. Such protection ought to be entrenched in the law.⁷⁰

3.4.2 Contextual Analysis

While most children in Africa experience challenges in accessing justice, some children have to surmount far more barriers to benefit from the protections of the law. Some of the barriers are made worse by the personal characteristics or circumstances of the child such as the listed grounds of non-discrimination which include sex, ethnicity, opinion, social status or religion. A majority of the legal and justice systems in Africa do not make any provision for specific or specialised support to make it easier for children in these categories to access justice on an equal basis with other children in the same context.

3.4.3 Examples

Below is a selection of examples of how these principles are applied at the national level:

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

- The Law of the Child of Tanzania provides that a child shall have a right to live free from any discrimination, and a person shall not discriminate against a child on the grounds of gender, race, religion, age, language, political opinion, disability, health status, custom, ethnic group, rural or urban background, birth, socio-economic status, or refugee status.⁷¹

Similar provisions are found in the laws of Kenya,⁷² Uganda,⁷³ and South Sudan.⁷⁴ Section 36 of the Child Act of South Sudan makes it the responsibility of all levels of government to implement the rights in the Children's Act, to protect a child from any form of discrimination, and to take positive action to promote children's rights.

The Botswana Children's Act⁷⁵ and the Lesotho Children's Protection and Welfare Act⁷⁶ both contain a general principle prohibiting discrimination on certain protected grounds. Protection from discrimination is visible in attempts in various countries to eradicate discrimination between children who are born in a marriage and those born outside of marriage. Legislation in Namibia,⁷⁷ Mozambique,⁷⁸ Swaziland⁷⁹ and Tunisia⁸⁰ declares that children should be treated equally, irrespective of the marital status of their parents.

To consider examples from case law, in *Bhe and Others v Magistrate, Khayelitsha and Others (Commission for Gender Equality as Amicus Curiae)*⁸¹ one of the issues that had to be decided by the South African Constitutional Court was whether customary law rules on inheritance that gave rise to differentiation between children born in marriage and children born outside of marriage amounted to unfair discrimination. Section 9 of the Constitution of South Africa prohibits discrimination on the grounds of 'birth'; the Court found that prohibiting discrimination on the grounds of 'birth' includes a prohibition of differentiation between children based on whether the child's parents were married or not at the time of the child's birth. The differentiation between these children was thus found to be unfair discrimination.

3.5 Rule of law

3.5.1 Basic concepts

The fifth general principle is that the principles of the rule of law principles should apply as fully to children as to adults. Elements of due process, such as the principles of legality and proportionality, the presumption of innocence, the right to a fair trial, the right to legal advice, the right to access to courts and the right to appeal, should be guaranteed for children as they are for adults, and should not be denied or minimised on the basis of the child's best interests.

3.5.2 Contextual analysis

The rule of law principle links to numerous factors relating to access to justice, certain of which are dealt with individually in this study. African countries have recognised the need to highlight some of these issues and provide, for instance, that it is the responsibility of the governments to ensure that the rule of law prevails for children.

3.5.3 Examples

The Kenyan Children's Act requires that the administering authority establish a written procedure for considering complaints made by or on behalf of children accommodated in care institutions,

and that such procedure should include a process for the informal resolution of a complaint.⁸²

The Children's Act 8 of 2009 of Botswana includes a Children's Bill of Rights, set out at the beginning of the Act, that complements the fundamental rights a child has in terms of the Constitution of Botswana.

Similarly, section 28 of the Constitution of South Africa and section 29 of the Constitution of Swaziland are mini-bills of rights for children, in addition to all their other rights in the respective constitutions.

Section 80(1) of the Constitution of Egypt provides for the establishment of a separate juvenile justice system:

The State shall establish a judicial system for child victims and witnesses. No child is to be held criminally responsible or detained except in accordance with the law and the time frame specified therein. Legal aid shall be provided to children, and they shall be detained in appropriate locations separate from adult detention centers.⁸³

According to the national report on Tunisia commissioned in parallel to this study,

[T]he general principle with regard the legal representation of children in criminal proceedings, is that hiring a defence lawyer is optional in cases of misdemeanours and offences, but it is compulsory in cases of felonies. If the child does not appoint a defence lawyer, the court is obliged to assign a lawyer at the expense of the State (free legal aid). If the case is related to a misdemeanour, the child may apply for legal aid in the misdemeanours punishable by imprisonment for at least three years, provided that there is no recidivism. The court will charge a lawyer to defend the child at the expense of the State.⁸⁴

The ACERWC includes a complaints mechanism for children to bring a communication to the ACERWC alleging a violation of their Charter rights. However, domestic remedies first must have been exhausted. As previously mentioned, in communication no. 009/Com/001/201 (*Ahmed Bassiouny represented by advocate Dalia Lotfy and Amal v Government of the Arab Republic of Egypt*), the ACERWC declined to declare the communication admissible since local remedies had not been exhausted.⁸⁵ The initial complaint involved police brutality and torture following the arrest of a 15-year-old boy, who was, in addition, held together with adults in a correctional facility. Contrary to the Egyptian Child Act, the child was sentenced in an adult court rather than a Court of Juvenile Justice.

In Mauritania, adequate provision for child-centred litigation exists. Under the national laws, child-rights organisations are permitted to file collective actions on behalf of children in order to expand child-rights protection and grant children access to justice. Article 109 of Ordinance No. 15 of 2005 on Judicial Protection of Children stipulates that

[a] child's parent, legal guardian or lawyer and associations that are duly authorised and whose statutes seek to protect or support abused children are permitted to file cases seeking monetary compensation for torture, acts of barbarity, violence, sexual aggression, and endangering children when criminal prosecution has been put in motion by the Public Prosecutor or the victim.⁸⁶

3.6 Child-adapted systems and institutions

Child-adapted systems and institutions lie at the core of requirements for separate child justice systems. Adaptations involve both physical structural as well as human resources issues. They also include training of all staff tasked with administering functions in justice systems for children.

A good practice in this regard, emanating from Namibia, is the integration of child protection, child justice and gender-sensitivity training into the training curriculum of all recruits at police training colleges. Five manuals have been developed, also covering domestic violence, trafficking and prosecution of sexual offences. A module on the child as a witness is included to ensure child-sensitive collection of evidence. The training is based on experiential learning methodologies, with exercises and real-life case studies. The training was institutionalised at police training colleges at the beginning of 2018.⁸⁷

In Nigeria, the recent Administration of Criminal Justice Act (2015) provides for a separate system for children in conflict with the law, in accordance with section 204 of the Child Rights Act, which stipulates that

[n]o child shall be subjected to the criminal justice process or to criminal sanctions, but a child alleged to have committed an act which would constitute a criminal offence if he were an adult shall be subjected only to the child justice system and processes set out in this Act.

The national study of Egypt also noted that a specialised police unit for dealing with children in conflict with the law had been established within the Egyptian law since 1957. The unit had been renamed ‘child police’, as the term ‘juvenile’ was replaced by ‘child’ in the Child Law of 2008.

In 2005, Liberia established the Women and Children Protection Section (WACPS) within the Liberian Police Force, through a grant of USD 1.6 million from the Norwegian government administered by the UN Development Programme (UNDP), to serve as a special mechanism to deal effectively with sexual and domestic violence against women and children. The Liberian National Police were able to establish WACPSs in more than 20 locations throughout Liberia. The key mandate of the WACPS is to carry out the investigation, prosecution and documentation of cases of child-rights violations, domestic violence and sexual offences. The WACPS comprises police officers, responsible for criminal investigation of matters reported to them, and civilian social workers, who mainly deal with the psychosocial problems of the victims.⁸⁸

A promising practice in South Africa was the release, in November 2017, of amended regulations relating to the Sexual Offences courts; the draft Regulations were published for public comment on 30 September 2015 in Government Notice No. 899 of 30 September 2015. All the comments received were taken into account, alongside of amendments required because of the changes effected to section 55A of the Act by the Judicial Matters Amendment Act 8 of 2017. Financial constraints also necessitated certain revisions.

The draft regulations cover facilities at courts, for instance requiring child-friendly facilities, devices and equipment, as well as dealing with, inter alia, judicial trauma debriefing and support services

and staff. An example is Regulation 10: Basic requirements regarding waiting areas, which stipulates the following:

- (1) The waiting areas for complainants referred to in regulation 4(a) and (b) must be furnished in a manner aimed at the following:*
 - (a) setting a complainant and witness at ease;*
 - (b) ensuring proper ventilation; and*
 - (c) being accessible to complainants with disabilities and who are older persons.*
- (2) The waiting areas referred to in sub-regulation (1) must be furnished in a manner taking into account the following:*
 - (a) The different ages of child and adult complainants;*
 - (b) Persons other than complainants, namely the persons referred to in regulation 9(1)(a)(ii), may use the waiting areas; and*
 - (c) complainants and the persons referred to in regulation 9(1)(a) may have to spend lengthy periods of time in the waiting areas.*
- (3) The court manager at an established court must ensure that in the waiting areas referred to in sub-regulation (1) –*
 - (a) information, accessible to persons with disabilities and older persons, about –*
 - (i) court procedures, the role of a complainant and a witness, witness fees payable to complainants and witnesses and any other relevant court service; and*
 - (ii) appropriate resources relating to victim empowerment support services; and*
 - (b) toys and, where possible, educational items for children, are available, having regard to the different age groups of complainants and the other persons referred to in regulation 9(1)(a)(ii) and the needs of complainants ...*

In Malawi, access-to-justice reform efforts can be traced to when the National Child Justice Forum (NCJF), formerly the National Juvenile Justice Forum, emerged out of conversations held in 1999 by justice system stakeholders on their experiences in working with children in the system. In 2001, the judiciary was given the responsibility to coordinate government departments and NGO role-players. This also saw the establishment of four specialised courts, located in the four main regions of Malawi (Blantyre, Zomba, Lilongwe and Mzuzu), along with the roll-out of specialised children's courts at district level in all the 28 administrative districts.

The objectives of the NCJF include strengthening existing structures that respect the rights of children; maintaining and strengthening a comprehensive database for the child justice system; and providing, coordinating and facilitating further training of stakeholders. The NCJF members have been able to conduct child justice programmes and initiatives through structures within the judiciary (Child Justice Courts); Ministry of Gender (Community Victim Support Units); the police (Victim Support Units); and the Ministry of Health (One-Stop Centres).

Over the last 10 years, the NCJF has also gained a reputation among policy-makers in Malawi for credible leadership on child justice issues, and has played a valuable role in driving service delivery improvements. The NCJF falls under the Judiciary (not the Justice Department as such), and staff are employed under its auspices. It has been suggested that the high-profile leadership provided by the judiciary has enhanced the success of the implementation of the child-friendly justice initiative.⁸⁹

Another positive example of child-adapted services has been the establishment of the One-Stop Centres in Malawi. At these centres, different duty-bearers operate under one roof, providing integrated services specifically designed for children who are victims of sexual and physical abuse. The centres ensure that victims of crime are treated in a way that promotes their sense of dignity and worth. There are currently four One-Stop Centres, located in Mzuzu, Lilongwe, Zomba and Blantyre. According to a 2011 baseline report,⁹⁰ these centres annually treat an average of 368 cases of sexual violence against women and children.

In Zambia, until 2011 there was one Child-Friendly Court in Lusaka, but no infrastructural improvements had been carried out on courts in other provinces. In 2011, UNICEF announced the construction of a child-friendly court in Nakonde in Northern Province. Magistrates interviewed in the districts said that they improvised to create a child-friendly environment. At present there are no judicial rules on procedure and practice to regulate the administration of justice in Child-Friendly Courts. A set of guidelines is hence needed that goes further than the Juveniles Act. What this means is that currently the sitting magistrate uses his or her discretion in disposing of cases.

In Tunisia, under Tunisian law children may not be prosecuted before any other courts than the juvenile court. A specialised judge for children in the courts is the only body competent to examine child cases, whatever the circumstances and details of the crime. There are no exceptions for children's courts to waive their jurisdiction and refer child cases to adult courts. If the military court undertakes a case and discovers that the suspect or one of the suspects is a child, the child shall be referred to a civil court, in accordance with article 86 of the Child Protection Code.⁹¹

Another adaptation relates to the time-frames within which cases must be concluded: the Tunisian law provides for a specific period in which the trial of children in conflict with the law must end. The specialised judge for children must consider the possible means or punishment that may be imposed on the child no later than 20 days from the date of submitting the child's case in writing.⁹²

In Zimbabwe, Victim-Friendly Courts have been established at 17 out of 30 Regional Courts in the country in order to create a confidential and conducive criminal justice delivery system. The increase and countrywide distribution of the establishments has significantly reduced the distance children have to travel to access justice, in addition to which it has eased the courts' case backlog.⁹³

In the same vein, additional structures in place include health institutions and victim-friendly units in police stations. All health institutions have the capacity to provide survivors of sexual abuse with services that include counselling, forensic examination, administration of post-exposure prophylaxis, prophylactic treatment for sexually transmitted infections, and treatment for the prevention of pregnancy. The government is in the process of establishing 'child-sensitive' survivor-friendly clinics within the institutions. To date, four survivor-friendly clinics have been established, and there are 269 police stations with victim support units, staffed by 817 police officers.⁹⁴

CHAPTER IV: GENERAL ELEMENTS OF CHILD-FRIENDLY JUSTICE

The general elements of a child-friendly justice system are drawn from standards contained in the CRC, ACRWC and other international child rights instruments outlined in Chapter 2 of this study.

4.1 Information and advice

4.1.1 Basic concepts

As soon as children are involved in the justice or other administrative system, and throughout their cases, children and their parents or caregivers should be provided with information and advice. This information should cover their rights; the system and procedural steps (that is, what role the child will play); alternatives to justice processes and their consequences; in the case of victims, the progress in investigations (that is, whether charges have been brought or arrests made, the times and dates of court proceedings, and other matters); what protective measures and/or services are available; and any compensation to which the child may be entitled and how to access it.

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

4.1.2 International law on information and advice

According to the CRC, States Parties have a responsibility to make the provisions of the Convention widely known, by appropriate and active means, to adults and children alike. With regard to juvenile justice, article 40(2)(b)(ii) states that every child alleged as or accused of having infringed the penal law has the right ‘to be informed promptly and directly of the charges against him or her’. This is the only specific reference to being informed in the context of the administration of juvenile justice. The ACRWC contains a similar provision in article 17(2)(c)(ii).

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

Rule 22 of the UN Rules for the Protection of Juveniles Deprived of their Liberty (JDLs) provides that parents must be notified when children are admitted to a place of detention. Furthermore, a child who is admitted must be provided with the rules of the facility, a written description of his or her rights and obligations, and information on how to lay complaints.

The Guidelines for Action on Children in the Criminal Justice System make no mention of information for alleged child offenders, but do so in the case of child victims in Part 111, ‘Plans concerned with child victims and witnesses’. Guideline 51(a) states that the responsiveness of

judicial and administrative processes to the needs of child victims and witnesses should be facilitated by informing child victims of their role, the scope, timing and progress of the proceedings, and of the disposition of their cases, especially where serious crimes are involved.

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

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

Guideline 20 provides that child victims, parents or guardians and legal representatives should also be informed promptly and adequately of the progress and disposition of the case, including apprehension, arrest, custodial status of the accused, pending charges, prosecutorial decisions, post-trial developments and outcomes of the case, and opportunities to obtain reparation from the offender or the state.

The Guidelines on Action for Children in Justice Systems in Africa provide that from their first involvement with the justice system, and throughout their contact with the justice system, children and their parents must be provided with information and advice in a language and at a level they understand, relating to

- their rights; the options for non-judicial or judicial procedures; the likely duration of procedures; access to remedies, appeal or review, reparations; and the availability of any independent complaints mechanisms;
- the time and place of any court or other relevant hearings;
- the general progress or outcome of proceedings; and
- what protective measures are available and how and where support services can be accessed.⁹⁵

4.1.3 Contextual analysis

A complaint frequently made by children and their parents is that they do not understand what is happening in their cases or have a clear idea of what their options are. For children accused of crimes, the situation is aggravated if they do not have legal representatives, which many do not.

Children who are victims and witnesses should be able to count on the prosecutor to provide them with information, but if prosecutors are not specially trained they might not always do so.

Moreover, the need for information arises before the court process starts – the point of first contact with the system is the police, yet police officials often lack the skills and knowledge to deal with these cases properly, and do not always remember to give appropriate information. Easy-to-read booklets can be a big help in aiding children and their parents or caregivers to understand what is happening and what to anticipate.

4.1.4 Examples

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

The Children's Act of Kenya requires that every child accused of having infringed any law be informed promptly and directly of the charges against him or her.⁹⁶ In section 38(o) the Act goes further to state:

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

The Juvenile Justice Act⁹⁷ of Ghana provides as follows in section 8:

- (1) *A police officer or the person effecting an arrest shall inform the juvenile of the reason for the arrest.*
- (2) *Where the arrest is made under warrant, the police officer or person effecting the arrest under the authority of the warrant shall notify the juvenile of the content of the warrant and exhibit a copy of the warrant to the juvenile.*

Many similar examples are found in legislation across the continent. There are also notable examples of good practices and promising initiatives in regard to the provision of advice and information.

One such instance is the preliminary inquiry introduced in the South African Child Justice Act 75 of 2008 (in force from 1 April 2010). The officer presiding at this informal pre-trial 'case conference' is required to provide information to the child in conflict at the outset of the inquiry. This must include information about the process and further procedures that will follow.⁹⁸ The preliminary inquiry procedure has been emulated in the Malawi Child Care and Protection Act of 2010 and the Lesotho Child Welfare and Protection Act of 2011.

Ongoing and systematic training of police officials – such as has been occurring in Zambia for a decade and is being rolled out in Namibia – bodes well for improvements in the provision of adequate information to children in conflict with the law and to child victims and witnesses. For

instance, the Namibian curriculum contains a module on statement-taking from children that has detailed exercises focusing on the provision of adequate information on the progress of the case to children.

Due to the nature of their engagement with the children, legal aid representatives and other lawyers play a key role in the provision of information to children. This role is expressly recognised in law in some instances. For example, in Malawi the legal representative appointed for the child must explain the rights and responsibilities of the child in relation to the proceedings and allow the child to give instructions if he or she is capable of doing so.⁹⁹

In Sierra Leone, some of the principal duties of the Child Welfare Committee, which has child members, are to raise awareness of children's rights, to educate villagers and children about children's rights, and to advise children.¹⁰⁰ In the event that a Child Panel or Family Court in Sierra Leone finds a child guilty of an offence, the child and the child's guardian or parent must be informed of the child's right to appeal, and the right to appeal must be fully explained.¹⁰¹

Botswana's Children's Act 8 of 2009 recognises that a child's right to participate is inextricably linked to the child's right to information. The Act further recognises the importance of communication with the child in a language the child understands.

Section 8(2) of the Botswana Children's Act states:

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

(a) Adequate information, in a manner and language that the child understands, about —

(i) The decision to be made,

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

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

(iv) Any relevant complaint or review procedures

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

(c) Adequate information about the decision made and a full explanation of the reasons for the decision ...

4.2 Protection of privacy

4.2.1 Basic concepts

The privacy and personal information of children who are or have been involved in court proceedings or administrative proceedings should be protected in accordance with national law. This generally means that no information that reveals or could reveal the child's identity may be made available or published, particularly in the media.

Similarly, there should be limited access to all court records or documents containing personal and sensitive information about children, in particular in proceedings involving them.

Whenever appropriate, children being heard or giving evidence in judicial or administrative proceedings should preferably do so *in camera*. As a rule, only those directly involved should be present, provided they do not obstruct children in giving evidence.

Professionals working with and for children should abide by the strict rules of confidentiality, except where there is a risk of harm to the child.

4.2.2 International law on privacy

A number of provisions in international treaties and standards are geared towards protecting the rights of children to privacy, among them the following:

- The CRC (article 16) states that no child shall be subject to arbitrary or unlawful interference with his or her privacy, and that the law should provide protection in this respect.
- The ACRWC (article 10) repeats the provisions of the CRC in similar terms. Moreover, in article 17, which deals with the administration of juvenile justice, the ACRWC specifically provides that States Parties shall ‘prohibit the press and the public from trial’.
- The Beijing Rules, Rule 8.1, provide that a ‘juvenile’s right to privacy shall be expected at all stages in order to avoid harm being caused to her or him by undue publicity and/or by the process of labelling’. Rule 8.2 stipulates that in principle no information that could lead to the identification of a child offender may be published.
- The Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime provide that child victims and witnesses should have their privacy protected as a matter of primary importance. Information about the child’s involvement in a justice process should be protected by maintaining confidentiality and not revealing his or her identity. Measures that should be taken include excluding the media and the public from the courtroom during the child’s testimony.
- The Guidelines on Action for Children in Justice Systems in Africa provide that ‘the child’s right to privacy shall be respected at all times in order to avoid harm being caused to him or her by undue publicity and no information that could identify a child suspected or accused of having committed a criminal offence shall be published’.¹⁰²

4.2.3 Contextual analysis

The idea of holding court hearings behind ‘closed doors’ can be controversial because it runs contrary to the broadly established principle that justice must be seen to be done and that open courts are guarantors of justice. Nevertheless, most modern legal systems have long held that there are well-founded exceptions to this rule, notably where victims or offenders are vulnerable. This approach is coming under pressure in some countries from media and freedom of expression groups wishing to see more openness in these matters. However, most countries in Africa have legislative provisions that protect children’s privacy.

In the field studies underlying this report, it was found that while the Local Courts Act in Sierra Leone requires courts to ensure closed hearings for matters involving children, traditional courts are not bound to adhere to the same measures. The failure to guarantee the right to privacy and anonymity is a significant flaw in the traditional justice system.

4.2.4 Examples

An example from case law is a matter heard by South Africa's Constitutional Court in which a media company wanted a section of the Divorce Act struck down as unconstitutional as it did not allow the media to report any information at all about divorce cases. The Court found that it was important to protect the children of divorcing parents, and ordered that

[s]ubject to authorisation granted by a court in exceptional circumstances, the publication of the identity of, and any information that may reveal the identity of, any party or child in any divorce proceedings before any court is prohibited.¹⁰³

A recent case, also in South Africa, that of *Centre for Child Law and others v Media 24 Limited and others*,¹⁰⁴ confirmed that the protection of privacy extended to victims aged below 18 years even if they are not eventually called as witnesses in any specific case. However, the Court failed to uphold the prohibition on revealing the identity of victims, witnesses or children in conflict with the law once they turn 18 years, holding that the protection falls away once the child turns 18 years; thereupon, the child's identity can be revealed.¹⁰⁵

Tunisia has strong legal provisions protecting the privacy of children in conflict with the law. Under Tunisian law, it is prohibited to publish any summary of the pleadings and decisions issued by the judicial bodies relating to the child that would undermine the child or the family's reputation and honour. Any person contravening these provisions shall be punished by imprisonment of 16 days to one year and a fine of 100 to 1,000 dinars, or only by one of these two penalties.

As such, it is prohibited to cause damage or attempt to cause damage to a child's private life either by publishing or disseminating news related to the child's court hearing in books, the press, radio, television, cinema or any other means, or by publishing or promoting texts or images that would reveal the identity of the child who is a suspect or a victim. Any person violating these provisions is punishable by imprisonment of 16 days to one year and a fine of 100 to 1,000 dinars, or only by one of these two penalties.¹⁰⁶

However, a paradox exists in that the legislator has approved the secrecy of court hearings when involving children in conflict with the law, but with the exception of cases where the child is victim. The court hearings of these cases are initially public if the accused are adults.¹⁰⁷

4.3 Safety

4.3.1 Basic concepts

The key tenets of safety for children in the justice system are:

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

4.3.2 International law on safety

Guideline 13 of the Guidelines on Justice for Child Victims and Witnesses provides that to avoid further hardship to the child, interviews, examinations and other forms of investigation should be conducted by trained professionals who proceed in a sensitive, respectful and thorough manner. Guideline 14 continues in the same vein, stating that all interactions should be conducted in a child-sensitive manner in a suitable environment that accommodates the special needs of the child.

Guideline 112 of the Guidelines for Children in Alternative Care states that, as a matter of good practice, all agencies and facilities should systematically ensure that, prior to employment, carers and other staff in direct contact with children undergo an appropriate and comprehensive assessment of their suitability to work with children.

Similarly, in Guideline 82 of the JDLs, personnel working in a detention facility must be appointed through careful selection and recruitment processes, since the proper management of detention facilities depends on their integrity, humanity, ability and professional capacity, as well as their personal suitability for the work.

4.3.3 Contextual analysis

It is a well-understood concept that children should not be subjected to secondary abuse by the system. Protection against this requires child-friendly procedures in interviewing children and ensuring that their dignity and safety is upheld throughout the justice process. Personnel working with children must be carefully selected and trained. Where children are in any form of residential care, the risk of abuse is significantly increased, and so the procedure for appointing staff has to involve particularly rigorous selection, background checks and training.

4.3.4 Examples

South Africa has implemented various protective mechanisms to make testifying more child-friendly for children affected by care and protection proceedings. Child care and protection proceedings in the Children's Court may require testimony from a child who was neglected or abused. Section 61(2) of the Children's Act 38 of 2005 states:

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

In addition, if the child's presence is necessary at court, the presiding officer may request that any person leave the room if it is in the best interests of the child; the proceedings must then be conducted, as far as possible, in a relaxed, non-adversarial atmosphere conducive to obtaining the participation of the child.¹⁰⁸

Children testifying in the criminal court in sexual abuse matters are protected by the use of an intermediary and close-circuit televisions, which allow the child to testify in a separate room, thereby avoiding direct confrontation with the accused and facilitating examination and cross-examination in a child-friendly manner that minimises secondary trauma.¹⁰⁹

The South African Children's Act 38 of 2005 and the Criminal Law (Sexual offences and Related Matters Act) 32 of 2007 create registers to record the detail of persons who have committed child abuse and sexual offences, respectively. Part 2 of Chapter 7 of the Children's Act establishes the national Child Protection Register. It has a Part A, which records all reports of abuse or deliberate neglect, all convictions for abuse or deliberate neglect, and all findings by a children's court that a child is in need of care and protection due to the child being abused or deliberately neglected.¹¹⁰ Part B records the details of all persons who have been found unsuitable to work with children. Employers have to check the names of applicant employees against the register if the employee is going to work with children.¹¹¹

The National Register of Sexual Offenders records the details of all persons who have been convicted of a sexual offence committed against a child or a person with mental disabilities.¹¹² However, it is disadvantageous to countries to establish two separate registers, as this is a duplication that results in unnecessary costs and an administrative burden on child protection organisations. A further negative aspect of the National Register for Sex Offenders is that details of a child found guilty of a sexual offence may also be recorded on the register (but this is subject to a judicial discretion).

In December 2017, Botswana became the third country in Africa to introduce (via Parliament) a register of persons who have committed sexual offences against children, in order to prevent persons convicted of sexual offences from working with children.¹¹³

An important aspect of special protective measures is the creation within the police of specialised units trained to interact with child offenders and, especially so, child victims. In Tunisia, the Child Protection Code created Child Protection officers who deal with all children who come into the system, be they offenders or victims.¹¹⁴ In Lesotho, the Mounted Police Service established the Child and Gender Protection unit, which provides a user-friendly reporting environment and ensures the confidentiality of child victims who come to the police station to report sexual offences.¹¹⁵ The country has also acquired mobile offices that function separately from the police office to facilitate more confidential and child-friendly interviews, an innovation that further encourages the reporting of offences.

Similarly, Namibia was commended by the ACERWC for the establishment of Gender-Based Violence Police Units (GBVPU) which deal with the victims of sexual offences and domestic violence, including children, and with children in conflict with the law.¹¹⁶

4.4 Training of professionals and the systems-strengthening approach

4.4.1 Basic concepts

All professionals working with and for children should receive the necessary training on the rights and needs of children of different age groups, and on proceedings that are adapted to them.

Professionals having direct contact with children should also be trained in communicating with them at all ages and stages of development, as well as with children in situations of heightened vulnerability.

4.4.2 International law on training of professionals

The Beijing Rules make several references to the need for special training of professionals – for example, Rule 6 requires the use of discretion by officials, while the commentary¹¹⁷ emphasises that professional qualifications and expert training are a way of ensuring that discretion is exercised judiciously. Rule 12 requires specialisation in the police, with the commentary requiring specialised training for police, particularly given that they are the child offender's point of first contact with the system. Rule 22 encapsulates the need for professionalism and training in the entire system, stating that

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

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

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

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

The chapter goes on to provide a relatively detailed list of what should be included in the training.¹¹⁸

According to Guidelines 114 and 115 of the Guidelines on Children in Alternative Care, personnel dealing with children in alternative care must be trained in the rights of children without parental care, in sensitivity regarding cultural, social, gender and religious issues, and in how to deal with challenging behaviour.

4.4.3 Contextual analysis

Training for officials who work with children is a key component of an effective, child-friendly justice system. It is fair to observe that even countries with limited resources in terms of special courtrooms or facilities could provide good services for children nonetheless if the personnel who come into contact with those children are well trained. This relates not only to the original professional training but to continuing education, which enables new knowledge, insights, methods and techniques to be shared and keeps replacement staff for those who have moved on updated about developments in the field.

In some countries there are training institutes that undertake such work, and/or organisations that hold regular seminars or conferences. Training should be multidisciplinary as far as possible, with different role-players being trained together, or at the very least being trained to understand the disciplinary perspectives of their counterparts. This is linked to the multidisciplinary approach, which is dealt with in the section below.

4.4.4 Examples

In March 2016 the University of the Western Cape convened a specialised training seminar for Central Authorities of a range of southern and eastern African countries¹¹⁹ concerned with intercountry adoption, an event that offered a unique platform within which south-south contextual learning could take place.

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

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

4.5 The multidisciplinary approach

4.5.1 Basic concepts

Close cooperation between different professionals should be encouraged in order to obtain a comprehensive understanding of the child and assessment of his or her legal, psychological, social, emotional, physical and cognitive situation.

4.5.2 International law on the multidisciplinary approach

The JDLs state that a facility for children should have a range of specialists, such as educators, vocational instructors, counsellors, social workers, psychiatrists and psychologists.¹²⁰ Furthermore, they stipulate that 'the administration should introduce forms of organisation and management that facilitate communications between different categories of staff'.¹²¹

The Guidelines for Action on Children in the Criminal Justice System (with regard to both child offenders and child victims) emphasise a holistic approach to implementation through maximisation of resources and efforts, as well as the integration of services on an interdisciplinary basis.¹²²

The Guidelines on Justice in Matters involving Child Victims and Witnesses provide very clearly that

[p]rofessionals should make every effort to adopt an interdisciplinary and co-operative approach in aiding children by familiarizing themselves with the wide array of available services, such as victim support, advocacy, economic assistance, counselling, education, health, and legal and social services. This approach may include protocols for different stages of the justice process to encourage cooperation among entities that provide services to child victims and witnesses, as well as other forms of multidisciplinary work that includes police, prosecutor, medical, social services and psychological personnel working in the same location.¹²³

According to the Guidelines on Children in Alternative Care, decisions on placement should be made by suitably qualified professionals in a multidisciplinary team.¹²⁴

4.5.3 Contextual analysis

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

4.5.4 Examples

The Juvenile Justice Law of Somaliland states that it is one of the duties of a probation officer to coordinate and cooperate with the Children Police, social workers, parents, victims and others who may be interested in any case involving children.¹²⁵

The Child Act of South Sudan states that the Ministry of Labour, Public Service and Human Resource Development shall in the course of investigations of any reasonable suspicion that a child is engaged in industrial undertaking, request medical officers, social workers and other professionals to provide expert information where necessary.¹²⁶

In Tunisia, a child in conflict with the law is referred to a Child Protection Delegate Centre to provide protection and sponsorship to cases of delinquent and threatened children and take measures to protect them. The Child Protection Delegate shall first work to prevent the child from being deprived of liberty, by seeking mediation in favour of the child in conflict with the law through making an agreement between the child and the victim to stop the criminal consequences.¹²⁷

In this regard, the 2016 report of the Child Protection Delegate provides statistics on mediation or restorative justice. According to the report, 452 requests of mediation were submitted in 2016 on behalf of children in conflict with the law, compared to 515 requests in 2015, and 377 requests in 2014. The report notes that theft ranked as the most frequent crime committed by children, followed by violence and vandalism.¹²⁸

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

Thuthuzela Care Centres operate in public hospitals located in communities where the incidence of rape is particularly high. They are also linked to sexual offences courts, which, located closely to the Centres, are staffed by prosecutors, social workers, investigating officers, magistrates, health professionals, NGOs and police. The Centres are managed by a top-level inter-departmental team comprising representatives from the departments of justice, health, education, the treasury, correctional services, safety and security, local government, home affairs, and social development, as well as designated civil society organisations.

Thuthuzela's integrated approach to rape care is founded on respect, comfort, and restoring dignity to and ensuring justice for children, women and men who are victims of sexual violence. The Thuthuzela Care centres have been emulated in other African countries, such as Malawi.¹²⁹

With regard to child offenders, the one-stop Child Justice Centre is an innovation in child justice in South Africa that prevents young people from being pushed from service to service and so getting lost in the system. The Child Justice Act 75 of 2008 envisages that one-stop Child Justice Centres will be established progressively to streamline the entire justice process from arrest to formal court proceedings.¹³⁰

Among the stated aims of one-stop Child Justice Centres is to promote cooperation between government departments and between them and the non-governmental sector, with a view to applying an integrated and holistic approach to the implementation of the Child Justice Act.¹³¹ All the major services will be in one building – holding cells, assessment rooms, police services, probation services, a courtroom and rooms for presenting diversion programmes – so that parents and children will not need to travel.

The Child Justice Act provides that the jurisdictional boundaries of these one-stop centres do not have to correspond to the boundaries of existing magistrate's courts.¹³² The Mangaung One-Stop Child Justice Centre in Bloemfontein and Nerina One-Stop Child Justice Centre in Port Elizabeth are examples of centres that already exist.¹³³ The Child Justice Act provides that the ministries of justice, social development, safety and security and correctional services will all be responsible for the provision of resources and services for the One-Stop Child Justice Centres.¹³⁴

4.6 Deprivation of liberty

4.6.1 Basic concepts

Any form of deprivation of liberty of children should be a measure of last resort and be for the shortest appropriate period of time.

When deprivation of liberty is imposed, children should, as a rule, be detained separately from adults. When children are detained with adults, this should be for exceptional reasons and based solely on the best interests of the child. In all circumstances, children should be detained in premises suited to their needs.

In addition to the rights that detained adults have, children in particular should be kept in conditions that take account of their age.

The deprivation of liberty of unaccompanied minors (including those seeking asylum) and separated children should never be motivated by or based solely on the absence of residence status.

4.6.2 International law on deprivation of liberty

Article 37(b) of the CRC states:

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

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

- should be used only as a measure of last resort and for the shortest possible period of time;
- should, wherever possible, be replaced with alternative measures;
- must be separate from adults; and
- must allow for necessary individual assistance (for example, social, educational, psychological and medical help).

With regard to detention as a sentence, the Beijing Rules state that institutionalisation should be avoided to the maximum extent possible. Rule 19 states that '[t]he placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum period of time'.

Rule 26.4 highlights the needs of girls in stating that

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

It is also significant that the Beijing Rules provide that children should have 'frequent and early recourse to conditional release'.

The JDLs are premised on the same ideas, but remind us that children awaiting trial are presumed innocent and should be treated as such, and that their cases should be treated expeditiously.¹³⁵ Detailed provisions are included in the JDLs about the treatment of children deprived of their liberty. These relate to all aspects of their dealings with the justice system, including admissions; registration; transfer; classification; physical environment and accommodation; education; vocational training and work; recreation; religion; medical care; notification of illness; injury or death; contact with the wider community; limitations of physical restraint; disciplinary procedures; inspections and complaints; and return to the community.¹³⁶

With regard to unaccompanied foreign children, Guideline 140 of the Guidelines for Children in Alternative Care states that such children 'should, in principle, enjoy the same level of protection and care as national children in the country concerned'. The same Guideline also prescribes that the child's immigration status in the country should not in and of itself be reason for detention.¹³⁷

4.6.3 Contextual analysis

It is estimated that one million children are deprived of liberty worldwide, although the Global Study¹³⁸ will be seeking, as one of its objectives, to verify that estimate. In 2006, the UN Study on Violence against Children found as follows:

Millions of children, particularly boys, spend substantial periods of their lives under the control and supervision of care authorities or justice systems, and in institutions such as orphanages, children's homes, police lock-ups, prisons, juvenile detention facilities and reform schools. These children are at risk of violence from staff and officials who are responsible for their wellbeing.¹³⁹

The over-utilisation of custodial measures is as much a problem in Africa as it is in other parts of the world. Many countries do not even have reliable data on how many children in them are deprived of liberty, or for how long they are kept so deprived. In this regard, the UN Office on Drugs and Crime (UNODC) and UNICEF developed 15 indicators for the measurement of juvenile justice, most of which deal with detention.¹⁴⁰ As a benchmark, a good practice is indicated where countries have the following quantitative data:

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

Most African countries have adopted legislative provisions that prohibit detention except as a last resort and stipulate that it should be for the shortest appropriate period of time, with these principles applying to both pre-trial detention and sentencing after detention. This is most certainly due to the influence of the CRC and other international law instruments discussed previously. However, in practice, provisions limiting the detention of children are commonly flouted, children are regularly detained with adults, and their treatment whilst in detention is often inconsistent with the protection of their best interests.

4.6.4 Examples

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

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

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

In Tanzania, the Law of the Child Act has provisions that allow for alternatives to detention as a sentence for an offence.¹⁴¹ Section 116(1) states that

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

Section 119(2) of Tanzania's Law of the Child Act goes on to state:

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

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

In Sierra Leone, the general rule is to release the child who is in conflict with the law into the care of a parent, guardian or responsible person. However, there are difficulties with the proviso that the child may be held in detention pre-trial if 'the officer has reason to believe that the release of such a person would defeat the ends of justice'.¹⁴²

In Malawi, a child may not be detained prior to the preliminary enquiry and before a finding has been made against the child unless (i) the Director of Public Prosecution has satisfied the magistrate that it is a serious crime and there is sufficient evidence to prosecute; (ii) it is necessary in the interests of the child to remove the child from undesirable circumstances; or (iii) the prosecutor has reason to believe that release will defeat the ends of justice.

The child may only be held in a safety home and must be brought before a magistrate for preliminary enquiry within 48 hours, failing which the child must be released. If (i) detention in a safety home is not practicable; (ii) the child is of such character he or she cannot be safely held in a safety home; (iii) there is a mental or physical health condition which makes it inadvisable to detain the child in a safety home; or (iv) the detention is not in the best interests of the child, then the officer in charge of the police station responsible for the child may apply for an alternative order, which may be any of the following: parenting order; hospital order; home confinement order; or reformatory centre order.¹⁴³

An example of African legislation prohibiting imprisonment of children in conflict with the law is section 140 of the Child Care and Protection Act of Malawi.¹⁴⁴

In Tunisia, it is stipulated that all felonies committed by children, except for murder, may be reduced to misdemeanours, taking into account the type, gravity and circumstances of the crime, the damage caused, and the child's personality. The purpose of such a step is to reduce the punishments on the child, including the punishments of deprivation of liberty or aggravated punishments.¹⁴⁵ Furthermore, in principle, at the sentencing stage

a child is placed in a reform centre only if the crime committed is considered dangerous and if there is no alternative measure that serves his or her best interests. The reform centres are established for the purpose of reforming and educating children, and are separate from prisons and detention centres. Furthermore, they are designed in a way that suits children and their specific needs. Children are entitled to a number of rights and must carry out certain duties according to the bylaws of each facility. They have the opportunity to study and learn a profession, in addition to a series of activities and exercises. They are entitled to field trips and family visitations at certain times.¹⁴⁶

Children aged below 15 may not be detained at all.¹⁴⁷

In Liberia, the 2012 Children's Law domesticates the principles of the CRC and ACRWC. Article IX sets standards in juvenile justice, such as the rule that, at every stage of investigation and prosecution involving a child, diversionary measures shall be considered. This section also states that a child shall not be subjected to a pre-trial detention, including remand, unless all other alternative measures for dealing with the child pending trial have been exhausted.¹⁴⁸

South Africa's Child Justice Act contains detailed provisions restricting the pre-trial deprivation of children's liberty in prisons. The child may be placed in prison awaiting trial only if a bail application has been postponed; the bail conditions have not been complied with; the child is older than 14 years; the child is accused of committing a very serious offence; the detention is necessary in the interests of justice; and there is a likelihood that the child, if convicted, could be sentenced to imprisonment.¹⁴⁹ Additional stringent requirements apply where the child is aged over 14 but under 16 years. Imprisonment as a sentence is excluded for children aged below 14 years, and strict criteria for imposing a sentence of imprisonment have been legislated.

As to whether the strict controls over detention of children have been effective, the annual report of the Department of Correctional Services (DCS) on the implementation of the Child Justice Act for 2015-2016 is instructive. The report indicates that an average of 346 children were incarcerated in DCS facilities in 2010, the year in which the Act commenced. On 31 March 2010 the actual headcount was 504 children in remand detention. This has declined steadily to an average of 167 children for 2014, and a snapshot figure for 31 March 2016 was 136 children in remand custody in correctional facilities nationally.¹⁵⁰ A similarly positive outcome was indicated with regard to the sentencing of children: whereas there were 717 sentenced children in prisons at the commencement of the Act in April 2010, the figure declined to 187 as of 31 March 2016 – a decrease of more than 73 per cent.¹⁵¹

In the case of *MR v Minister of Safety and Security*,¹⁵² an application for damages was made against the Minister (South Africa) for the unlawful arrest and detention of a 15-year-old child. M had intervened and interposed herself between her mother and police officers who were trying to arrest her mother for violating a protection order, the incident taking place at their house. The pair (MR and her mother) were arrested, taken to the nearest police station and detained; they were released about 19 hours later. The prosecutor declined to prosecute.

Bosielo AJ, writing for the majority of the Constitutional Court, posed the following as the central questions to be answered:

Two crucial questions call out for an answer: first, what does the best interests of the child mean? Intricately allied to this question is: what does it mean that these best interests be accorded paramount importance? Second, what does this require of police officers who have to confront children in conflict with the law in real-life situations? In other words, how does section 28(2) impact on the power of police officers to arrest under section 40 of the Criminal Procedure Act⁷ (CPA)? Does this mean that police officers may never arrest and detain children, even when they are in conflict with the law?

The Court came to the conclusion that, first, arrest and detention were two separate legal processes, and, furthermore, that the Constitution demands, in non-negotiable terms, that in all matters affecting a child her best interests are of paramount importance. In the context of an arrest of a child, this requires that the police officers, notwithstanding the fact that they are satisfied that the jurisdictional facts have been met, have to go further and not merely consider but accord the best interests of such a child paramount importance. Arrest should be resorted to when the facts are such that there is no other less invasive way of securing the attendance of such a child before a court. This does mean not, however, that children can never be arrested – rather, it requires that the criminal justice system be ‘child-sensitive’.

Regarding the subsequent detention, the Constitutional Court held that the need to detain a child is necessarily a fact-based inquiry that requires a balancing of interests. In this instance, there was no evidence that police considered individual circumstances of the child in question to determine if her detention was a measure of last resort; as such, it followed that her detention was in flagrant violation of the Constitution and hence unlawful. Damages for wrongful arrest and detention were awarded.

This case sets a new precedent in applying the best interests criterion to police decision-making. It also shows the importance of judicial oversight of the deprivation of liberty of children.

In the case of Egypt, the country provides only non-punitive measure for convicted children aged below 15 years (the minimum age of criminal responsibility is 12). Article 101 of the Child Law No. 12 of 1996, amended by Law No. 126 of 2008, states:

The verdict for a child who has not reached fifteen (15) years of age, when having committed a crime, shall include one of the following interventions:

- 1) *Reproach/censure*
- 2) *Placement with parents, guardians, or custodians;*

- 3) *Training and rehabilitation*
- 4) *Committing to certain obligations*
- 5) *Judicial probation*
- 6) *Community service activities not harmful to the child's health or mental state. The by-laws shall determine the nature of the work and restrictions thereof.*
- 7) *Placement in specialized hospitals*
- 8) *Placement in social care institutions.*¹⁵³

Even though placing children in alternative institutions remains deprivation of liberty, it is sometimes necessary that they be detained in, or sentenced to, such a facility because they would otherwise be at risk in the community due to the seriousness of the offence.

The national studies undertaken for this study indicated that where children are detained together with adults in cells and prisons, the countries' authorities cited a lack of alternatives in practice. Whilst many of the countries had sound and appropriate legal provisions upon which to establish a child-friendly justice system, implementation was poor to non-existent.

A case in point was Nigeria, where only three borstals (children's detention facilities) exist for the entire country. The national report for this study concludes that there remains

overreliance on detention and deprivation of liberty of children in conflict with the law. Despite the progressive provisions of the Child Rights Act, Nigerian state authorities both at the federal and state level still have not successfully implemented alternatives to detention and provision for diversion which would provide an alternative in certain cases dispensing with a formal trial.¹⁵⁴

The national report on Tunisia evinces a similar concern:

Defence and Social Integration Centres were established as public institutions under the supervision of the Ministry of Social Affairs, in order to serve threatened and delinquent children and those released from reform centres or prisons, as well as directing children living in difficult conditions towards institutions that help them to integrate into social and economic life in coordination with other institutions. The centres also contribute to the social, psychological and educational aspects of children at risk of delinquency and children subject to punitive provisions and measures, in order to rehabilitate and socially integrate them. In addition to that, the centres empower families to help tackle the difficulties they face. Despite their significant roles and functions, these institutions encounter many difficulties in their structures and functionality; and are limited number coverage and resources. With respect to the rest of integration and rehabilitation centres, they are limited in number, overcrowded, have limited resources and are centralised, as they do not cover all governorates.

Many countries suffer from a lack of suitable placement possibilities for children who require secure accommodation (pre-trial and post-conviction). In Tunisia, there are six Reform Centres where children are placed to serve their time. In addition to their small numbers, the capacity of

the Centres to receive new children is very limited, in addition to which they are decentralised and not distributed equally across the country – some towns and villages are located more than 300 kilometres from them. Consequently, judges, families and children themselves prefer to have children placed in regular (adult) prisons instead of being sent far away from their families. These Centres, moreover, are not considered an ideal framework for accepting children, as they face numerous problems such as overcrowding, lack of resources, and the tendency sometimes to be abusive to children.

As such, establishing alternative detention facilities for children can be quite contentious – an argument made against them is that the more ‘beds’ are created, the more children will be found to fill them, thereby diluting efforts to avoid deprivation of liberty altogether.

Monitoring conditions of detention is mandated by a number of international treaties, including treaties that are not directly related to children such as the the UN Convention against Torture. A good example of legislation enshrining this is in Mauritania. The 2005 law states as follows in article 167: ‘The competent juvenile judge shall follow up on the sentences of convicted juvenile detainees and shall be considered a member of the prison control committee and shall visit each institution hosting the children at least once a month.’

Further to this, article (168) requires that ‘[t]he Public Prosecutor or a judge of the Public Prosecution Office who is in charge of children’s affairs shall visit the court hosting the child, and the children who are detained at least once a month.’ Children who are detained shall be visited at least once every month by the Public Prosecutor at the Court of Appeal or the Judge responsible for Children in the Public Prosecution at the same court. They are also visited daily by the staff of the Medical Authority and the Social Assistance Authority.¹⁵⁵

4.7 Alternatives to judicial proceedings

4.7.1 Basic concepts

Alternatives to judicial proceedings, such as mediation, diversion and alternative dispute resolution, should be encouraged where these may best serve the child’s best interests, and must not be an obstacle to access to justice.

Where there is a choice between these options and the formal system, children should be assisted in making an informed choice.

Traditional and customary law options may also be considered, provided children’s rights are protected in such processes.¹⁵⁶

All alternatives to court proceedings should guarantee basic legal safeguards.

4.7.2 International law on alternatives to judicial proceedings

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

More detail about diversion of child offenders is provided for in Rule 11 of the Beijing Rules, including the provision that ‘efforts shall be made to provide for community programmes’ for diversion. The Guidelines for Action on Children in the Criminal Justice System recommend that states undertake a review of existing procedures and, where possible, introduce alternatives to the criminal justice process.¹⁵⁷

Two other international instruments not specific to children are also of relevance to alternative measures. The first of these is the UN Standard Minimum Rules for Non-Custodial Measures (also known as the Tokyo Rules),¹⁵⁸ which provide details on legal safeguards and on measures being taken at the pre-trial, trial and sentencing stages. The second relevant instrument are the UN Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, in which restorative justice is defined as

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

4.7.3 Contextual analysis

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

Restorative justice is a notion advanced by a worldwide movement that views justice in a different way, with much of the early work in this area having been done in relation to children in the criminal justice system. Restorative justice processes, which include mediation, conciliation, conferencing and sentencing circles, can be employed at any stage of the justice process, but in appropriate cases have proven especially useful in diversion prior to trial.

Against this background, formal diversion processes linked to accredited programmes have come to the fore, as have formal diversion referrals to restorative justice processes facilitated by practitioners, and informal diversions to traditional justice processes.¹⁵⁹ As such, diversion is increasingly being regulated by legislation or subsidiary guidance, for example directives and regulations.

4.7.4 Examples

In Malawi, Division 5 of the Child Care, Protection and Justice Act sets out a framework for diversion aimed at preventing the child's entry into the criminal justice system. Diversion can occur only if the child admits responsibility for the alleged offence; the child understands his or her right to remain silent; there is sufficient evidence to prosecute the child; the diversion process has been explained to the child and his parent, guardian or appropriate adult; and – if such a person is available – that person consents to the diversion.¹⁶⁰

Section 116 of the same Act regulates the establishment of Child Panels that develop and administer diversion programmes. Every diversion programme must comply with the minimum norms and standards for diversion as set out in section 114 of the Act. Each magisterial district must have a Child Panel consisting of a member from the faith community, local government, chiefs, teachers and health workers. Section 118 includes victim-offender mediation or restorative justice processes as diversion options, which will be facilitated by probation officers. Assessments indicate that diversion is well entrenched in practice in Malawi.¹⁶¹

In Sierra Leone, the Child Rights Act provides two forums for informal or quasi-judicial resolution of disputes before matters are escalated to the family courts. Section 47 requires that Child Welfare Committees be established in each village. They oversee the general wellbeing of children, a function that includes deciding on appropriate foster parents for children in need of care; counselling and advising a child alleged to have committed a minor misdemeanour; providing advice to parents about the best short- and long-term interests of the child; and mediating maintenance matters and any other complaints or concerns raised by an adult or child about the welfare of a child in the village. The Act stipulates that there must be a girl child and a boy child in every committee as full members.¹⁶² However, despite these promising provisions, it is reported that not a single panel has been established.¹⁶³

Section 71 regulates the establishment of Child Panels in each district, the function of which is explicitly to mediate any criminal or civil matter concerning a child. A Child Panel may mediate in any civil matter concerned with the rights of the child and parental duties.¹⁶⁴ When there is a complaint that a child committed an offence, a Child Panel is required to facilitate reconciliation between the child and any person offended by the action of the child.

A child appearing before a Child Panel must be cautioned as to the implications of his action, and as to the fact that similar behaviour may subject him or her to the juvenile justice system. The Child Panel may impose a community guidance order on a child with the consent of the parties concerned in the matter, which means placing the child under the guidance and supervision of a person of good standing in the local community for a period not exceeding six months for purposes of his or her reform. Finally, in the course of mediation a Child Panel may propose an apology, restitution to the offended person, or service by the child to the offended person.¹⁶⁵

In the meantime until the Panels are established, the volume of pending cases has prompted formal justice actors to initiate and mainstream non-judicial dispute resolution actions within their work – even though they do not have any legal mandate to settle disputes outside of formal legal proceedings. The Sierra Leone Police (SLP) has been particularly active in this regard, and has set

up the Community Police Partnership Board, the Informal Dispute Resolution (IDR) mechanism and the Family Support Unit.¹⁶⁶

The Informal Dispute Resolution (IDR) mechanism within the SLP is an initiative introduced in Bo, Kenema and Makeni in 2016-2017 by the SLP's Directorate of Crime under the Access to Justice pillar of the president's Post-Ebola Recovery Programme. Cases reported to the SLP that do not necessarily require a judicial proceeding can go through the IDR mechanism for peaceful settlement of the case, provided that the victim consents. In terms of procedure, the investigative police have to send the case file to the office of the Director of Public Prosecution (DPP) for council and the IDR mechanism can only proceed upon the approval of the State Councils from the DPP office.

The IDR mechanism can be implemented at police level, by any of the police departments, such as the Family Support Unit (FSU), the Criminal Investigation Department (CID) and others investigative authorities. However, the IDR mechanism is still a pilot intervention – with guidelines and different forms of the IDR mechanism developed by the SLP – and has not been legally integrated within the mandate of the SLP.¹⁶⁷

In Zambia, a recent situational analysis of the country's Access to Justice Programme found that, where possible, the courts should encourage legal aid providers – including suitably qualified paralegals – to help in formulating the terms of diversion agreements. Where this is possible, magistrates should consider limiting themselves to examining proposed settlements (as to the fairness of procedures and the substance of the settlement) for conformity with a set of guidelines to be adopted by the Chief Justice under section 71 of the Juveniles Act. The Access to Justice Programme and GIZ¹⁶⁸ have supported development of mediation schemes towards this end.

Zimbabwe established a pre-trial diversion office within the Ministry of Justice, Legal and Parliamentary Affairs in 2009. An evaluation of the functioning of pre-trial diversion was undertaken in late 2016, showing that it has had positive results in enhancing access to diversion. A potentially good practice was thus to institutionalise an office to drive the diversion programme within the Ministry, thereby also securing high-level support for the initiative.

An independent evaluation of the programme (the latter was conducted in five pilot sites, commencing in 2013) revealed that in practice only five of the diversion options – formal caution, counselling, victim-offender mediation and reparation – are used regularly. Formal cautions are used in 83 per cent of diversion cases, 52 per cent are diverted for counselling, 19 per cent for victim-offender mediation, and 14 per cent for reparation. Where counselling takes place, it is tailored to the needs of the child and family, and in 70 per cent cases it is the diversion officer that provides counselling, though civil society may also provide this.

As for some of the other diversion options, attendance at an institution for vocational or educational purposes is rarely used in practice. Placements are indeed available for vocational training, but parents cannot afford to pay the tuition fees and the measure is hence not used. Due to a lack of funding and leisure activities, the option of constructive use of leisure time had been applied on only one occasion.¹⁶⁹ Formal cautions are issued in writing and may have conditions attached to them. At the onset of the programme, the managers set as a milestone that 500 juveniles should be diverted each year in the period 2014-2016. During the first two years (2014 and 2015), this milestone was met – indeed, it was exceeded.¹⁷⁰

Ghana is an example of a country that adopted overarching¹⁷¹ alternative dispute mechanism in 2010. However, the fact that a country does not have formal legislation regulating diversion does not prohibit the initiation of pilot projects or programmes.

For instance, while it is the case that diversion and restorative justice processes are now included and regulated in the South African Child Justice Act 75 of 2008, the Act only came into operation in April 2010. As of that date, diversion and restorative justice processes had already been employed in South Africa. Indeed, these processes were used since the 1990s as options for child offenders in addition to family-group conferencing and victim-offender conferencing.¹⁷²

Similarly, in Namibia, the Prosecutor General delegated the power to divert a child offender to prosecutors countrywide. Diversion programmes are well entrenched, despite the fact that Namibia is yet to finalise a Child Justice Bill. Caution must be exercised, though, as the lack of formal regulation or recognition of diversion may lead to ‘highly discretionary diversion’.

In Mauritania, article 155 of Ordinance No. 15 of 2005 on Judicial Protection of Children stipulates that ‘[m]ediation is a mechanism aimed at concluding a reconciliation agreement between the child offender or his/her legal representative and the victim or his/her legal representative, so as to avoid criminal prosecution, trial or implementation’. Thus, mediation plays an important role in avoiding freedom-restricting punitive measures against children by blocking the criminal proceedings and reducing the sentence before it is issued.

Article 156 of the same Ordinance states:

Mediation can be conducted at any time from the date of committing the act to the expiry date of the implementation of the sentence issued against the child, whether it is a criminal penalty or a preventive measure. Mediation may not be conducted if the act committed by the child is a felony. The judicial police may conduct mediation in cases of a contravention or an offense committed by minors under the supervision of a competent public prosecutor. Social assistance workers may attempt to mediate in cases of a contravention or an offense committed by children or involving children. At any time and until the commencement of the proceedings, the General Attorney may attempt to mediate in cases of minors. At each stage of the investigation, the investigating judge may attempt to mediate as well. The president of the juvenile court may attempt to mediate before passing a sentence.

It is evident that a mediation agreement can be concluded by the police, the General Attorney, the investigative judge and social workers, with the exception that mediation is excluded if the act committed by the child is a felony. Taking the area of West Nouakchott as an example of how mediation exempts children from being exposed to harsh punitive measures, in 2016, 200 reconciliation agreements were reached by the child committees. At the national level, 23 cases were recorded, in addition to 21 cases during the investigation stage in the fourth district. As for children held in detention rooms, two cases were settled in mediation, and three settled in mediation by the Criminal Court..¹⁷³

In Tunisia, mediation takes place outside judicial proceedings and requires the consent of the child after having conclusive evidence that he or she has committed the acts attributed to him or her, noting that the confession made by the child within the mediation proceedings cannot be relied

upon in any subsequent lawsuit against him or her. The request for mediation is submitted by the child or his or her representative to the Child Protection Delegate, who seeks to conclude a reconciliation agreement between the parties. The agreement is then signed and submitted to the competent judicial authority, which adopts and enforces it unless it violates public order or good morals. A specialised judge for children may review the agreement to serve the child's best interests, as stipulated by articles 116 and 117 of the Child Protection Code.¹⁷⁴

Alternatives to formal dispute resolution have begun to feature in child protection legislation as well. The South African Children's Act 38 of 2005 encourages mediation and conciliation in civil matters between parents before parents resort to litigation. As a general principle, section 6(4)(a) states that in any matter concerning a child 'an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided'. In respect of care and contact disputes in particular, section 33(2) states that

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

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

Similarly, Namibia's Child Care and Protection Act 3 of 2015, contains provisions for lay forums hearings and for settling matters out of court in care and protection cases.¹⁷⁵

4.8 Children and the police

4.8.1 Basic concepts

Police should ensure that child-friendly processes are followed from apprehension or arrest through to the conclusion of the investigation. The police official is usually the first official with whom a child in conflict with the law will come into contact. He or she must treat the child with dignity and in a manner appropriate to the child's age and maturity.

The police official must explain to the child what his or her rights are and what the next steps of the legal process will be. This must be done in child-friendly language, and, as far as possible, in the child's vernacular.

The parents of the child must be notified without delay that the child is in police custody, and must be asked to come to the police station.

There should be a mechanism at the police station for the release of the child into the care of the parent or guardian, at least in the case of minor offences or where the child poses no risk to the community.

A child who has been taken into custody should not be questioned about the crime or asked to sign a statement about it, except in the presence of the child's lawyer or parent, or, if no parent is available, a suitable adult whom the child trusts.

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

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

4.8.2 International law on children and the police

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

The Guidelines on Justice in Matters involving Child Victims and Witnesses of Crimes do not have provisions that deal specifically with the role of the police, but offer strongly worded guidelines to ensure that all professionals working with children see to it that children are treated in a caring and sensitive manner throughout the process; that children are treated as individuals with their own needs, wishes and feelings; that interference in the child's private lives is kept to a minimum; that further hardship is avoided by way of conducting interviews by trained professionals; and that all interactions with the child are conducted in a child-sensitive manner and suitable environment, using language the child understands.

Furthermore, Guideline 19 states that child victims and witnesses, their parents and legal representatives must – from the point of first contact with the justice process and throughout it – be informed promptly and accurately of all relevant information pertaining to the case.

4.8.3 Contextual analysis

Specialisation in the police is not easy to achieve in developing countries. Given the limited numbers of law enforcement officers as well as the regular rotation of police officers, it is difficult to know in advance which police official will encounter a child suspect. In these circumstances, it is imperative to train all police officials in how to deal appropriately with child suspects.

This is not to discount the value of the specialised police units or dedicated officers at police-station level that many African countries have adopted and which make a significant contribution to the protection of the rights of women and children.

4.8.4 Examples

Historically, legislation has not distinguished between police treatment of adults and children. However, the recent South African Constitutional Court case of *Radhuvha* provides conclusively that in the exercise of their discretion (for instance to arrest or detain a child), police officials should take into account the 'last resort' and 'shortest appropriate period of time' principles, and should bear in mind the principle of the best interests of the child (noting, though, that this is not

an additional criterion but an underlying principle that must inform the way in which police officials choose to act when exercising their powers of arrest and detention).

The Namibian Child Care and Protection Act 3 of 2015 includes some novel dimensions relative to the protection of children in police custody.

The example of the Namibia Child Care and Protection Act

The Child Care and Protection Act 3 of 2015 concerns the protection of children broadly. However, it contains an important provision (section 231) that affords specific protection to the child in detention. It details that children must be detained separately from adults, with the following exceptions:

- i. children may eat or exercise in the same room as adults provided that there is proper supervision by a member of the police or correctional official; and
- ii. children may be detained with a parent or caregiver in circumstances where this would be in the best interests of the child.

The rules specify that the child in police custody must be permitted visits with parents, guardians, caregivers, legal representatives, social workers, probation officers, health workers, religious counsellors, and any other person who in terms of any law is entitled to visit the child, provided that such visit is in the best interests of the child.

The provision continues that children must be detained in conditions that take into account the particular vulnerability of a child and reduce the risk of harm to the child in question; the child must also be detained with children who are at the same stage of criminal prosecution, so that children who are accused of a crime are detained separately from children who have been convicted of a crime or children who are awaiting sentencing.

There are specific new provisions which deal with complaints received from children in custody. The provisions specify that if any complaint is received from a child or any other person concerning the conditions of a child in a prison or police cell, or if a member of the police or other state official observes that a child has been injured or is severely traumatised while in custody, that complaint or any observation of the injury or trauma must, in the prescribed manner, be recorded and reported to the Permanent Secretary, who must direct a social worker to investigate the circumstances of such child and to submit a report on such investigation to him or her without delay.

The Permanent Secretary means the Permanent Secretary of the Ministry of Gender Equality and Child Welfare.)

The Permanent Secretary must then arrange for the child to be provided with immediate and appropriate medical treatment if

- (i) there is evidence of injury or severe psychological trauma;
- (ii) the child appears to be in pain as the result of an injury;

- (iii) there is evidence that a sexual offence has been committed against the child; or
- (iv) there are other circumstances that warrant medical treatment.

A report must also be submitted to the Children's Advocate (at the office of the Ombudsman) by the designated social workers as soon as possible.¹⁷⁶

The draft Namibian Bill of 2013 relating to children in conflict with the law at present contains the following protections:

- The Bill specifies that during pre-trial procedures, such as taking a confession or during a pointing-out, a legal representative for the child must be present.
- Fingerprints and other identification materials (for example, DNA samples) may not be taken from the child unless essential to the investigation of the case or required to establish age or whether the child has previous convictions.
- Ordinarily, a magistrate or High Court judge must first approve the taking of such materials from a child.

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

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

- a) The child has been informed of his or her rights in relation to the arrest or detention and the reasons for the arrest in a manner appropriate to the age and understanding of the child;*
- b) There is no harassment or physical abuse of the child;*
- c) The child is provided with medical attention where necessary;*
- d) There is no use of handcuffs, except if the child is handcuffed to the arresting police officer or the person effecting the arrest;*
- e) The child is not mixed with adults;*
- f) The child is provided with nutritious food;*
- g) [The c]hild is accompanied by a parent, guardian or appropriate adult as far as it is practicable to do so;*
- h) A parent, guardian or appropriate person is informed immediately after the arrest if such parent, guardian or appropriate person was not present at the time of the arrest;*
- i) In serious offences, the child is provided with legal representation; and*
- j) The child has been provided with counselling services where possible.*

Of particular interest in the Malawi Child Care, Protection and Justice Act is that the officer in charge of the police station has the power to caution and discharge a child offender with or without conditions. This may happen only if the offence committed was not serious, if there is sufficient evidence to prosecute the child, and if the child voluntarily admits responsibility for the offence.¹⁷⁷

The South African Minister of Police has issued National Instruction 2 of 2010 to ensure that police members treat children in conflict with the law in accordance with a child-rights approach. The National Instruction provides greater clarity and guidance on new concepts in the Child Justice Act 75 of 2008. In respect of the treatment of child offenders, it states as follows:

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

- a) The member must, if circumstances permit, introduce himself or herself to the child and, if a parent, guardian or an appropriate adult is present, to such person.*
- b) The member must explain to the child that he or she is being suspected of having committed the offence. The member must explain this to the child in a language that he or she understands, preferably in the mother tongue of the child, using plain and simple vocabulary to assist the child to have a better understanding of the child justice system and the procedure that will be followed in his or her case. The child must understand that this is a very serious matter.*
- c) The member must realise that the child may be overwhelmed and scared in the presence of the Police and must therefore patiently explain the nature of the offence and the procedure that will be followed in his or her case. The member must give enough detail about the matters and allow sufficient time so that the child can absorb the information. The member must encourage the child to ask questions and respond to the questions and satisfy himself or herself that the child understands the information and explanation given. The member may elicit responses from the child by asking questions in order to ensure that he or she understands the information.*
- d) A member must not humiliate or intimidate a child and must at all times treat and communicate with the child in a manner which is appropriate to the age, maturity and stage of development of the child. The younger the child, the more patient and understanding the member must be while communicating with the child. The level of schooling of the child and the child's ability to read and write are also relevant when considering what would be an appropriate manner in which to treat and communicate with the child.*
- e) The member must take steps to protect the privacy and dignity of the child and must ensure that discussions with the child and his or her parent or guardian or an appropriate adult (whether at the police station or at the crime scene) take place in private, out of sight and hearing of other persons.¹⁷⁸*

In addition, the Minister of Police issued a National Instruction on Sexual Offences, setting out the manner in which child victims of sexual abuse must be treated by the police. When a child victim reports a sexual offence, a member of the Family and Child Services Unit must be contacted to investigate the matter. A police officer must secure the child's safety, explain the necessity of a medical examination to the child, and explain the procedure and the child's rights to the child and the parent, guardian or appropriate adult.¹⁷⁹ The National Instruction also provides the guidelines for taking the statement of a child victim.¹⁸⁰

In Uganda, the Children's Act requires that the police ensure that the parent or guardian of a child that has been arrested is present at the time of the police interview. Section 89(5) requires that the police inform a probation officer, social welfare officer or authorised person when a parent or guardian cannot be immediately contacted, as soon as possible after the child's arrest, so that he or she can attend the police interview.

Section 89(2) provides for the police to be able to dispose of matters concerning child offenders without formal proceedings. The section states that '[t]he police shall be empowered to dispose of cases at their discretion without recourse to formal hearings in accordance with the criteria to be laid down by the Inspector General of the Police'.

The Juvenile Justice Law of Somaliland provides for special police to attend to matters concerning child offenders and child victims. This force is called the Children's Police.¹⁸¹ In terms of section 47, a child under the age of 15 years shall not be arrested for an offence unless his or her safety requires it, and where a child is arrested for security reasons, his or her parents or guardian shall be notified as soon as possible. Furthermore, section 52 requires that the police immediately report an arrest of a child to the Office of the Attorney General and the competent Children's Court, and should such report not be made within 24 hours of the arrest of the child, the Children's Police must, at the preliminary hearing, provide a written report explaining such a failure.

4.9 Access to courts and judicial processes

4.9.1 Basic concepts

As bearers of rights, children should have recourse to effective remedies to exercise their rights or act upon violations of their rights. The domestic law should facilitate, where appropriate, the possibility of access to court for children who have sufficient understanding of their rights, and of the use of remedies to protect these rights, based on adequate legal advice.

Any obstacles to access of court, such as the child's lack of capacity to litigate, the cost of the proceedings, or the lack of legal counsel, should be ameliorated as far as possible by the law.

Prescription laws or statutes of limitations should not be a complete bar to young people who have recently reached majority from taking cases relating to when they were children, and the relevant laws should be reviewed accordingly.

4.9.2 International law on access to courts and judicial processes

The 2008 UN Guidance Note of the Secretary-General: UN Approach to Justice for Children observes that '[a]ccess to justice, though increasingly recognised as an important strategy for protection the rights of vulnerable groups, and thus for fighting poverty, rarely takes children into account'.

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

A public and civil society that contributes to strengthening the rule of law and holds public officials and institutions accountable, should target children's participation in such efforts in order to ensure that children are involved from the onset in identifying legal matters that are important to them.¹⁸²

4.9.3 Contextual analysis

Around the world, children have taken cases to court, mostly (but not always) assisted by adults, to protect or advance their rights. In the African context, promising practices have emerged in

countries with generous rules on ‘legal standing’ (the ability to pursue a case before court), such as in Zimbabwe.¹⁸³ The option of bringing a communication to the ACERWC also exists, provided that local remedies are exhausted. There have also been developments in child-rights litigation at national level in some African countries in what has been described as a fledgling child-rights jurisprudence.¹⁸⁴ Continuing to advance children’s rights and interest through strategic litigation remains a promising practice in the African region.

4.9.4 Examples

Section 37(2) of the Child Rights Act 2007 of Sierra Leone states that any person, including a child, concerned about the welfare of children or any child in the community may communicate his or her concern to a Village Child Welfare Committee. The Child Protection Act also allows the child to approach the Family Court to request a variation or termination of previous orders made by the Family Court or to obtain an order confirming parentage of a child.¹⁸⁵

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

Turning to South Africa, the Children’s Act 38 of 2005 states as follows:¹⁸⁶

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

15. Enforcement of rights

- 1) Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights or this Act has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.*
- 2) The persons who may approach a court are:*
- 3) A child who is affected by or involved in the matter to be adjudicated;*
- 4) Anyone acting in the interest of the child or on behalf of another person who cannot act in their own name;*
- 5) Anyone acting as a member of, or in the interest of, a group or class of persons; and*
- 6) Anyone acting in the public interest.*

To consider examples in case law, in South Africa the matter of *Minister for Education v Pillay*¹⁸⁷ dealt with a child’s right to wear traditional jewellery as a way of expressing and exercising her culture and religion. The wearing of a nose stud was not allowed in the school’s code of conduct, and the school refused to make an exception for the child. The child’s mother brought the case in her own name on behalf of the child. The Constitutional Court found that it would have been preferable if the child herself brought the case in her own name:

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

In *RM and Another v Attorney General*,¹⁸⁸ the child, assisted by the children’s rights organisation Cradle, brought an application to the High Court in Nairobi, Kenya, to have the statutory differentiation between children born in a marriage and children born outside the marriage declared unlawful, as it breached the principle of non-discrimination entrenched in Kenya’s Constitution and international and regional children’s rights instruments. Although the case did not succeed, the reason for failure was not based on the lack of standing of the child or the organisation.

In Zimbabwe, the court in the *Mudzuru* case argued that section 85(1) of the Constitution (dealing with the capacity to litigate a case) must be accorded a liberal, broad and generous interpretation rather than the narrow traditional conception of *locus standi*. Specifically, the court stated that ‘the object is to overcome the formal defects in the legal system so as to guarantee real and substantial justice to the masses, particularly the poor, marginalised and deprived sections of society’.¹⁸⁹

4.10 Legal representation

4.10.1 Basic concepts

Children facing court proceedings as offenders or in civil proceedings should have access to free legal aid.

Children should have the right to their own, separate legal assistance where there is, or could be, a conflict of interest with their parents. This could be through curator or guardian *ad litem* (‘for the suit’), or through an independent legal representative for the child.

Children should be considered to be fully-fledged clients, and lawyers representing their interests must ascertain the views and wishes of the child, provide the child with appropriate legal advice about the possible impact of those views and wishes, and thereafter make the views and wishes known to the court.

4.10.2 International law on legal representation

The Beijing Rules (Rule 15.1) provide that throughout the proceedings, the juvenile shall have the rights to be represented by a legal adviser or to apply for free legal aid where there is provision for such aid in the country. The CRC and the ACRWC also provide for the child’s right to legal representation.

With regard to children in the care and protection system, Guideline 56 of the Guidelines for Children in Alternative Care provides that

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

4.10.3 Contextual analysis

Legal representation is a crucial protection for children as child offenders as well as, ideally, other children who are or may be deprived of their liberty, such as those in need of care and protection, or unaccompanied foreign children. Such assistance should be provided by the legal aid system. There is growing awareness of the need for children to be legally represented in family law matters where there may be a conflict of interest between the child and the parent or caregiver.

The discussion of access to justice earlier in this study highlighted the importance of children being able to access legal representation in order to bring cases to advance or protect their rights. Civil society organisations and lawyers acting pro bono (for free) will often provide this kind of service.

Generally, state-funded legal aid systems in Africa are weak and poorly funded. However, an expansion in the provision of legal services to children (and sometimes other vulnerable groups such as women, and sometimes generally to persons facing criminal charges) seems to have taken place in recent times, and improvements in accessibility of legal representation for children can be recorded anecdotally. Different models prevail and are led by different sets of actors including non-governmental organisations (whether local or international), or government led or funded initiative. The work of the Children's Legal Protection Centre (CLPC) established by ACPF in Ethiopia, or the Socio-legal Defence Centres established by DCI are some examples in this regard). Legal representation can be instrumental in increasing access to diversion and meeting other needs, such as medication. This is an area where there seems to have been positive progress since the Kampala Conference, which, as noted, led to the development of the African Guidelines for Action for Children in the Justice System.

4.10.4 Examples

Section 95 of Botswana's Children's Act 8 of 2009 states:

- 1) *A party in a matter before a children's court may appoint a legal representative of his or her own choice and at his or her own expense.*
- 2) *The State shall provide counsel to represent any person involved in proceedings before a children's court if that person cannot afford the cost of legal representation.*

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

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

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

- a) Allow the child to give independent instruction on the manner in which the case is to be conducted;
- b) Clearly explain the child's rights and responsibilities in relation to any proceedings under this Act and which the child is involved to him/her in language which he/she can understand;
- c) Encourage informed decision-making by explaining possible options and the consequences of decisions;
- d) Promote diversion where appropriate whilst ensuring that the child is not unduly influenced to acknowledge guilt;
- e) Ensure that all time periods or delays throughout the case are kept to the minimum and that remands are limited in number and period of time between each remand;
- f) Ensure that the child is able to communicate in his/her language, and in cases where the legal representative does not speak the same language as the child, ensure that an interpreter is used who should also be apprised of these principles; and
- e) Become acquainted with the local options for diversion and alternative sentencing.

. . .

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

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

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

In South Africa, section 28(1)(h) of the Constitution provides that every child has the right to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child if substantial injustice would otherwise result. In the matter of *Legal Aid Board v R and Another*,¹⁹⁰ the High Court found that section 28(1)(h) meant that Legal Aid South Africa could assign legal representation to a child without consulting the parent or guardian in matters where it would be appropriate to have a separate legal representative for the child. In high-conflict disputes between parents who are litigating about the care and custody of a child, there may be a conflict of interests between the interests of the child and the interests of the parents, and it is

therefore necessary that a legal representative be appointed by a neutral body, and that such legal representative must remain uninfluenced by the parents. It is therefore appropriate that an independent body that provides legal representation at state expense appoints a legal representative for the child without consultation with or approval from the parent.

In Zimbabwe, reports indicate that the legal aid system is seriously underdeveloped, lacking the necessary resources and personnel. Since 1996 when the Legal Aid Directorate became a stand-alone department, it operated only in Harare until 2011. In 2011, it was extended to Bulawayo, the second-largest city in the country. However, ad hoc efforts by non-state actors such as NGOs have been used to afford children legal representation in matters that affect them. Of note is the work of NGOs such as Justice for Children Trust, Legal Resources Foundation, Care at the Centre of Humanity (CATCH), and Zimbabwe Lawyers for Human Rights, which have been involved in legal aid and legal representation for children in matters that affect them.

For example, it is reported that the National Strategy for Legal Assistance for Children 2012-2015, established by the Ministry of Justice, Legal and Parliamentary Affairs in partnership with UNICEF,

[reached] a total of 8,749 children ... within this first year of the project. 180 cases involving children were taken to court by lawyers from the LRF [Legal Resources Foundation], and 122 of the cases were successfully closed. It is important to note that of the 122 cases represented in court and successfully closed, 47 such cases were criminal juvenile cases.¹⁹¹

A report prepared for the purposes of this study showcases similar interventions through the work of the Children's Legal Protection Centre (CLPC) established by the ACPF in Ethiopia in 2005. Since 2012, the CLPC has operated under the ambit of the Federal Supreme Court of Ethiopia to offer services, including psycho-social and legal services, to children.¹⁹²

Another model, using paralegals, was identified in the Sierra Leone country study, which noted that

as access to justice and to a lawyer can be extremely complicated in rural areas, local community members are recruited by the Legal Aid Board, NGOs, CSOs and/or FBOs and trained to become paralegals. Trained in basic laws and mediation skills, paralegals provide legal counsel and can also settle disputes at community level. Cases involving children alleged to have committed crimes represent a fair amount of cases that are dealt with by paralegals at the community level. Individuals can directly bring cases to the attention of paralegals if they are not satisfied with the proceedings that have [been] initiated at either the traditional or formal level. For example, parents often seek the services of paralegals when their child has been arrested and/or detained by the police. In such contexts, paralegals can offer free-of-charge support to parents seeking bail for their child, and paralegals may also go as far as to mediate and resolve the matter in order to cease any criminal proceedings at the detriment of the child.¹⁹³

While, as observed above, the extension of children's access to legal representation seems to be area in which positive progress can be reported, much room remains for further work and capacity-building in this regard. The vulnerability of NGO-led legal aid services to funding cuts is a risk factor

which suggests that, as far as possible, governments need to take the overall responsibility for the fulfilment of children's rights to legal representation, whether it be provided in-house or outsourced to suitable organisations.

4.11 Avoiding undue delay

4.11.1 Basic concepts

In all proceedings involving children, the urgency principle should be applied to enable a speedy response and to protect the best interests of the child, while also respecting the rule of law.

In family law cases (for example, custody or parental abduction), courts should exercise exceptional diligence to avoid any risk of adverse consequences for the family relations.

When necessary, judicial authorities should consider the possibility of taking provisional decisions, which would be monitored for a certain period of time for the purposes of later review in the event of non-compliance.

Provided it is in accordance with the law, judicial authorities should have the possibility to take decisions that are immediately enforceable in cases where this would be in the best interests of the child.

4.11.2 International law on avoiding undue delay

The CRC provides in article 37 that a child deprived of liberty shall have prompt access to legal assistance, and in article 40(b) that the child has the right 'to have the matter determined without delay by a competent and impartial authority or judicial body'. The ACRWC, in article 17, states that children will be informed promptly of charges against them, and 'shall have the matter determined as speedily as possible'. The 'matter' in both of these provisions refers to the case or complaint filed with the court or otherwise made against the child.

The Beijing Rules, Rule 10.2, emphasise that when a child has been apprehended, the issue of release will be considered without delay.

Guideline 30(c) of the Guidelines on Justice in Matters involving Child Victims and Witnesses directs that professionals should

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

The Hague Convention on the Civil Aspects of International Child Abduction is based on the notion of 'prompt return' of a child who has been unlawfully taken to or retained in a country that is not the child's habitual residence. The proceedings should commence within one year of the unlawful abduction. Expedition is a key principle, and all Hague Convention matters should be considered urgent. Ideally, court proceedings should be concluded within six weeks.¹⁹⁴

4.11.3 Contextual analysis

Time seems to pass more slowly for children than it does for adults, so a child caught up in judicial proceedings for a year or two will feel the burden of that delay acutely. Children want to get on with their lives and return to normality. It is self-evident that a delay in proceedings involving children deprived of their liberty is especially egregious; these cases must hence be prioritised on a court's roll.

Child victims and witnesses will have their anxiety prolonged if there is a long delay between the incident and the trial, particularly as therapy may be delayed. Furthermore, due to delay the child may forget the details of the incident and have difficulty in giving accurate testimony.

Children involved in care and protection or family law proceedings also suffer from delay. In such instances, one caregiver may gain advantage over another prospective caregiver through the delay. The concept of permanency plays a role in determining how long these proceedings can be allowed to drag on. It is true that matters to do with the care of children must be thoroughly investigated and sincere attempts made at reunification, but there comes a point where the child needs a permanent solution – which is something the law should recognise.¹⁹⁵

4.11.4 Examples

One of the cornerstone provisions of the South African Children's Act 38 of 2005 is section 6(4)(b), which requires that '[i]n any matter concerning a child ... a delay in any action or decision to be taken must be avoided as far as possible'.

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

Section 155 of the South African Children's Act 38 of 2005 allows an adjournment of 14 days in care and protection matters. In criminal matters, a child justice court must conclude all trials of children as speedily as possible, and must ensure that postponements in terms of this Act are limited in number and in duration.

In respect of the South African Child Justice Act, this provides that if a child is in detention in prison, a child justice court may, prior to the commencement of a trial, not postpone the proceedings for a period longer than 14 days at a time. If the child is in detention in a child and youth care centre, a child justice court may, prior to the commencement of a trial, not postpone the proceedings for a period longer than 30 days at a time. Finally, if the child is not detained awaiting trial, then a child justice court may, prior to the commencement of a trial, not postpone the proceedings for a period longer than 60 days at a time.¹⁹⁶

The Children's Act of Uganda requires that every case be dealt with expeditiously and without unnecessary delay.¹⁹⁷ General Principle 2 of the first Schedule to the Children's Act obliges any court of law to consider the general principle that any delay in determining the question before it is likely to be prejudicial to the welfare of the child. In relation to matters concerning children who are accused of having infringed the law, Section 99(2) states that

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

The Children's Act of Ghana states in section 19:

(3) If after investigation it is determined that the child has been abused or is in need of immediate care and protection, the Department shall direct a probation officer or social welfare officer accompanied by the police to remove the child to a place of safety for a period of not more than seven days.

(4) The child shall be brought before a family tribunal by the probation officer or social welfare officer before the expiry of the seven-day period for an order to be made.

However, in spite of these promising legislative provisions, it is widely reported that lengthy delays characterise judicial processes in most African jurisdictions. More effort needs to be made to speed up judicial processes when children's interests are at stake. The need for efficient case management systems is evident, as is the need for auxiliary processes (preparation of pre-sentence reports, family background reports, and so forth) to be conducted as efficiently and timeously as possible.

4.12 Giving evidence and participation in judicial proceedings

4.12.1 Basic concepts

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

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

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

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

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

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

4.12.2 International law on evidence and judicial participation

Article 12(2) of the CRC explicitly provides for the child to be given the opportunity to be heard in any judicial or administrative proceedings that affect him or her, either directly or through a legal representative or an appropriate body. Article 4(2) of the ACRWC contains similar wording, but adds

that the child may be heard as a party to the proceedings. The CRC Committee has issued a dedicated General Comment on the right of the child to be heard, which contains useful guidance.¹⁹⁸

The Guidelines on Justice for Child Victims and Witnesses set out, in Chapter VIII, a heading relating to '[t]he right to be heard and to express views and concerns'. Guideline 21 states that professionals must ensure that child victims are consulted on relevant issues and that child victims and witnesses are enabled to freely express their views and concerns about their involvement in the justice process, their safety in relation to the accused, the manner in which they prefer to testify, and the outcome of the process.

The Guidelines for Children in Alternative Care (Guideline 6) state that decision-making on alternative care should take place through a judicial, administrative or other adequate and recognised procedure. The decision should be based on rigorous assessment on a case-by-case basis by suitably qualified professionals in a multidisciplinary team, wherever possible. This should involve full consultation at all stages with the child, according to his or her evolving capacities, and with his or her parents or legal guardians.

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

4.12.3 Contextual analysis

Participating in judicial proceedings is one of the most dynamic opportunities for children to participate. As their capacities evolve, they should be invited to play an increasing role in such processes and their views and wishes be given more weight. There is no specific age in international law at which a child is considered of sufficient age and maturity to participate in proceedings: this is a flexible standard, should be decided on a case-by-case basis, and, as a general rule, a child who is willing to participate should be permitted to do so. After hearing the views and wishes of a child, the court can decide how much weight to place on them (and should have received training in this).

Sometimes children do not want to participate, particularly when are afraid or feel torn by conflicting interests (for example in conflicts between parents). Unless their testimony is vital to the conviction of a perpetrator, or vital to their own defence, they should not be forced to testify against their will, and even then only when professionals have weighed their best interests.

Children can participate in many ways. Although criminal trials offer few alternatives to giving testimony in in a courtroom, the atmosphere can be made child-friendly and procedures modified to protect witnesses. Civil proceedings sometimes allow a child to be represented by a legal representative or guardian *ad litem* without the child being present at court, which can be positive if the child does not want direct participation but still wants his or her views and wishes to be known to the court. In Hague Abduction cases, it has become fairly common for the judicial officer to speak in chambers to the child whose return is being sought. Other possibilities include having professionals such as psychologists or social workers interview children and provide a report on their views to a court.

4.12.4 Examples

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

Among the general principles of the Lesotho Child Protection and Welfare Act is the child’s right to express his or her opinion freely and to have that opinion taken into account in any matter or procedure affecting him or her. The opinion of the child shall be given due weight in accordance with the child’s age and maturity.¹⁹⁹

Furthermore, in custody and access disputes, the views of the child are an essential factor in determining what would be in the child’s best interests.²⁰⁰ An area in which it is of particular importance to obtain the views of the child is in the consideration of an application for the adoption of the child.

Section 59(4) of the Child Protection and Welfare Act of Lesotho ensures that the child’s views are taken into account in adoption proceedings, in that a child who is ten years or older must consent to his or her adoption; if that the child is younger than ten, then his or her opinion shall be taken into consideration.²⁰¹

Section 31 of the Child Rights Act of Sierra Leone emphatically states that

no person shall deprive a child capable of forming views of the right to express an opinion, to be listened to and to participate in decisions which affect his welfare, the opinion of the child being given due weight in accordance with the age and maturity of the child.

In addition, section 73(5) of the same Act provides that, commensurately with the level of understanding of the child concerned, a Child Panel shall permit a child to express his or her opinion and participate in any decision that affects the child’s welfare. A similar provision applies in respect of the Family Court, where the child shall have a right to give an account and express an opinion.²⁰²

The right to participate and express views can be respected only when children are equipped with correct information that enables them to understand the proceedings and when there are procedural measures that allow them the opportunity to express their views. In order to allow the child to participate effectively, the Children’s Act 8 of 2009 of Botswana goes further than merely declaring that the child has a right to participate. Section 8(2) states:

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

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

i. The decision to be made,

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

iii. The ways in which the child can participate in the decision-making process, and

Any relevant complaint or review procedures;

- b) The opportunity to express the child's wishes and views freely, according to the child's age, maturity and level of understanding;*
- c) Any assistance that is necessary for the child to express those wishes and views;*
- d) Adequate information regarding how the child's wishes and views will be taken into account;*
- e) Adequate information about the decision made and a full explanation of the reasons for the decision; and*
- f) An opportunity to respond to the decision made.*

Similar provisions are common in legislation in Africa concerning children. The challenge, though, is the continued development of mechanisms and structures to create the enabling environment for child participation. These are many and varied, and relate, inter alia, to assisting children in giving evidence (for instance, through intermediaries or by using anatomical dolls), training skilled interviewers (such as police and social workers), and sensitising the judiciary to be aware of the need to adapt its processes (for example, allowing breaks in proceedings when child witnesses are tired or hungry).

4.13 Information and feedback after judicial proceedings

4.13.1 Basic concepts

The child's lawyer, guardian *ad litem* or legal representative (or other suitable professional in the case of child victim or witness) should communicate and explain the decision or judgment to the child in a language adapted to the child's level of understanding, and should give the necessary information on possible measures that could be taken, such as appeals.

National authorities should take all necessary steps to facilitate the execution without delay of judicial decisions or rulings involving and affecting children.

When a decision has not been enforced, children should be informed, possibly through their lawyer, guardian *ad litem* or legal representative, of available remedies.

Implementation of judgments by force should be a measure of last resort in family cases where children are involved.

After judgments in highly conflictual proceedings, guidance and support from specialised services should be offered, ideally free of charge, to children and their families.

Particular health-care and appropriate social and therapeutic intervention programmes or measures for child victims of abuse should be provided, ideally free of charge, and children and their caregivers should be informed promptly and adequately of the availability of such services.

The child's lawyer, guardian or legal representative should have a mandate to take all necessary steps to claim for damages during or after criminal proceedings in which the child was a victim. Where appropriate, the costs could be covered by the state and recovered from the perpetrator. Victim compensation schemes should be considered.

Measures and sanctions for children in conflict with the law should always be constructive and individualised responses to the committed acts, bearing in mind the principle of proportionality, the child's age, physical and mental wellbeing and development, and the circumstances of the case. Corporal punishment and other inhuman sentences should be outlawed.

If sentenced to a custodial sentence, which should be a last resort and for the shortest possible period of time, the conditions of prisoners aged below 18 years must take account of their age. Their right to education, vocational training, employment, rehabilitation and reintegration should also be guaranteed.

In order to promote reintegration into society, and in accordance with national law, criminal records of children should be non-disclosable on reaching the age of majority. Exceptions for the disclosure of such information can be permitted in cases of serious offences and for reasons of public safety, such as when employment with children is concerned.

4.13.2 International law on Information and feedback after judicial proceedings

The CRC provides, in article 40(2)(v), that if a child is found to have infringed the penal law, then he or she has a right to have that decision (as well as any decision on 'measures' or sentence) reviewed by a higher, competent, independent and impartial authority. Article 37(d) states that a child deprived of liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of liberty, and to a prompt decision on any action.

Rule 21.1 of the Beijing Rules states that the records of child offenders shall be kept strictly confidential and closed to third parties. Rule 21.3 provides that records of child offenders shall not be used in adult proceedings in subsequent cases.

When it comes to sentencing, article 37 of the CRC is clear that no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without the possibility of release shall be imposed for offences committed by persons below 18 years. The Committee on the Rights of the Child General Comment No. 10 has extended this to include all forms of life imprisonment, and clearly includes corporal punishment (as a sentence or in detention facilities) as cruel, inhuman or degrading treatment.

With regard to child victims and witnesses, the right to be informed includes, at Guideline 20 of the Guideline on Justice for Child Victims and Witnesses of Crime, the right to be informed about prosecutorial decisions and about any post-trial development and the outcome of the case.

Furthermore, child victims and their parents must be informed about existing opportunities to obtain reparation from the offender or from the state through the justice process, through alternative civil proceedings, or through other processes. Chapter xiii of the Guidelines deals specifically with reparation, with Guideline 35 stating that, wherever possible, child victims should receive reparation to achieve full redress, reintegration and recovery. Guideline 36 gives the go-ahead for restorative justice processes, provided that the proceedings are child-sensitive and respect the Guidelines. Finally, reparation may include restitution from the offender ordered in the criminal court, aid from victim compensation programmes, or damages ordered by courts in civil proceedings.

4.13.3 Contextual analysis

Child offenders who are convicted and sentenced should have the opportunity to take their cases to appeal and review. Many legal aid systems are weak when it comes to taking matters to appeal. Automatic judicial review by a higher authority of any custodial sentences of child offenders should be considered.

4.13.4 Examples

Various countries have incorporated the principle that a probation officer's report must be obtained prior to sentencing a child.

In terms of section 155 of the Lesotho Children's Protection and Welfare Act, a Children's Court may not impose a sentence with a residential element on a child without having obtained a pre-sentence report.

Section 71(1) of the Child Justice Act 75 of 2008 of South Africa states:

- (a) A child justice court imposing a sentence must, subject to paragraph (b), request a pre-sentence report prepared by a probation officer prior to the imposition of sentence.*
- (b) A child justice court may dispense with a pre-sentence report where a child is convicted of an offence referred to in Schedule 1 or where requiring the report would cause undue delay in the conclusion of the case, to the prejudice of the child, but no child justice court sentencing a child may impose a sentence involving compulsory residence in a child and youth care centre providing a programme referred to in section 191(2)(j) of the Children's Act or imprisonment, unless a pre-sentence report has first been obtained.*

As a general rule, the Malawi Child Care, Protection and Justice Act 22 of 2010 protects the child from labelling and stigmatisation after a guilty finding, and promotes reintegration of the child into his or her community.²⁰³ Section 86 states that

[t]he words "finding of guilty", "conviction" and "sentence" shall not be used in respect of any child in proceedings in a child justice court or any other court, but in pronouncing the conviction against the child, the court shall record that the child is found to be responsible for the offence charged and, instead of sentencing the child, the court shall proceed to make an order upon such a finding in accordance with this Act.

Section 140 of the Malawi Child Care, Protection and Justice Act declares emphatically that 'no child shall be imprisoned for any offence. Children who are found guilty of very grave offences must be sentenced to a reformatory.'

In Kenya, the Children's Act states in section 191(2) that no child offender shall be subjected to corporal punishment. Section 94(9) of the Children's Act of Uganda also prohibits the imposition of corporal punishment. Similarly, corporal punishment in all its forms was banned in Tunisia. Article 319 of the Penal Code, as amended on 26 July 2010, makes it unlawful to use corporal punishment as a disciplinary measure in penal institutions and alternative care settings. Corporal punishment is also not available as a sentence in the Penal Code, Code of Child Protection or the Code of Criminal Procedure.

Likewise, in Mozambique, section 40 of the law for the Promotion and Protection of the Rights of the Child makes corporal punishment unlawful as a sentence, while section 64 explicitly prohibits corporal punishment as a disciplinary measure in child detention facilities.

In Zimbabwe, the judgment in *S v C (a minor)* came before the Harare High Court on review in December 2014. The accused had been convicted and sentenced to a moderate whipping of three strokes with a rattan cane, which was a lawful punishment for juvenile offenders under an exception to the prohibition on torture or cruel, inhuman and degrading treatment of punishment under the previous Zimbabwean constitution. But under the 2013 Constitution, the right to freedom from torture or cruel, inhuman or degrading treatment or punishment is provided for under section 53 (without exceptions), and section 86(3)(c) lists this right as one of those in respect of which ‘no law may permit such torture or cruel, inhuman and degrading treatment or punishment to occur’, and in respect of which ‘no person may be permitted to violate it’.

The Harare High Court viewed this as leading to the conclusion that corporal punishment as a sentence was now unconstitutional, a conclusion strengthened if regard is had to further provisions in the new Constitution that protect the rights to personal security, equality and non-discrimination. The Court relied heavily on international instruments which had been ratified by Zimbabwe, including the key children’s rights texts, with the most detail accorded to the ACRWC.²⁰⁴

Corporal punishment as a sentence was found unconstitutional by the South African Constitutional Court in *S v Williams*,²⁰⁵ where the court, per Langa J, stated:

The severity of the pain inflicted is arbitrary, depending as it does almost entirely on the person administering the whipping. Although the juvenile is not trussed, he is as helpless. He has to submit to the beating, his terror and sensitivity to pain notwithstanding. Nor is there any solace to be derived from the fact that there is a prior examination by the district surgeon. The fact that the adult is stripped naked merely accentuates the degradation and humiliation. The whipping of both is, in itself, a severe affront to their dignity as human beings ...²⁰⁶

One would have thought that it is precisely because a juvenile is of a more impressionable and sensitive nature that he should be protected from experiences which may cause him to be coarsened and hardened. If the State, as role model par excellence, treats the weakest and the most vulnerable among us in a manner which diminishes rather than enhances their self-esteem and human dignity, the danger increases that their regard for a culture of decency and respect for the rights of others will be diminished.²⁰⁷

A number of countries in Africa (as many as 27) still permit corporal punishment as a judicial sanction. It is recommended that advocacy efforts toward the abolition of this form of punishment should be intensified in the quest to achieve child-friendly justice.

4.14 Monitoring and oversight

4.14.1 Basic concepts

Domestic legislation, policies and practices should be reviewed to ensure the necessary reforms to implement child-friendly justice.

Where the state is yet to ratify, efforts should be made to accelerate the ratification and domestication of the ACRWC and the Hague Conventions.

African countries should maintain or establish a framework to measure compliance with child-friendly justice guidelines, and that brings the executive, the legislature and, where appropriate, the judiciary into the process.

Measures should be adopted to ensure that civil society – in particular organisations, institutions and bodies that aim to promote and to protect the rights of the child and to provide access to justice for children – participate fully in the monitoring process.

Robust information management systems should be developed to ensure that proper data is collected to underpin monitoring efforts and show systemic improvement in child justice systems over time. Information management is crucial for the implementation of principles such as deprivation of children's liberty as a last resort and for the shortest period of time, for tracking the movement of children in the alternative care system, and for ensuring adequate service provision for vulnerable groups such as refugee, unaccompanied and asylum-seeking children, to name but three examples.

4.14.2 International law on monitoring and oversight

The 2008 UN Guidance Note of the Secretary-General: UN Approach to Justice for Children discusses how justice-for-children efforts are to be integrated into the framework for strengthening the rule of law. This framework includes institutions of justice, governance, security and human rights, as well as monitoring bodies and programmes to promote integrity and accountability. The Note also stresses a public and civil society that contributes to strengthening the rule of law and which holds public officials and institutions accountable, with children's participation.

4.14.3 Examples

The South African Child Justice Act 75 of 2008 contains very specific monitoring mechanisms aimed at ensuring that Parliament is provided with annual information on the implementation of the Act by all stakeholders (among them the departments of justice, social development, correctional services, the South African Police Service, and Legal Aid). The most recent report provides valuable statistics and highlights priority areas for review and attention.²⁰⁸

In Egypt, articles 97 and 98 of the Law No. 12 of 1996, amended by Law No. 126 of 2008, provide as follows:

A General Committee for Childhood Protection shall be established in each Governorate, chaired by the Governor, and having as members the Directors of the security, social affairs, education, and health Directorates, as well as representatives from the civil society dealing with children, as well as any other party as deemed necessary by the Governor. A Decree shall be issued by the Governor in this regard. This Committee shall formulate the general policy for child protection in the Governorate, and shall follow up the implementation of this policy. Within the jurisdiction of each department or police district, a Sub-Committee for child protection shall be established. The Sub-Committee shall be established by virtue of a Decree emanated by the General Committee and shall include security, social,

psychological, medical, and educational representatives. There shall be at least five members, including the Chairman of the Committee. The Sub-Committee may include among its members one or more representatives from civil society organizations dealing with children. The Sub-Committees for child protection shall monitor all cases of children at risk and take the necessary preventive and therapeutic measures for such cases, and shall follow up on the measures taken.²⁰⁹

4.15 Conclusions and recommendations

An analysis of legislation and policy aimed at incorporating the general elements of child-friendly justice shows that despite significant progress, there are still some glaring deficiencies. Under-resourcing of good legislation remains endemic. In most cases, implementation of laws remains weak and only sporadic access to specialised courts and services exists. Thus, the National Report: Liberia notes that

since the war ended, the Government has been making efforts to establish referral pathways and to create linkages among service providers to coordinate their responses for survivors of violence, exploitation, abuse and neglect. However, these efforts have remained [too] small-scale and under-resourced to have a strong, wider impact. The Ministry and partners have also been making efforts to strengthen community-based child protection mechanisms such as CWCs-child care workers], to monitor and report child welfare and protection issues. CWCs and gender-based violence (GBV) observatories are to serve as community mechanisms that can identify, monitor and enhance justice and the effective rehabilitation of child survivors.²¹⁰

The report also notes that only one juvenile court exists.

An area for ongoing development remains the establishment of trained specialised units to work with children, such as specialised reception or one-stop centres for child offenders and child victims, wherein the child enters the system with the protection and assistance of a multidisciplinary team of professionals. Specialised courts should be instituted where they do not yet exist, and these should make special efforts to improve access to justice for vulnerable groups.

Legislative provisions prohibiting detention, except as a last resort and for the shortest appropriate period of time, appear to be the norm in most African states. These principles apply in relation to both pre-trial detention and sentencing. However, the practice of depriving children of their liberty unnecessarily remains widespread, and it is hoped that the forthcoming Global Study on Children Deprived of Liberty of the UN Special Representative of the Secretary-General will make a significant practical contribution in suggesting measures to reduce this phenomenon.

Furthermore, there is a clear need to intensify efforts to eliminate inhuman punishments, such as judicially sanctioned corporal punishment, from all child justice systems on the continent, both in law and in practice.

Training in the elements of child-friendly justice needs to be continuous and adapted to the needs of the receiving audience, be it members of the police, forensic analysts in sexual offence cases, or the judiciary. Although there have been some promising initiatives on the continent, there is much scope for curriculum development and information-sharing between countries.

A positive trend is the development and mainstreaming of alternatives to formal criminal proceedings in many countries in Africa. Some of these are entrenched in legislation, whilst others rest on police, guidelines or other mechanisms (for instance, MOUs and agreements with stakeholders such as prosecuting authorities). There are also suitably detailed evaluations and reports available on various diversion and alternative dispute resolution projects (as have been highlighted in this chapter). Efforts to expand access to diversion should be supported, and suitable monitoring mechanisms should be adopted to ensure the ongoing effectiveness of the diversion programmes that have been developed and institutionalised. African countries can learn from each other in this regard and build on the promising practices that already exist.

Children's access to legal representation was noted as an area where there has been positive progress. However, there is also still much room for further work and capacity-building in this regard. Extending legal representation services to children in civil and criminal cases must be mainstreamed in all rule of law programmes to ensure the continued viability of services. The vulnerability of NGO-led legal aid services to funding cuts is a risk factor which suggests that, as far as possible, governments need to take overall responsibility for the fulfilment of children's rights to legal representation, whether it is provided in-house or outsourced to suitable organisations

Another common theme that emerges in this chapter is the lack of specialisation in justice systems when it comes to child victims and witnesses. Often specialised services are not available at all or only in capital cities. The National Report: Tunisia laments that

there are no procedures in the Tunisian law or in practice related to questioning and interviewing child victims and witnesses. These children should be interviewed by police officers, men and women, who have received special psychological, social and legal training on how to deal with victims of sexual assault, working in civilian clothes and within a framework suitable for the child's psychology, in addition to preserving the confidentiality of the investigations and the privacy of the victims. The disclosure of the victim's identity leads to negative effects, so it should be possible to consider having a secondary identity during all stages of the criminal proceedings, in order to maintain the confidentiality of the victim's identity, investigation process and the privacy of the victim, as well as to encourage victims to file complaints and to effectively end impunity. Interviewing child victims and witnesses is part of the normal mechanisms of general questioning. This causes a great deal of harm to the child[ren], exhausting them as witnesses and deepening their sense of aggression if they are victims.²¹¹

Efforts to expand services to victims can draw on some of the positive examples profiled in this chapter, such as the Thuthuzela Centres in South Africa and similar units in Malawi. Training for police seems to be a key entry point, as they frequently are the first encounter the child has with the justice system. Promising models are available, albeit in their infancy, and these can be used to inform the ongoing adaption of the justice systems to the needs of child victims and witnesses.

CHAPTER V: CHILDREN AND INFORMAL JUSTICE SYSTEMS

5.1 Introduction

‘Africans perceive conflict as the motor and engine of relationships. This is because it is impossible to speak of a relationship without conflict and it is impossible to speak of conflict without a relationship. Being a social phenomenon, the general intention of conflict resolution ... is to mend broken or damaged relationships, rectify wrongs, and restore justice and harmony between individuals, families and the community at large. The traditional concept of conflict resolution is to reconcile and make peace between disputing parties, ensure the reintegration of the disputing parties into the society and to promote cooperation and harmony between them that may help improve their relationship.’²¹²

The continued use of informal justice mechanisms should be understood both in the historical and contemporary context. Side-lined during the colonial era,²¹³ informal justice systems were regarded as backward and an impediment to development. With the introduction of formal justice systems during colonial rule, it was thought they would simply die out. However, for reasons set out below, this did not occur, and they continued to form the backbone of access to justice for citizens in an estimated 70 to 90 per cent of instances, according to some sources.

That informal justice systems impact on children goes without saying. Recent studies indicate, however, that there is surprisingly little research on the legal situation of children in these systems, apart from the latter’s use for juvenile diversion programming.²¹⁴ This study thus seeks to amplify research in this regard which already exists, as well as examine the challenges of applying child-friendly justice approaches in informal justice systems.

Many studies have shown that the persistence of community, traditional and informal justice systems is fostered by the inaccessibility of the formal justice system, especially in rural areas. In addition, the type of justice offered by formal justice systems is often inappropriate for people living in close-knit communities in which the breaking of social relationships can cause conflict in the community and possibly impact the economic interdependency on which inhabitants rely. In most African countries, state justice systems operate with extremely limited infrastructure and resources, and case resolution is characterised by long delays which are inimical to achieving justice for victims and those affected by disputes. Formal justice systems often appear to lack legitimacy, as cases are won by ‘clever’ lawyers who do the talking,²¹⁵ as opposed to the truth-seeking approaches of the informal justice system.

5.2 Terminology

According to the Office of the High Commissioner for Human Rights, there are different terms used to describe informal justice systems, including traditional and indigenous systems.²¹⁶ In some countries, including those in Africa, customary justice structures are recognised by law, making it inaccurate to refer to them as informal justice systems – though for the sake of brevity this study uses the term ‘informal justice systems’ for all the structures discussed. UN agencies, led by the UNDP, have chosen the term ‘informal justice system’. This is defined as every mechanism and process that exists separately from formal state-based justice institutions and procedures, such as police, prosecution, courts and custodial measures.²¹⁷ However, as mentioned, in many countries the state recognises informal practices and structures their operations through laws, regulations and jurisprudence, which results in a grey area of semi-formal processes.

Religious justice systems in Africa are frequently bodies imbued with judicial authority derived from Islam and other religious writings and texts. They may also be formally recognised in the legal system, with jurisdiction being granted to them to deal with specified disputes relating, for example, to personal and family law matters.

Characteristically, informal justice systems rely on customary law and oral traditions, which can vary widely across any one country or region. As Karuiki points out, traditional justice systems are justice processes based on cooperation, communitarism, strong group coherence, social obligations, consensus-based decision-making, social conformity, and strong social sanctions.²¹⁸ They are accessible by the rural poor and the illiterate people; they are flexible, rely on voluntary participation, foster relationships, offer restorative justice outcomes, and give some level of autonomy to the parties in the process.²¹⁹

These systems regard justice processes an integral part of social life – as such they are not intended to ‘set precedents’ or overrule or underscore previous determinations, as in the formal justice system. Rather, they are located in the specificities of the context and circumstances so as to arrive at an outcome.²²⁰

So, too, the level of formalisation of informal justice systems, and their interaction with formal justice systems, varies from place to place, even within countries.²²¹ There are many examples of state recognition (through legislation or regulation) of informal justice structures. ‘Legal pluralism’ is the term used to describe this interplay of formal, semi-formal and informal systems that operate along a continuum of integration with the formal justice system, from being part of the first-tier justice system to operating completely separately from, and parallel to, the formal justice system.

Although terminology differs, the following types of systems are usually included in the definition of informal justice systems:

- *Traditional, indigenous and religious systems.* These systems and mechanisms have typically existed since pre-colonial times and are conducted by hereditary or religious authorities. Examples include traditional authorities (Mozambique), traditional courts (Zambia and Ghana), religious courts (Kenya), and chiefs (Liberia).²²²
- *Semi-formal systems.* These systems have been created or endorsed by the state and are often integrated into the formal justice system but apply customary norms. Examples

include community courts (Mozambique), local council courts (Uganda), and local courts using informal procedures (Zambia). In Ethiopia, the Kebele courts (social courts) have been integrated into the formal system, yet some of them operate through the application of traditional norms (for example, the Shimglina amongst the Tigray).²²³ In Malawi, too, traditional laws have been codified into by-laws, blurring the lines between their application as either informal or formal justice mechanisms. Mauritania considers the mediation provided for in the child justice system as a traditional mechanism, even though it now forms part of the formal system.

- *Alternative community-based systems.* These are often initiated by the state or NGOs. Many draw on community norms, adapted to include human rights, and use modern alternative dispute resolution procedures (such as negotiation and mediation). Examples include community mediation centres, paralegals, justice committees, neighbourhood watch committees, and community policing councils (for example, Ghana, Mozambique, Uganda and Zambia).²²⁴

5.3 Prevalence and operations of informal justice systems

There are often multiple informal justice systems within the borders of one country, depending on citizens' ethnic or community affiliations. The Office of the High Commissioner of Human Rights records that in Uganda, each ethnic group has its own customary law system; Namibia has 49 recognised traditional authorities, each with its own system of governance and adjudication.²²⁵ In Ethiopia, there are more than 80 separate ethnic groups, each using its own traditional justice system, including for criminal matters.

In some countries, disputants have the option of going to either the formal or informal system, whereas in others, traditional forums have been integrated into the system and serve as the port of first call (for example, Burundi, Ghana, Mozambique and Zambia). In some places, the two systems operate in total isolation from each other.²²⁶

Liberia operates dual administrative and justice mechanisms: the formal mechanisms governed by the government institutions such as the Police, Magisterial Courts, Ministries and Commissions, and the informal/traditional mechanisms mainly governed by Chiefs under the supervision of Commissioners.

The main challenge here is lack of clear understanding about limitations, jurisdiction and referral pathways among both formal and traditional justice actors. Therefore, the Ministry of Justice in coordination with the Ministry of Gender, Children and Social Protection and the Ministry of Internal/Interior Affairs will continue to invest in initiatives that strengthen and clarify working relationships between the formal and traditional justice mechanisms.

This includes working with partners who provide services to intensify awareness-raising on referral pathways, particularly on child abuse and GBV issues, organising community dialogue between the key actors of both the formal and traditional justice mechanisms, and in some cases even facilitating the signing of memoranda of understanding among them in order to formalise such relationships.²²⁷

Amongst the Tswana of Botswana, dispute resolution starts at the household (*lolwapa*) level.²²⁸ If a dispute cannot be resolved at this level, it is taken to the *kgotlana* (extended-family level), where elders from the extended family sit and listen to the matter. The elders emphasise mediation of disputes. If the *kgotlana* does not resolve the dispute, the disputants take the matter to *kgotla*, which is a customary court with formal court-like procedures. It consists of the chief at the village level and the paramount chief at the regional levels. The chiefs are public officials and handle both civil and criminal matters. The decision of the paramount chief is appealable to the customary court of appeal, which is the final court on customary matters and has the same status as the High Court.²²⁹

In the *Gacaca* system in Rwanda, the initial conflict- and problem-resolvers were the 'headmen of the lineages or the eldest male or patriarchs of families who resolved conflicts by sitting on the grass together to settle disputes through restoration of social harmony, seeking truth, punishing perpetrators and compensating victims through gifts. The main aim of the *Gacaca* process was to ensure social harmony between lineages and social order throughout the Rwandan ethnicities.'²³⁰

One of the common characteristics of informal justice systems is that they approach dispute resolution from the perspective of the collective rather than the individual (or in the case of criminal offences, from the vantage-point of the interests of the state). They embrace informal modes of information-gathering in contrast to the formal evidentiary rules of the state justice system. They are flexible, often entailing a high degree of public participation; no provision is made for legal representation; and the process is voluntary.

Moreover, the focus more often than not is on reconciliation and the restoration of harmony. Proceedings are invariably oral, and written records are all but unheard of. Philosophically and methodologically, informal justice mechanisms enjoy greater acceptance among local communities than formal state structures such as courts. These mechanisms accord with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power in that they typically involve victim participation. Other principles that aid in conflict resolution are social cohesion, harmony, openness or transparency, participation, peaceful coexistence, respect, tolerance and humility.²³¹

However, there are no formal enforcement mechanisms of any measures ordered, though community support often backs the measure by exerting social pressure. The legitimacy of traditional authorities lends weight to their rulings, which do not need to be enforced through fear or threats. Also, contested decisions would lead to a breach of the community harmony that informal justice processes seek to restore. Usually informal justice structures do not make a distinction between civil and criminal matters, though imprisonment is not an option available to informal justice structures. Nevertheless, despite the claim to communitarianism, it has been pointed out that the high level of flexibility of customary law, its unwritten nature and the lack of reliance on a formal system of precedent can render customary-law outcomes uncertain and susceptible to elite capture.²³²

In contrast to the state justice system, which is seen as inaccessible due to transport costs, language barriers, and costs of litigating (requiring recourse to legal assistance in environments where legal

aid is often very constrained), informal justice systems are speedy and get results (instead of long-outstanding judgments). Customary justice hearings may take place at weekends or at night, and are conducted in the local language. Moreover, actors in formal state systems often have little or no understanding of customary law, and do not receive training on it either. Judgments of the formal courts are frequently perceived as inadequate or even harmful (as when a perpetrator is imprisoned, leaving the family at risk).

Unfamiliarity with the formal system, especially among illiterate or uneducated communities, contributes to negative attitudes towards formal justice structures, even where the state system is performing well. Furthermore, traditional courts are often perceived as less corrupt than the state court system.

Customary justice and children in Upper Egypt

Field work research by Terre des Hommes, the international children's right organisation, shows 'how customary justice in Upper Egypt follows unwritten rules and protocols at all stages of the proceedings. Such unwritten rules and protocols apply to the identification of the case, the selection of the arbitrator, the investigation, the judgment or the decision, the appeal and, if successful, the reconciliation (*sulh* in Arabic). In that perspective, customary proceedings can be initiated by the family of the victim or by the family of the alleged perpetrator. Either party to the dispute can approach a mediator (*waseet*) who will contact the other party to make sure of his/her willingness to engage in customary procedures. If that is the case, one or several arbitrators, approved by the parties, are chosen. Alternatively, customary proceedings can also be activated after the dispute has reached the police station, either upon the request of one of the disputing parties or of the police themselves.'²³³

In the study by Terre des Hommes, the arbitrators dealt with 244 cases involving 296 children. The difference between the number of children and the number of cases is explained by the fact that several children can be implicated in one case. Among the 296 children, one-third (33.4%) were involved in civil cases. These include personal status cases (20.6 per cent of the total number of children) and land disputes (12.8 %). Personal status disputes correspond to family law cases such as the custody of children, inheritance issues, or a potentially arranged marriage. There were 168 criminal cases involving 197 children: 101 were offenders and 96 were victims. Only 38 were girls, hence 80 per cent of the sample were boys; amongst the victims, 76 per cent were also boys.

With regard to age, the average age of offenders was 13.4 years, with roughly 20 per cent being 11 years or younger, which is lower than data from Western countries, where research has suggested a predominant age of 16 or 17 years. However, the researchers point out that the lower age could be linked to the fact that more severe cases are dealt with in the formal justice system. Among the offenders, 79 per cent were involved in assault, 11 per cent in drug use, 6 per cent in robbery, and the remaining four per cent in drug trafficking (2%), sexual assault (1%) and terrorism (1%). There were no offenders accused of murder, which suggests that prosecution for those cases takes place within the formal justice system. Almost all offenders (94, representing 93 per cent of the total) participated in the customary proceedings.

The average age of victims was 11.7 years. Among the victims, 79 per cent were victims of assault, seven per cent of murder, six per cent of robbery, and the remaining seven per cent are distributed among road traffic offences (3%), sexual assault (2%), drug use (1%) and drug trafficking. Roughly three-quarters of the victims (74, representing 77 per cent) took part in the customary proceedings.

The researchers highlight the presence of two victims and one offender of sexual assault, as, according to the local social conventions, such cases seldom arrive at the justice system (formal or customary) because they compromise the reputation of the family.

Just more than half of the cases ended with an agreement between the parties, with proceedings in the remainder of the cases (two out the seven murder cases and seven assault cases) lasting more than a month.

By way of comparison with the formal criminal justice system in the same region, the research notes that whereas 200 criminal cases were dealt with in the informal justice system, some 1,200 cases were processed by the two local child courts in one affected region. However, the disclaimer is offered that comparable official statistics are difficult to come by. The observation is also made that, interestingly, property offences did not feature much in the sample, the exception being robbery.

In conclusion, the researchers point out that the majority of efforts to reform the juvenile justice sector in Egypt ignore the role of these actors and processes:

The Concluding Observations of the Committee Rights of the Child (2011) list numerous recommendations (paragraph 87), yet none of these address the customary system. In turn, this lacuna is reflected in the policies of many non-governmental agencies active in juvenile justice reform, whose programmatic recommendations around diversion and alternatives to detention almost exclusively refer formal actors from key Ministries (Justice, Interior and Social Affairs).²³⁴

This research concludes that in order to reflect the lived realities of children in conflict with the law in Egypt, particularly in rural areas such as Assyut, customary actors must be considered in policies for juvenile justice reform.

The decisions of informal justice systems are made by members of the community – chiefs, headmen or headwomen, elders or by the whole community. Informal judicial decision-making powers are often intertwined with executive authority at the village or local-authority level.²³⁵ In some systems in which there is semi-formal or more formal state involvement, positions as adjudicators are allocated upon recommendation by the chief (as in Zambia) or may even be the result of an electoral process.

The most widely used method of dispute resolution is negotiation, which is controlled by the parties themselves and where the aim is to achieve an outcome that satisfies both parties and addresses the root causes of the conflict.²³⁶ Mediation involves the presence of a third party. According to Sone,²³⁷ if the parties have tried negotiation and mediation and no positive result is obtained, they use the tribal court. This is when the *mogji* or *bale* commonly used by the Yorubas

and Ibos; *kgotlaor inkundla* used by the Zulus and Batswanas; *ntooh* for the Wimbumbas; and *wazee* or *kokwo* for the Pokot and Marakwet ethnic groups in Kenya, can be instrumental in resolving conflicts. Arbitration is hence considered an alternative dispute resolution method.²³⁸ Reconciliation is effected by an authority selected from the community who mediates between conflicting parties and is empowered to make binding judgments. The purpose is not to render a judgment or punishment in law, but to reconcile the conflicting parties by following the norms of the community.²³⁹ The reconciliation process often requires symbolic gestures and associated rituals, including the exchange of gifts and the slaughter of animals (chickens, goats, sheep or cows) to be shared by the parties and those present in the reconciliation process.²⁴⁰

As regards jurisdiction, this has generally been confined to family matters, juvenile issues, inheritance and minor criminal matters. However, in practice traditional forums may exercise far more extensive jurisdiction, either because of confusion about their powers or because the litigants choose them above the state court systems. Other matters typically adjudicated in traditional systems include wrongful injury, liability for animals, land issues, loans, and contractual agreements such as those related to the exchange of goods.

The traditional justice system in Sierra Leone

‘The traditional justice system is organised through different levels. Each Community/Town/Village has a Chief and a Chief Court that is supposed to address petty offences: this is the lowest level.

The next level is called “Section”, which comprises a group of villages with well-defined geographical boundaries. The Section is governed by a Section Chief and has a Section Chief Court that receives referrals from Chief Courts, depending on the gravity of the matter according to “traditional perspectives”.

The third level is the “Chieftdom” which is governed by the Paramount Chief, i.e. the highest level of chiefs. At Chieftdom level, there is an informal Paramount Chief Court that usually deals with land disputes and serious crimes referred by the Section Chief Court, and a Local Court that mostly deals with civil matters (e.g. family and marriage disputes, debts and fraud).

Local Courts are under the political leadership of the Paramount Chief, but administratively placed under the Judiciary: Local Courts represent the linkage between the formal and traditional justice system. Technically, only Local Courts are supposed to arbitrate, while Chiefs operating in traditional courts must only mediate or facilitate disputes involving more petty crimes, in line with a restorative justice approach, and refer serious crimes to the police or higher-level courts. However, in practice, Chiefs also arbitrate cases, often because fines paid by community members represent a valuable financial income.’²⁴¹

5.4 Human rights principles and informal justice systems

It is widely recognised that human rights issues can be implicated in informal justice processes.²⁴² In particular, concerns are raised about the applicability of fair trial rights, including the right to an appeal; gender discrimination; and power imbalances in traditional societies generally.²⁴³ For instance, the restorative nature of traditional justice processes and the need for an acceptance of responsibility may come into conflict with the right to be presumed innocent; so, too, the right to counsel, as legal representation is not allowed during informal justice system processes. These concerns are more evident in criminal than in civil type disputes.

Some sanctions which violate human rights may continue to be practised, such as the imposition of corporal punishment or banishment. In some informal justice systems, trial by ordeal is permitted, which flies in the face of universal human rights principles.²⁴⁴ One recent study suggests that in customary justice there is no minimum age for participation in the proceedings and that the same arbitrators deal with children and adults, which infringes upon the concepts both of a minimum age of penal responsibility and of specialised child justice systems.²⁴⁵

The Dina system in Madagascar

‘The Human Rights Committee addressed the use of capital punishment by a traditional justice system in Madagascar in its concluding observations on the State party’s report. The Committee was concerned about the existence of a system of customary justice (Dina) which did not always produce fair trials. It regretted that summary executions had been perpetrated on the strength of Dina decisions. It took note of the assurance by the State party that Dina could no longer intervene in anything other than minor offences, and under judicial supervision. The Committee recommended that the State party should ensure that the Dina administer a fair justice system under the supervision of the State courts and invited it to ensure that no further summary executions were perpetrated on the strength of Dina decisions and that every accused person benefited from all the safeguards set forth in the Covenant.’²⁴⁶

However, it is worth noting that a significant volume of the current literature on local justice mechanisms is commissioned by international development actors. A lot of the literature therefore presents detailed expositions of the deficiencies of local justice mechanisms in terms of human rights and how human rights assistance by development actors should engage local justice mechanisms in incorporating key principles of human rights and the formal justice mechanisms.²⁴⁷

This present report proceeds from the stance that because children’s rights are implicated in informal justice systems, a rights-based approach can and should infuse children’s contact with these justice systems. Nevertheless, it may be that understanding the manner in which formal rights are infused into informal justice systems (such as the right to be heard, or to enjoy legal representation) requires a modified approach. For instance, the lack of access to legal representation might be mitigated by the fact that parties represent themselves directly in informal justice proceedings, which operate on a ‘truth-telling’ basis,²⁴⁸ and that children’s interests and voices are represented in proxy by adults such as parents.²⁴⁹

From a children's rights perspective, the four 'general pillars' of the CRC Committee must be taken to apply to proceedings in informal justice systems. To recap, these are the right of the child to non-discrimination (article 2 CRC); the right of the child to have his or her best interests taken into consideration (article 3 CRC); the right to survival and development (article 6 CRC); and the right of the child to express views and have these taken into consideration (article 12 CRC).

The right of the child to express views and have these taken into consideration may be imperilled in informal justice processes, as traditionally children are meant to be 'seen and not heard'.²⁵⁰ The CRC Committee has also expressed concern about how respect for the views of the child remains limited in the courts, before administrative authorities, and in society at large, owing to traditional attitudes. In its consideration of the periodic report of Niger, the Committee recommended that the State Party develop a systematic approach to increasing public awareness of the participatory rights of children in the best interests of the child, particularly at local level and in traditional communities with the involvement of community and religious leaders, and ensure that the views of children are heard and taken into consideration in accordance with their age and maturity.

Regarding the necessity of ensuring the application of children's best interests in custody disputes, customary and/or religious practices are sometimes applied to determine custody solely on the basis of the child's age or gender, without consideration of the views of the child and the child's best interests. For instance, women in Niger retain custody of children under the age of 7 but men may be entitled to custody of children after this age. This does not take adequate account of the principle of the best interests of the child, which should be a primary consideration.

As UN Women points out, children and women are structurally disadvantaged in informal justice systems, which tend to be dominated by middle-aged and elderly men as adjudicators.²⁵¹ Vulnerability increases when the best interests of the child do not coincide with those of the parents, guardians or close family. In fact, the best interests of a child are most at peril when the person purportedly representing the child is also the perpetrator of violations of the child's rights.

Given that customary justice operates according to the notion of collective rather than individual responsibility, children involved in customary proceedings are perceived not as individuals in their own right but as part of the wider social unit to which they belong: the family, clan or tribe. In practice, this means children are often treated as peripheral to the customary proceedings, with their agency potentially being denied and their right to participate, negated. Senior male family members (father, grandfather, uncle) tend to request the intervention of the customary justice system, and they are the main interlocutors during the proceedings.²⁵²

This point is reinforced by Harper, who notes that customary systems often discriminate against vulnerable groups such as women, minorities, children and the poor:

In some contexts, participation in dispute resolution is restricted based on gender, social status and/or ethnicity. In Somalia, for example, women can only be represented by male relatives. In Northern Kenya, some tribes allow women to present evidence, but only "while seated on the ground and while holding a grass reed above their heads"; men by contrast present evidence "while standing and holding a long rod understood to be a symbol of respect".²⁵³

‘When something happens in which a child is implicated, the matter goes to the elders who conduct a conversation with the family as to why the child did it and what to do about it. The parents of the child would agree to compensation such as a cow or livestock. They would share a meal with the victim’s family. Then the whole incident is forgotten, never to be spoken about again. There is no labelling, no lasting stigma – “that is the child who did X or Y”. They never speak about it again.

‘The child (and his or her behaviour) represents the family as a whole – that is why parents must come and explain what they can do to make things right. The child does not speak directly: the child would be represented by a family member such as an uncle. The family is therefore represented, and must make the amends.’²⁵⁴

On a positive note, the Special Representative of the UN Secretary-General on Violence against Children has noted that customary justice systems tend to use more accessible language, have a greater potential for healing, are less costly and promote more direct involvement between the accused and the victim, as well as between their families and the community more generally. A child normally appears in a traditional justice proceeding with a member or members of his or her family, and the focus tends to be on reparation, reconciliation and ensuring the child remains part of the community. Customary justice processes do not normally involve the detention of children, either in the pre-trial stage or after judgment, avoiding the harmful effects of detention on children and the risk of violence to children in detention.²⁵⁵ These conclusions point to a more child-friendly process for children before informal justice authorities than before formal justice systems.

Nevertheless, human rights concerns may arise for children in proceedings before traditional justice mechanisms. One of the disadvantages of reliance on customary law with regard to children is that in many communities the age of maturity is ten years or even younger, leading to the risk of such children being treated as adults at a very young age. Some customary justice systems may support harmful traditional practices that directly affect children, such as early and forced marriage.²⁵⁶ The lack of privacy of informal justice proceedings imperils universal principles relating to children’s rights and privacy, especially in sensitive cases. Another concern raised in research and field work is that intra-familial sexual offences where children are victims, including rape, defilement and incest, are dealt with by mediation and offenders escape criminal liability – in effect enjoying immunity.

A recent study in Zambia that explored this issue in relation to child sexual abuse, or defilement, suggested that the majority of these cases in the study were dealt with by the family or in informal or traditional justice systems.²⁵⁷ Zambia has a system of traditional courts that differ from state courts in that legal representation is not permitted, African customary law is applied, and the presiding officer is not legally trained.

The study asserts that defilement is less of a wrong under the informal justice system, in which it is called ‘deflowering’ rather than ‘defilement’. Moreover, it is not a crime in the informal justice system but a civil wrong. Compensation may be awarded to the family of the child as virginity damages, inasmuch as it is the family that has wronged rather than the child. The study is

inconclusive as to whether the child actually appears before the informal justice system. Nevertheless, a number of human rights concerns are raised by this research, not the least of which is the violation of the *child's* right to a remedy.

The *Mtaa* mediation system in Tanzania

'In the *Mtaa* mediation system in Tanzania, each *mtaa* has a dispute resolution committee that is empowered to resolve disputes, including those involving children. The primary mechanism for achieving dispute resolution is mediation, hence the *mtaa* arguably retain some features of informal justice systems. The *mtaa* can make orders in relation to certain criminal offences committed by children (theft, truancy, assault or injury, smoking marijuana and using abusive language); as regards civil matters, children can report child neglect, parents failing to provide basic needs or to pay school fees, abuse and maltreatment.

'Sanctions for minor offences include requiring the child to report to the *mtaa* daily, community service, ordering the imposition of corporal punishment, and ordering that compensation be paid by the child's parent(s). Civil remedies include ordering parent(s) to fulfil their parental responsibilities. An appeal does lie from a *mtaa* committee to a ward committee.'²⁵⁸

5.5 Children and Religious Justice Systems

Religious justice systems in Africa frequently, although not exclusively, entail the application of Islamic law by religious courts. By their nature, Islamic courts are based on written religious sources. Although there are differences within the Islamic faith on how they are interpreted, these sources represent the guiding reference for the application of Islamic justice.

'Religious institutions relate to the application of the spiritual dimension in conflict resolution. The workers in the institutions who live with the indigenes in the community are often regarded as people with high moral rectitude and are respected in the community as peace crusaders. The religious authorities are pastors, priests and church elders in the community and are active in settling societal conflicts.'²⁵⁹

In Zanzibar, the Children's Act 6 of 2011 specifically refers to the *Khadis* courts and their function in presiding over custody and related disputes. These religious courts are statutorily recognised.²⁶⁰

In 2000, Zamfara State enacted the first Shari'a Penal Code in Northern Nigeria. In due course, 11 other northern states followed this example, and at present Islamic criminal law is enforced in 12 northern states of Nigeria by the enactment of new Penal Codes or the amendment of the existing Penal Code.

The Shari'a Penal Codes contain provisions on

- Qur'anic offences (*hudûd*), such as unlawful sexual intercourse (that is, between persons who are not married) (*zinâ*); theft (*sariqa*); robbery (*hirâba*); drinking of alcohol (*shrub al-khamr*); and false accusation of unlawful sexual intercourse (*qadhf*);
- provisions on homicide and hurt; and
- corporal punishment (caning or flogging) as penalty for many offences.

The punishments contained in the Shari'a Penal Codes include death, forfeiture and destruction of property, imprisonment, detention in a reformatory, fine, restitution, reprimand, public disclosure, boycott, exhortation, compensation, closure of premises, retaliation, death by stoning, amputation, caning, a blood price, and a warning.²⁶¹ It is not known to what extent children may be tried before these courts.

'... [T]he Sharia courts ... also have jurisdiction on child matters in the areas where the Child Rights Act of Nigeria has not been brought into force. Although there is no express provision in either the Qu'ran or Hadith which permits or prohibits the testimony of children in either civil or criminal trials, ... a child is considered not a competent witness in both instances according to the Hanafi, Shafi'i and Hanbali schools of Islamic thoughts.

'The Maliki School whose doctrine is being applied in the Nigeria Sharia Courts agree with the view of the majority that generally, a child is incapable of being a witness with the proviso that the testimony of a child is only admissible in instances, of injury or homicide where there are no adult witnesses.'²⁶²

More research on children's rights in religious courts would be useful.

5.6 Examples of promising practice

A UN Women study identified that, to a large extent, the barriers children face in ensuring their rights are upheld in informal justice processes are social rather than formal, requiring a change in mentality rather than new rules.²⁶³ Further, the quality and standing of the person representing the child is fundamental, beginning with a recognition by the affected parties, including the arbitrator, that the legal rights of the child are at stake.²⁶⁴

In relation to child protection, there is need for capacity-building and training programmes among local actors; training should include applicable human rights norms, the trauma experienced by child victims, child-appropriate interviewing techniques, and skills to deal with child victims and witnesses.²⁶⁵

The UN Women study makes the important point that informal justice systems do not replace or substitute for a national legal system. Interventions to improve children's rights adherence in informal justice systems must take cognisance at the same time of the constant need to improve

the reach of, and human rights standards applicable in, the formal justice system.²⁶⁶ Equally importantly, interventions in informal justice systems should be premised on realistic solutions that envisage long-term improvements (not short-term gains that are unsustainable and create dependency).²⁶⁷

Terre des Hommes is engaged in projects exploring children's rights in informal justice systems in a range of countries, mostly in the Middle East. However, two African countries in which it has been working are Egypt and Burkina Faso. The organisation has documented 700 cases involving children and the justice system in Egypt. Its future work is to be based on four pillars:

- data collection that includes documenting case studies of children dealt with in informal justice systems (at the time of writing, the organisation already has a database of more than 2,000 cases pertaining to both civil and criminal justice);
- coordination, especially between the formal and the informal justice systems;
- sensitisation (on juvenile justice and children's rights); and
- engaging with informal justice structures and bodies on child participation.²⁶⁸

The Danish International Development Agency (Danida) released a 'How to Note' on informal justice systems to guide responses to rule of law reform projects. The Note deals with a particular aspect of support for the realisation of human rights – enabling access to justice for the poor and marginalised through increased focus on informal justice systems. Specifically, the Note advises as follows:

It is sometimes difficult to isolate the adjudicative function of informal justice system mechanisms from the prevailing practices and norms within communities. The problems or human rights violations may indeed occur outside of or prior to any process of adjudication. From a programmatic point of view, it may thus be inadequate to address the adjudicative aspects of informal justice systems without addressing the norms and even the world-views that inform them. In relation to the difficult area of real property and land allocation, the formulation of a national policy may itself be a major hurdle. Norms having a basis in religious faith may require a specific approach best developed by women themselves. Tackling the social practices and beliefs themselves is outside the scope of this study. This recalls the treaty bodies' recommendations of using multi-pronged strategies over time to address these issues. In practice, the same community leaders – traditional or religious – who would be called upon to adjudicate disputes in the event of a conflict are those who are upholding the problematic practices – including, for example, child marriages, and discriminatory inheritance practices.

According to Danida, the following approaches should underlie future interactions with informal justice systems (from the standpoint of international cooperation):

- *Applying a people-centred and demand-driven approach to access to justice. Support for informal justice systems should begin with the needs of the poor to access justice that is non-discriminatory and inclusive, and that improves their livelihood. Specific attention should be paid to those who are excluded from or discriminated against in both informal and formal systems.*

- *Promoting local ownership and multiple stakeholder dialogue. Many stakeholders with potentially conflicting interests are affected by support to informal justice systems. National ownership is essential, but an inclusive process at the local level must inform reform of both formal and informal justice systems.*
- *Applying a holistic, integrated approach to justice sector reform. Support to informal justice systems should complement or be incorporated into support to the formal justice system to enable everyone to access justice regardless of their education, class, ethnicity, gender, sexual orientation or caste: to this can be added ... age.*
- *Providing long-term support based on realistic objectives. Improving access to justice for poor and marginalised groups is likely to be slow and incremental. It requires not only legal and institutional reform, but also efforts to influence the cultural beliefs, social barriers and structural inequalities that limit or deny justice to these groups. It is, therefore, important to be realistic about what can be achieved in certain periods of time.*
- *Be harmonised with the support of all development partners.*
- *Supporting gradual adherence to human rights, including accountability, non-discrimination, fairness and physical integrity.*
- *Building and strengthening monitoring mechanisms (which is a challenge given the lack of records kept in most informal justice systems).²⁶⁹*

Some of these recommendations have informed the conclusions and recommendations set out below. However, from a child-rights perspective, harmful practices cannot be subject of gradual improvements and must be stopped immediately.

5.7 Conclusions and recommendations

Research

There is clearly a paucity of credible, detailed and up-to-date research on children's experiences of informal justice systems, both in the criminal and civil dimensions. The recent research undertaken by Terres des Hommes in Egypt shows that some old 'truths' contradict popular conceptions, such as that children do not participate in informal justice system processes. Other myths or practices of old which are being transformed might also need to be subjected to further scrutiny, such as the patriarchal nature of informal structures and the absence of women as adjudicators.

Hampering such ethnographic research, however, is the oral tradition of informal justice systems, the lack of records, and reliance on recall and memory, which may result in findings that are only anecdotal. Hence, creative methodologies would need to be explored in the absence of large-scale and potentially lengthy grass-roots research projects.

A further hurdle is presented by the multiplicity of informal justice systems, even within a single country. It cannot be taken for granted that processes, practices and outcomes are similar even in communities that are geographically close to each other, nor can it be assumed that the practice of informal justice is purely a rural phenomenon, as the example of the *mtaa* in urban Tanzania and the findings from the Sierra Leone report show (in relation to informal justice in peri-urban areas). Clearly, more research is needed to ensure that interventions to infuse children's rights and universal principles in these structures are appropriately devised.

Investment in the positives

The positive features of informal justice systems – in general as well as specifically for children – should not be underestimated. This includes their proximity to the people they serve (access to justice being one element of the child-friendly justice framework); their speedy nature (avoidance of delay being another); and their avoidance of deprivation of liberty (a third core principle). This does not mean harmful practices (trials by ordeal, or corporal punishment) should be overlooked, or that children's experiences of injustice (when sexual offences against them are trivialised and perpetrators escape with impunity) left unremedied. Glorifying custom and tradition prevents universally accepted principles from taking root and the child-rights agenda from moving forward.

Rather, work should continue to flag the important benefits that people themselves realise when they prefer an informal system over the formal mechanisms instituted by the state. As the same time, these advantages should serve as a beacon to states to improve the extent, reach, and accessibility of formal systems in the service of their people.

Training and sensitisation

Stakeholders in informal justice systems need to be sensitised to child-friendly justice, the basic elements of human rights, and the rule of law. Sensitisation efforts should be followed by robust monitoring and evaluation to ensure that training brings about the desired changes at grass-roots level.

Involvement of informal justice systems in rule of law programmes

The value of the role informal justice systems play in rule of law programmes is undeniable, and as such there is a need to impress on African governments the importance of including the informal justice sector in rule of law programmes and in their engagements with donor communities.

Articulation and coordination with formal justice systems

As this chapter has highlighted, the extent to which formal and informal justice systems interact with each other and coordinate their efforts varies along a continuum, from legal recognition of the customary or traditional justice system, at the one end, to the existence of completely separate systems at the other – a situation in which the two remain isolated from, and largely ignorant of, one another.

A far more concerted effort to improve the articulation between formal and informal systems is recommended. Sexual offence cases – which sometimes require skilled forensic services, sensitive witness preparation, and recompense for victims – are matters that should be dealt with by formal systems. Where the necessary resources can be found, these cases should not be mediated at community level but referred to state justice systems. At the same time, the restorative and communitarian nature of informal justice systems could mean that appropriate mechanisms to divert matters involving children to these forums would provide better outcomes and avoid (for instance) the deprivation of liberty of children for minor infringements. These efforts should not be based on ad hoc plans at the individual level, but form part of the national access-to-justice policy of African states. In other words, they should be deliberately formulated and driven in a participatory way.

CHAPTER VI: ACCESS TO JUSTICE FOR VULNERABLE GROUPS

6.1 Introduction

The ACPF identified the need for a focus on vulnerable groups of children and barriers to their access to justice, based on the field work and research it has done over the past two decades. There is a multiplicity of vulnerable groups, the identification of which may also differ from place to place or region to region. In consultation with stakeholders during the preparation of this study, a decision was taken to focus on ten groups as described hereunder, in order to avoid overburdening this publication with detail. The aim of identifying the ten vulnerable groups was to draw attention to those who are the most marginalised and encourage child justice systems to ‘leave no one behind’. Therefore, it is recognised that there are gaps and omissions in the selection of the ten themes.

For the purposes of this study, ‘vulnerability’ is understood to refer to the condition of groups of children at risk of additional threats to their experience of child-friendly justice, or at risk of not experiencing justice at all.

6.2 Girls

There is little information on the experiences of girls who come in conflict with the law.²⁷⁰ This scarcity of information is a direct consequence of the relatively low numbers of girls who enter the formal justice system, where, historically, boys and men are overrepresented.

Due to this relatively lower numbers of girls (estimated at between 5 and 10 per cent of children in conflict with the law), many countries do not make special arrangements or create separate facilities for girls. As a result, girls who are alleged or recognised offenders are often held in detention together with adult women. Alternatively, to ensure their segregation from men and boys, girls risk being held in isolation or detained far away from home. They are particularly vulnerable to violence in the criminal justice system, including sexual violence.

Girls who are victims of trafficking and prostitution are at high risk of being deprived of liberty and subjected to ill-treatment, sexual abuse and rape by police officers rather than being supported through recovery and reintegration. Girls are also more vulnerable to prosecution for status offences, such as being runaways.²⁷¹

The Bangkok Rules make specific reference to the situation of juvenile female prisoners. Building upon article 40 of the CRC, the Rules stress that institutionalisation of children involved with the justice system must be avoided to the fullest extent possible. In the case of girl offenders, the Rules emphasise that their gender-based vulnerability must be taken into account in all relevant decision-making,²⁷² and require authorities to put in place measures to meet their particular

protection needs.²⁷³ This includes ensuring access to the same kind of educational and vocational training made available to juvenile male prisoners,²⁷⁴ in addition to the provision of age- and gender-specific programmes and services, such as counselling for sexual abuse or violence.

Girls face particular challenges in criminal justice systems, as highlighted by the 2015 report of the Special Representative on Violence against Children. The report points out the institutions linked to the criminal justice system are often poorly equipped to deal with the special needs of girls.²⁷⁵ Girls face particular vulnerabilities as victims of crimes. Often, cultural and social norms play a role in whether or not victims seek help in the first place. In many places when abuse occurs within the family (especially sexual abuse), these norms are pronounced, the expectation often being that victim stay silent and the situation remain within the confines of the closed family unit in order to avoid family embarrassment or a loss of perceived family honour.

Survey data from Zimbabwe confirms that disclosure of sexual abuse is relatively uncommon. For example, results from the 2010-2011 Demographic and Health Survey revealed that 72 per cent of girls and women between the ages of 15 and 49 who reported experiences of sexual violence said they had never told anyone about it. Victims of abuse often rely on informal networks and channels when it comes to both disclosure and seeking help. In a case presented in the Zimbabwe study, the victim chose to disclose to a community member. Again, cultural and social norms may have influenced the victim's decision to tell a community member rather than turning to authorities, for example because norms often dictate to whom it is deemed acceptable for victims to turn to for help.

The Special Representative's report also points out that girls remain especially vulnerable in informal justice systems due to patriarchal attitudes and pervasive gender discrimination.²⁷⁶ The Model Strategies on Violence Against Children call for safe and confidential complaint mechanisms that are both effective and easily accessible. Upon arrival at a detention facility, girls, as well as their families, should receive clear child- and gender-sensitive information about their rights, the procedures relevant to their situation, and their right to be heard. They should also be informed about effective remedies and available support services.²⁷⁷

The Special Representative calls for quality research and data collection to better ascertain the prevalence of violence against girls and the reasons for girls' involvement in the criminal justice system and their deprivation of liberty. The identification of discriminatory practices is an important element that should be captured, including through recording of data on ethnicity and racial background.²⁷⁸

In the case of Zimbabwe, where a diversion pilot project that commenced in 2009 was recently evaluated, out of the 2,157 children in conflict with the law, 1,741, were boys, compared with 416 girls. Girls therefore constituted 20 per cent of children coming in conflict with the law over the project period, which is a relatively high ratio.

The diversion rate for girls was 81 per cent, and for boys, 80 per cent. When the data was disaggregated by age and gender, there were two notable differences between boys and girls. First, the number of girls in contact with the law under the age of 13 was minimal, as most of the girls who had offended were in their teenage years. Secondly, in cases where girls had offended below the age of 13 years, the diversion rates were much higher than those of boys.²⁷⁹

Hence, gender-specific recommendations emanating from the evaluation included the

[d]evelopment of gender-specific diversionary measures. Current diversionary measures used should be adapted for girls. As a starting point for immediate implementation, only female diversion officers should be given girls' cases; girls referred to NGOs should be counselled by a female counsellor and there should be careful consideration of any previous trauma or abuse when deciding on a diversion measure.²⁸⁰

Another recommendation was that there should be further research and disaggregated data collection on girls in the criminal justice system in Zimbabwe, including investigation into why girls offend, the characteristics of girl offenders, and the differential impact of policies and programmes to prevent and respond to their offending.

Good practice

Protocol on the Multi-Sectoral Management of Sexual Abuse and Violence in Zimbabwe 2012

An original version of the Protocol was developed in 1997, with a second edition issued in June 2003. The 2012 revised Protocol stresses the need for holistic, effective and efficient service delivery for survivors of sexual abuse and violence, and has expanded the scope of the Protocol to include victims of all ages (not just children as was previously the case). The Protocol sets out minimum standards and key procedures with which relevant stakeholders have to comply in providing survivor-centred services to victims of sexual abuse and violence.

The revised Protocol also has an increased emphasis on the importance of adopting age-, gender- and disability-sensitive approaches in preventing and responding to sexual abuse and violence. It aims to strengthen and clarify the respective roles and responsibilities of service providers, on the one hand, and, on the other, agencies with statutory and thus obligatory responsibilities in the delivery of age- and gender-sensitive, survivor-centred services, thereby enhancing the accountability and credibility of all of these role-players.

All government ministries and departments that are signatories to the Protocol, and civil society organisations committed to managing sexual abuse and violence, are bound by the Protocol. There are systems in place to report any organisation or service provider that fails to meet its obligations under the Protocol. Because the Protocol was developed under the auspices of the judiciary, it enjoys enhanced status and legitimacy.

Police training materials on child protection, child justice, sexual violence and trafficking for Namibia Police Training Colleges in 2017 contain a specific module on gender-sensitivity and human rights. In a general manual entitled *Human Rights Work Book*, there are units on 'Thinking about gender', 'Commitments to gender justice', 'Principles and qualities of a police officer' and 'What feeds discrimination', each with practical exercises and role-plays. This can be regarded as a good practice in infusing gender issues into the police training curriculum.

This study advocates that mainstreaming of gender-related themes and issues must be infused into the theory and practice of child-friendly justice initiatives. The position of girls should be explicitly articulated in all programming, and training programmes for role-players involved in child-friendly justice should include a specific component to foster gender-sensitivity.

6.3 Children with disabilities

Section 11 of the Children's Protection and Welfare Act 6 of 2012 of Swaziland provides that 'a child with a disability has the right to special care, medical treatment, rehabilitation, family and personal integrity, sports and recreation, education, and training to help him enjoy a full and decent life in dignity and achieve the greatest degree of self-actualisation, self-reliance and social integration possible'.

Children with disabilities can face severe problems in their contact with justice systems. Notably, children with conduct or behavioural disorders and mental health problems are routinely overrepresented in juvenile justice systems. Writing of South Africa, Boezaart and Skelton tell the following story:

A is 14 years old. He is physically small, looking more like a child of 11 or 12 years. A and his brother were placed in a children's home in May 2007 when their mother died and it became apparent that their father could not care for them. During 2009, A was referred by the children's home to a psychiatric hospital on several occasions. His diagnosis indicated that he suffers from conduct disorder, ADHD, dysthymic disorder, severe MR and abnormal EEG. He has a low IQ and is developmentally delayed. On each occasion he was stabilised, provided with medication, and then discharged back to the children's home. The children's home repeatedly complained that they were unable to care for him due to his disruptive behaviour. In October 2009, the Children's Home laid a charge of malicious damage to property against A. He was transferred to a secure care facility for child offenders, pending a referral to a psychiatric hospital to determine if he was mentally fit to stand trial in terms of sections 77 to 79 of the Criminal Procedure Act 51 of 1977. The personnel at the secure care facility were concerned about his vulnerability but also found him to be aggressive. The report from the facility indicates that they kept him sedated for most of the time that he was there. He spent a month at this facility, before being referred back to the psychiatric hospital where he had frequently been admitted on previous occasions. In April 2010, his behaviour became erratic and the police were asked to intervene. On appearing at the criminal court, he was referred to the children's court. The magistrate ordered that he be held at a Place of Safety pending the children's court investigation, but the facility refused to receive him and he had to spend a night in the police cells. He was then taken back to the psychiatric hospital.²⁸¹

The authors note this is not an isolated case and that some of the children with mental health problems and conduct disorders find themselves shunted between mental health facilities, schools of industries or children's homes. They frequently find themselves detained in police custody or prisons. Adult mental health facilities are not child-adapted and are unsuitable to deal with childhood mental health disability.

Access to justice for children with albinism in Tanzania

At the request of an NGO called Under the Same Sun, the ACERWC undertook a mission to the Great Lakes region of Tanzania to investigate the situation of children with albinism being kept in temporary holding facilities. They had been placed there for their protection due to widespread physical attacks on children like them, whose skin is sought after as a symbol of good luck or for making *muti* (traditional medicine). By the time of the visit in 2015, some had been living in the facilities for several years with no end in sight.

The delegation expressed grave concern that the frequent violations against children with albinism took place with impunity. It was told there had been only five known convictions out of 139 attacks, which included kidnappings, murders and mutilations.²⁸² The delegation was of the view that unless an effective prosecution mechanism were established, there was little possibility of improving the plight of children with albinism and preventing attacks on them from continuing in perpetuity.

Among other recommendations, the ACERWC exhorted the Government of Tanzania to ensure the victims' right to justice and redress,²⁸³ and provide medical, psychosocial and legal support to them. The ACERWC also suggested that the Government of Tanzania collaborate with neighbouring countries to combat the violations and prosecute perpetrators with a view to addressing the cross-border aspect of the violations.²⁸⁴

In addition, children with disabilities face physical constraints in accessing courts, court buildings, and related facilities (such as ablution facilities), which for the most part are not adapted to their needs. In Sierra Leone, the country study explains that children with disabilities are often considered troublesome, stubborn and wayward.²⁸⁵

Good practice

A good practice is to be found in South Africa, where recently published Draft Regulations related to Sexual Offences courts specify that the facilities referred to in these Regulations must

- a) be accessible to the guide dogs used by complainants and witnesses in sexual offences cases who are visually impaired; and
- b) accommodate assistive devices of complainants and witnesses with disabilities.²⁸⁶

Another good practice is found in Ethiopia, where a court at the Federal Supreme Court has a mandate for dealing specifically with persons with mental disabilities and is staffed with personnel with specialist knowledge in working with children in this regard.²⁸⁷

Sensitivity to children with disabilities needs to be mainstreamed more intensively into the development and implementation of child-friendly justice initiatives. Consideration of the needs of such children should be explicitly built into all programming, and training in this regard given to all role-players involved in child-friendly justice. Where facilities are built or repurposed, addressing accessibility issues for children with disabilities should be a required consideration. Measures to

enable children with disabilities to testify should pay particular heed of the challenges these children face. Children in conflict with the law who have mental health difficulties necessitate specialised responses informed by a multisectoral approach.

6.4 Children accused of witchcraft

The accusation and persecution of vulnerable persons, among them children, for alleged witchcraft is a phenomenon that has been documented increasingly in the last two decades.²⁸⁸ Whilst elderly women and persons with disabilities are frequently targeted, evidence suggests that attacks on children are on the rise. Communities see the supposed practitioners of witchcraft as dangerous and likely to harm or commit violence against others. Achieving justice for accused witches amidst the real fears felt by communities is thus not easy.

According to Karuiki, the high regard for and belief in ancestral powers, superstitions, charms, sorcery and witchcraft form a major part of dispute resolution and prevention mechanisms in traditional African societies. Among the Samburu, Turkana and Pokot communities in Kenya, for instance, traditional healers, diviners, herbalists, spiritual seers and healers are regarded with respect, fear and reverence, and play a crucial role in the ‘truth-seeking’ entailed in conflict resolution.

Conflicts arising from witchcraft are not resolved by the customary courts but viewed as private matters to be resolved by traditional healers and affected parties.²⁸⁹ Research in Malawi found increasing numbers of accounts of parents being accused of teaching their children witchcraft, with devastating consequences for the children.²⁹⁰ In the Democratic Republic of the Congo (DRC) and Nigeria, civil society reports suggest that many children have been abandoned on the grounds that they were witches.²⁹¹ Similarly, the country study of Sierra Leone points out, in the context of a discussion on the minimum age of criminal responsibility, that ‘in cases of witchcraft, children as young as 7 years of age can be brought before the traditional court for questioning and confession’.²⁹²

The ACERWC has taken account of ritual crimes, including allegations of witchcraft, directed at children in Gabon:

The Committee is concerned about “ritual crimes” that pose a danger on children’s rights to life, survival and development. Therefore, the Committee urges the State Party to take action to ensure that the children are not endangered under the guise of rituals. In this regard the Committee recommends the State Party to improve the technical and financial capacity of institutions that work for children, to closely work with community and religious leaders in raising awareness, and to bring to justice the perpetrators of the acts.²⁹³

Community education remains key to diminishing the risk faced by children who are targeted as witches and hence denied access to justice.

6.5 Birth registration and access to justice

Birth registration has an enormous impact on children’s experiences of the justice system. Precise knowledge of age is vital in the context of criminal justice, as it may affect the minimum age of criminal responsibility (and proof of attainment of that age); the age at which a child may be detained or be subject to specific forms of detention (such as imprisonment); and the age at which

special procedures, resources, and staff (for example, probation officers) are available to a person because he or she is aged below 18 years. If the police record a child's age as 18 or older, then the child loses the protection of the child justice system.

The CRC Committee in its General Comment No. 21 states:

Lack of proof of identity has a negative impact on the protection of rights for children in street situations in relation to education, health and other social services, justice, inheritance and family reunification. As a minimum, States should ensure that free, accessible, simple and expeditious birth registration is available to all children at all ages. Children in street situations should be supported proactively to obtain legal identity documents. As a temporary solution, States and local governments should allow innovative and flexible solutions, such as providing informal identity cards, linked to civil society personnel/addresses, allowing children in the meantime to gain access to basic services and protection in the justice system. Innovative solutions should be adopted to overcome the challenges faced by children in street situations, who are often highly mobile and who lack the means to keep a physical identity document safe without losing it or having it damaged or stolen.²⁹⁴

In Sierra Leone, national guidelines on age assessment have been adopted, but recent studies by DCI-Sierra Leone have shown that police and justice officials seldom know of them and that, for many children the lack of birth registration and identification documents often results in an arbitrary age assessment within the formal system.²⁹⁵

In the case of Liberia, the country study finds that

since age verification remains a major problem within the justice system, particularly due to lack of birth certificates for most of the children that come into contact with the law, the Government works with the Liberia National Police and the Ministry of Justice to introduce initiatives that can be used to estimate the ages of children without birth certificates, in accordance with international guidelines. This includes the development of a policy and/or guidelines for age verification, building upon the demobilisation of child soldiers and other relevant experiences, by the Ministry of Gender, Children and Social Protection and the Ministry of Justice.²⁹⁶

Birth registration and proof of age can also have an important bearing on child victims and witnesses, as they may be necessary to establish age in sexual offences (where a minimum age is set, below which a child is deemed unable to consent to sexual intercourse), or to determine the applicability of special evidentiary rules and procedures.

The ACERWC has adopted a General Comment (No. 2) on article 6 of the Charter, which deals, inter alia, with birth registration. At paragraph 4.6.1 (subtitled 'Justice for Children'), the General Comment underscores that birth registration is for a child

of paramount importance for his/her enjoyment of protections under recognised justice for children principles. It is the age of the child that determines whether he/she is criminally responsible or not; the birth certificate is the primary

documentary proof that a child has attained the minimum age for criminal responsibility. If found criminally responsible, proof of age still serves to ensure that the criminal process is carried out in his/her best interests with the necessary protections ... Article 17 guarantees numerous other protections such as the right to special treatment in a manner consistent with the child's dignity, the right to be separated from adults in places of detention or imprisonment; the right to a speedy trial, the right to privacy (prevention of the public and the media from trial) and the benefit of the application of sentences primarily aimed at reintegration and rehabilitation of the child.

Given the centrality of proof of age for both children in conflict with the law and child victims and witnesses, it is recommended that states in Africa intensify efforts to improve their birth registration systems, an objective which is also a key tenet of AU policy.

6.6 Children living on the streets

'Children in street situations are more likely to be targeted, criminalized and end up in the juvenile or adult justice system and less likely to benefit from diversion, alternatives to detention or restorative practices as they are unable to afford bail and may have no responsible adults to vouch for them. Police misconduct, such as harassment (including stealing children's money and possessions, rounding them up or arbitrarily moving children on, often on the orders of their superiors and/or politicians), corruption, extortion (for money or sex) and physical, psychological or sexual violence are common rights violations that States should criminalize as a matter of urgency.'²⁹⁷

Access to justice and remedies

'Children in street situations who have been victims or are survivors of human rights violations have the right to effective legal and other remedies, including legal representation. This includes access to individual complaints mechanisms, by children themselves and/or represented by adults, and to judicial and non-judicial redress mechanisms at the local and national levels, including independent human rights institutions.'²⁹⁸

Recognition of the special needs of children living on the streets is a necessary first step towards rights-based approaches. The Ministry of Welfare in the DRC recently developed a set of principles dealing with adolescents in street situations,²⁹⁹ with a focus on girls and with specific reference to HIV-related vulnerabilities. The Protocol includes practical responses to enable the government and NGOs to take protective and positive steps.

General Comment No. 21 of the CRC Committee on children in street situations³⁰⁰ contains valuable insights on access to justice for children living on the streets.³⁰¹ The welfare³⁰² and repressive approaches³⁰³ towards dealing with children living on the streets fail to take into

account the child as a rights holder and result in the forcible removal of children from the streets, which further violates their rights. The causes, prevalence and experiences of children in living on the streets differ within and between states. Inequalities based on economic status, race and gender are among the structural factors driving the exclusion of these children.³⁰⁴ More specific factors include material poverty, inadequate social protection, conflict, famine, epidemics, natural disasters, forced evictions, or events leading to displacement or forced migration. Other causes are, for instance, violence, abuse, exploitation and neglect at home or in care or educational institutions; the death of caregivers; child relinquishment (including through HIV/AIDS); exclusion from education; substance abuse; and mental ill-health of children or families.³⁰⁵

According to the General Comment, a child-rights approach emphasises full respect for the autonomy of children in street situations. It seeks to promote their resilience and capabilities, increase their agency in decision-making and empower them as socio-economic, political and cultural actors.³⁰⁶ It is also the most sustainable approach for identifying and implementing long-term solutions for children living on the streets.

In this regard, the General Comment makes a number of recommendations for improving the legislative and policy environment. Among other things, it calls for

- the immediate removal of provisions that directly or indirectly discriminate on the grounds of the street situation of children or their parents or families;
- the abolishment of any provisions allowing or supporting the round-up or arbitrary removal of children and their families from the streets or public spaces;
- the abolishment, where appropriate, of offences that criminalise and disproportionately affect children in street situations, such as begging, breach of curfews, loitering, vagrancy and running away from home; and
- the abolishment of offences that criminalise children for being victims of commercial sexual exploitation, as well as of so-called moral offences, such as sex outside of marriage.

The CRC Committee also recommends that state policies and strategies address the multiple causes of the situation, ranging from structural inequalities to family violence, including taking into account measures for immediate implementation, such as stopping round-ups or the arbitrary removal of children from public spaces.³⁰⁷

Furthermore, states are encouraged to take action to enable children living on the streets to gain access to basic services, such as health and education, and to justice, culture, sport and information. States should also ensure their child protection systems provide for specialised services on the street that involve trained social workers who have a good knowledge of local street connections and can help children reconnect with family, local community services and wider society.³⁰⁸

Children living on the streets who have been victims or are survivors of human rights violations have the right to effective legal and other remedies, including legal representation. States have an obligation to respect the dignity of these children and their right to life, survival and development by refraining from state-led violence, by decriminalising survival behaviours and status offences, and by protecting these children from harm caused by third parties.³⁰⁹

In respect of the children's right to freedom of association and peaceful assembly, state policing or other measures relating to public order against children living on the streets are permissible only where such measures are taken on the basis of the law, entail individual rather than collective assessment, comply with the principle of proportionality, and represent the least intrusive option. Such measures should not be applied on a group or collective basis.

This means that harassment, coercion, round-ups and street sweeps of children living on the streets – including in the context of major political, public or sporting events – or other interventions that restrict or interfere with their rights to association and peaceful assembly, contravene those rights.³¹⁰ Specialised training is required to build the capacity of police and security forces to deal with public order situations in a way that upholds respect for the rights of children living on the streets.

This study endorses General Comment No. 21's comprehensive proposals for improving access to justice for children living on the streets. In addition, child protection systems-strengthening initiatives should take specific account of the need of children living on the streets to access child-friendly justice in Africa.

6.7 Victims of sexual offences

Victims of sexual offences face notorious barriers in accessing justice. Chief among them is the tendency for these offences to be buried due to cultural taboos, gender discrimination and beliefs that the family has been dishonoured. Victims may also be forced to marry their attackers, or it may happen that their families accept compensation for the attack.

Justice for Liz

In late June 2013, a 16-year-old Kenyan girl called Liz was brutally gang-raped by six men and left battered and unconscious. The attack left her with serious injuries: she was confined to a wheelchair and developed an obstetric fistula. Although three of the suspects were apprehended shortly after the event, the police officer on duty did not record the attack as a case subject to criminal prosecution but rather as an 'assault'. He ordered the three suspects to cut the grass outside the police station as 'punishment' before they were released.

In October 2013, Equality Now, the Coalition on Violence Against Women (COVAW), the African Women's Development and Communication Network (FEMNET), and Avaaz launched a global campaign known as #JusticeForLiz. The campaign collected more than 1.7 million signatures from around the world demanding that Kenya's Inspector General of Police arrest and prosecute the suspects.

By September 2014, two suspects had been apprehended. Furthermore, in late August of the same year, specially trained investigators began looking into 70 additional rape cases, with several arrests following soon after. At the same time, the National Gender and Equity Commission began its own investigation to better understand the systemic

shortcomings and persistent problems that contribute to situations of this kind. The Commission held closed hearings with hundreds of survivors of sexual violence and also met to discuss the issue with magistrates, chiefs, religious officers, government officials and Kenya's children's office.

By December 2014, a third suspect was arrested and charged. The father of one of the suspects was also charged with helping his son to evade capture. In the subsequent trial, eight witnesses testified, including Liz and a medical expert.

The trial allowed for victim-sensitive measures, including testifying with an intermediary present, to help protect her dignity and minimise further trauma. Two special prosecutors nominated by civil society were present and participated in the trial as members of the prosecution team. On 13 April 2015, three of the accused were convicted of gang rape and causing grievous harm, receiving sentences of a total of 22 years each.³¹¹

In a study on the procedure of determining disputes in the local justice system of the Maasai in Kajiado town in Kenya, localised research determined that matters generally involved intra-familial and marriage-related disputes. However, the Maasai elders denied dealing with rape cases, which they said were 'big cases' requiring the intervention of law enforcement authorities.³¹²

The true incidence of sexual violence against children remains largely unknown. The 2016 Optimus National Prevalence Study, the first statistically authentic study of the incidence of violence against children in South Africa, found that one in three children experience sexual violence or physical abuse before the age of 18 years.³¹³ South Africa's 2013/14 national crime statistics show that 29 per cent (18,524) of sexual offences reported to the police were in regard to children under the age of 18 years –which equates to a shocking 51 cases a day.³¹⁴ It should not be ignored that it is not only girls who are vulnerable in this respect. The Optimus study in South Africa found, just as alarmingly, that roughly an equal number of boys as girls reported being victims of sexual abuse.

A study in Zambia noted that, there is a marked difference in how the formal and informal justice systems handle cases of child sexual abuse.³¹⁵ To begin with, as previously noted in this study,³¹⁶ sexual violence is called 'defilement' in legislation, whereas in the informal and traditional justice systems it is known as 'deflowering'. To deflower is to 'pick off the flower' of tree or plant, and though this implies taking away something valuable, the term's connotations are still far less odious than those of 'to defile', which means 'to make unclean'.

Child sexual abuse, that is to say, is characterised as less of a wrong under the informal and traditional justice systems. Whereas the formal system considers it a crime for which the perpetrator could receive a minimum of 15 years' imprisonment if found guilty, in the local court applying customary law, a perpetrator who has 'deflowered' a child will not be sent to prison, because deflowering is not a crime but a civil wrong.³¹⁷

Furthermore, in informal justice processes it is the family that is seen as having been wronged, not the child.³¹⁸ Payment of compensation to the family hence violates the child's right to an effective remedy³¹⁹ and erodes his or her right to dignity.

‘In Malawi, child victims of sexual and physical violence now receive services through over 100 victim support units within law enforcement, 300 within communities, and additional ‘one-stop’ centres established with UNICEF support. These are managed by the district branch of the Ministry of Gender, Children and Community Development, and are linked to the nearest police stations. In addition, all police structures are reportedly capable of providing victim support services, following the establishment of 101 victim support units and 400 child protection desks.’³²⁰

This study endorses the recommendations arising from the field research done under the Optimus National Prevalence study in South Africa, which are key to addressing the prevalence of sexual offences against children and the impunity of perpetrators. The recommendations are to

- enhance the reach of community awareness campaigns that highlight the prevalence of violence against children, including sexual violence, and seek to shift social norms;
- discourage informal justice systems from handling sexual assault cases;
- train all frontline personnel involved in the receiving of reports of sexual abuse and their investigation (police, health, forensic authorities, prosecutors, the judiciary);
- establish and support specialised police units to deal with sexual offences; and
- pay attention to physical safety issues in all urban design and planning projects.

Above all, to achieve child friendly justice for victims, accountability amongst stakeholders involved in investigations and follow up, prosecutions on reports received must be enforced, and the impunity of perpetrators ended.

6.8 Children in rural areas

Children in rural areas face difficulties in accessing justice due to the fact that, all too often, specialised facilities, including specialised children’s courts, are available only in urban areas (and sometimes then only in the capital city). Moreover, in criminal justice systems, children in rural areas are disadvantaged when deprived of their liberty, as they are frequently kept in facilities far away from their families and communities and are hence unable to maintain contact with them.

In Malawi, for example, there are only two facilities for children deprived of their liberty, Bvumbwe Juvenile Detention Centre, located in Blantyre in the south, of the country, and Mpembe Reformatory for boys, in Chitipa in the north. Necessarily, this means that some children accommodated in these facilities will be located far from their families.

Good practice

Malawi’s Police Victim Support Units provide an example of good practice in that they have been established in 34 areas as part of the country’s One-Stop Centres³²¹ and not limited only to major towns and centres.³²²

According to a 2011 baseline report, these centres treat an average 368 cases of sexual violence against women and children annually.³²³ A visit undertaken to the Blantyre One-Stop Centre (located in a hospital) found that it is designed appropriately for children, in line with articles 3 and 4 of the CRC and ACRWC. The centre, both in its physical ambiance and in other respects, is far more child-friendly than ordinary hospitals, and because the facility is new, it is of a high standard. Staff members were mostly qualified and enthusiastic social workers, who conduct preliminary screenings of children and give support and counselling.

Where a country's population is mainly rural in nature, the likelihood is strong that accessing formal justice systems will be a widespread challenge and that many will have recourse to these systems' informal counterparts. The National Report: Liberia highlights such a case:

[C]ustomary laws are much more widely used and/or affected by the majority of the population, particularly in the rural areas, because the traditional system is much more accessible, easily understandable, cheaper to access and the proceedings do not last for long. A 2009 study of Liberia's dual justice system by the United States Institute of Peace (USIP) found that only two per cent of criminal cases reached formal courts, 45 per cent went to traditional/customary Courts and the rest reached no forum at all.³²⁴

The present study thus recommends that the capacity of rural populations to access justice must be constantly kept in mind in rule of law interventions and programmes. The location of specialised facilities – care facilities, secure facilities for children in conflict with the law, vocational and other residential facilities for their rehabilitation and reintegration, and specialised courts for children – must be assessed bearing these accessibility issues in mind. Where children do find themselves far away from their families due to their contact with child justice and care and protection proceedings, staff must make concerted efforts to ensure that children maintain contact with their families and communities.

6.9 Refugee, migrant and asylum-seeking children

This category of children is vulnerable due to the need, in most refugee systems, for an adult caregiver who would be the principal applicant in any asylum process. There are other drivers of vulnerability for children on the move, including poverty, exploitation by people who assist them in crossing borders, exposure to sexual and other forms of violence, and lack of documentation such as birth certificates and identity documents. The special needs of refugee children are rarely taken into account by frontline officials such as immigration officers, staff at border posts, and police.

Good practice

In Zambia, a UN Joint Programme on Protecting Migrant Children from Trafficking and Exploitation (Joint Programme) was conducted from 2013 to 2015. Funded by the EU, it included various actors, among them UNICEF, the UNHCR, the International Organisation for Migration (IOM) and the Ministry of Home Affairs. The Joint Programme was established, as its name indicates, to mitigate vulnerability and increase the protection of migrant children from trafficking and exploitation. One objective was to upgrade Zambian laws in this regard; another was to build capacity among the judiciary and other frontline service providers.

The programme achieved several goals. It provided protective assistance to 170 children as well as services that included medical assistance, counselling and shelter. More than a hundred frontline officials – a term used to encompass immigration officials, police officers, social welfare officers, prison officials, health officials, other civil servants and civil society organisation personnel who have ‘first contact’ with migrants in need of protection – were trained to identify and refer vulnerable migrants in need of protection assistance.

Moreover, a trainers’ manual, a participants’ handbook, a National Referral Mechanism and the Guidelines for the Protection Assistance for Vulnerable Migrants in Zambia are all tangible and positive outcomes of this programme.³²⁵ A good practice that came to light in the research in Zambia is that children can apply for refugee status by themselves and without having to depend on assistance from, for example, a parent, relative or legal guardian.³²⁶

In Egypt, lawmakers issued Law No. 82 of 2016 as part of the fight against illegal migration and protection of unaccompanied children. Article 2 of the Law explicitly states that ‘[t]he National Council for Childhood and Motherhood shall be the legal representative of the families of unaccompanied children, whose families or legal representatives cannot be identified’. Furthermore, the law enhances the protection of unaccompanied children by imposing penalties on offenders amounting to imprisonment and a fine of no less than 500 pounds and no more than 200,000 pounds, if the illegal migrant is a child.³²⁷

A wealth of information is available on good practice in addressing the particular needs of refugee, migrant and unaccompanied children, including from well-known agencies and organisations such as UNICEF, UNHCR, International Organisation for Migration (IOM) and international NGOs (INGOs) such as the International Committee of the Red Cross, Save the Children International, and Doctors without Borders, to mention only a few. It is superfluous, then, for this report to add to the abundance of guidance that is already available, save to recommend that in addressing child protection systems-strengthening, the particular needs of this group of children should be explicitly identified and catered for.

6.10 Trafficked children

Trafficked children remain a largely invisible group of children at high risk. They are frequently treated as perpetrators and not as victims, and are vulnerable to violence, rape and other offences. While many have suffered extreme trauma, there is little accurate data on the extent of child trafficking on the continent. A 2014 Global Report by the UN indicated that it increased by five per cent between 2007 and 2010.³²⁸ Governments in Rwanda, South Africa, and Ethiopia had all reported a discernible rise in child trafficking cases.

Traditionally, West and Central African countries are hard hit by the phenomenon.³²⁹ In Africa, countries act as both a ‘source’ country for those who are trafficked and as a ‘destination’ where those who are victims of trafficking end up. Internal as well as cross-border trafficking is prevalent. Trafficking of children occurs mainly because of the market for children in the labour and sex trade. Sex trafficking includes bride trafficking, child prostitution and child pornography.³³⁰

Good practice

Many countries have now adopted trafficking-specific legislation. Zambia adopted the Anti-Human Trafficking Act 11 of 2008, which also contains one article on smuggling. This Act comprehensively domesticates the Palermo Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, providing for, inter alia, services to victims and the establishment of victim centres, sanctions for traffickers, and implementation mechanisms. Article 9(1) criminalises the smuggling of a person into or out of Zambia, participation in smuggling and consenting to smuggling, and makes the offender liable to imprisonment for 15 to 20 years. The production, provision, procurement or possession of a fraudulent or identity document with regard to smuggling can be punished with a sentence of ten to 15 years of imprisonment (article 9(3)). Likewise, South Africa adopted the Prevention and Combating of Trafficking in Persons Act 7 of 2013.

As another example of good practice, the UNODC and IOM have developed a specific manual on trafficking to be used in training police recruits at the Namibian Police College, which should go a long way to aid identification of possible trafficking victims by police.

The following ways to tackle human trafficking have been identified:

- Enhancement of social protection by a safety-net system. This system is meant to target those who are vulnerable to trafficking.
- Providing job training and creating more jobs with the hope that people can stay where they live and not have to leave their countries and cities to find jobs.
- Putting in place labour safeguards as a way of tackling trafficking in fisheries, agriculture, mining, logging and construction.
- Education and information on human trafficking, migration and child labour as part of the school education, to contribute to raising awareness about human trafficking in connection to migration.
- Improvement of the health care for vulnerable groups as well as education on HIV/AIDS and sexually transmitted diseases.
- Increasing access to justice for the poor to empower them to stand up for their rights.³³¹

This study does not engage with the many well-documented strategies to prevent and combat child trafficking. However, it recommends that in addressing child protection systems-strengthening, the particular needs of child victims of trafficking must be explicitly identified and catered for.

6.11 Orphans

Orphans may experience severe constraints in accessing the justice system, both as perpetrators and as children in need of alternative care. Orphans who come into conflict with the law face a higher likelihood of deprivation of liberty, as they lack an adult guardian into whose care they can be released. They may be less likely to receive a community-based sanction, and therefore are at greater risk of a sentence involving deprivation of liberty.

Orphans are supposedly a group of children likely to find themselves in (formal) alternative care institutions. However, research has consistently shown that many children in so-called orphanages are not orphans and in fact have living parents. Poverty alleviation strategies and social protection systems to alleviate the need for parents to relinquish their children due to poverty are the best approach to this issue. Private residential institutions accommodating orphans can pose a danger, especially where they operate without proper governmental oversight and contribute to illicit practices in inter-country adoption.

Good practice

Since 2012, Rwanda has been implementing a comprehensive National Child Care Reform strategy, putting family-based care at its heart. Thanks to the strong partnership between government and NGOs in these efforts, in the course of three years (2011-2013) more than 1,866 children left residential care and were reunified with biological or extended families, foster families or settled for independent living. The National Child Care Reform recognises and builds on traditional informal care practices, such as the *malayika mulinzi* ('guardian angel') model which entails increasing the capacity of community-based caregivers who act as community advocates in recruitment campaigns for new formal foster caregivers. This pool of caregivers is also considered to be the first emergency or short-term foster caregivers and adoptive families.³³²

Zimbabwe

'The latest National Action Plan (NAP) for Orphaned and Vulnerable Children (2016-2020) records that despite some efforts and advances made under previous NAPs, the situation of children in Zimbabwe remains serious in some areas. Explicitly identified are child protection issues (including child marriage, especially amongst girls), water, sanitation and hygiene, and child mortality. The NAP OVC identifies child protection risks as acute, noting that these range from abuse to exploitation and violence; hence one pillar identified is that OVCs are able to access justice through a child- and victim-friendly justice system.'³³³

In the context of information management systems on child protection, the absence of birth registration systems can pose a serious challenge. There are many possible ways in which information management systems can add value both for individual case management as well as system-level business processes. Establishing accurate child- or case-identification and tracking mechanisms is key. As part of this, there should also be strong focus on maintaining a system of unique client identifiers. Barriers to this (for example, the lack of a birth certificate) should be anticipated and procedures put in place to address them by providing efficient and effective solutions for children (for example, birth registration services). The accuracy of identification and case-intake information is critical if the system is to function well, and this demands careful verification and monitoring in the implementation process.³³⁴

This study recommends that National Action Plans and child protection systems-strengthening initiatives should specifically take account of the needs of orphans. Alternative care systems throughout the continent need improved governmental oversight, and the UN Guidelines on the Alternative Care of Children (2009) require robust implementation. Social protection and poverty alleviation projects should be extended, bearing in mind this vulnerable group of children.

CHAPTER VII: CONCLUSIONS AND RECOMMENDATIONS

7.1 Summary of recommendations in this report

7.1.1 Formal justice systems

An analysis of legislation and policy in Africa aimed at incorporating the general elements of child-friendly justice shows that despite significant progress, there are still some glaring deficiencies. Under-resourcing of good legislation remains endemic. In most cases, implementation of laws remains weak, and access to specialised courts and services is only sporadic.

An area for ongoing development is the establishment of trained specialised units to work with children, such as specialised reception or one-stop centres for child offenders and child victims, wherein the child enters the system with the protection and assistance of a multidisciplinary team of professionals. Specialised courts should be instituted where they do not yet exist and make concerted efforts to improve access to justice for vulnerable groups.

Legislative provisions prohibiting detention, except as a last resort and for the shortest appropriate period of time, appear to be the norm in most African states. These principles apply in relation to both pre-trial detention and sentencing. However, the practice of depriving children of their liberty unnecessarily remains widespread, and it is hoped that the forthcoming study of the UN Special Representative of the Secretary-General on deprivation of liberty of children will make a significant practical contribution in suggesting measures to reduce this phenomenon.

There is a clear need to intensify efforts to eliminate inhuman punishments, such as judicially sanctioned corporal punishment, from all child justice systems on the continent, both in law and in practice.

Training in the elements of child-friendly justice needs to be continuous and adapted to the needs of the receiving audience, be it members of the police, forensic analysts in sexual offence cases, or the judiciary. Although there have been some promising initiatives on the continent, much scope remains for curriculum development and information-sharing between countries.

A positive trend is the development and mainstreaming of alternatives to formal criminal proceedings in many countries in Africa. Some of these are entrenched in legislation, whilst others rest on police, guidelines or other mechanisms (for instance, MOUs and agreements with stakeholders such as prosecuting authorities). There are also suitably detailed evaluations and reports available on various diversion and alternative dispute resolution projects. Efforts to expand access to diversion should be supported, and suitable monitoring mechanisms should be adopted to ensure the continued effectiveness of the diversion programmes that have been developed and

institutionalised. African countries can learn from each other in this regard and build on the promising practices that already exist.

Improved access to legal representation is another area where there has been progress. However, much work and capacity-building remain to be done on this front. Extending legal representation services to children in civil and criminal cases must be mainstreamed in all rule of law programmes to ensure the continued viability of services. The vulnerability of NGO-led legal aid services to funding cuts is a risk factor which suggests that, as far as possible, governments need to take overall responsibility for the fulfilment of children's rights to legal representation, whether it is provided in-house or outsourced to suitable organisations

Another common theme that emerges from this study is the lack of specialisation in justice systems when it comes to child victims and witnesses. Often, specialised services are not available or are available only in capital cities.

Efforts to expand services to victims can draw on some of the positive examples profiled in this study, such as the Thuthuzela Centres in South Africa and similar units in Malawi. Training for police seems to be a key entry point, as they are often the first encounter the child has with the justice system. Promising models are available, and these can inform the adaption of the child justice systems to the needs of child victims and witnesses.

7.1.2 Informal justice systems

There is a paucity of credible, detailed and up-to-date research on children's experiences of informal justice systems, both in the criminal and civil dimensions. Research by Terre des Hommes in Egypt shows that some old 'truths' contradict popular conceptions, such as that children do not participate in informal justice system processes. Other myths or practices of old which are being transformed might also need to be subjected to further scrutiny, such as the patriarchal nature of informal structures and the absence of women as adjudicators.

Hampering such ethnographic research is the oral tradition of informal justice systems, the lack of records, and reliance on recall and memory, which may result in findings that are only anecdotal. Hence, creative methodologies would need to be explored in the absence of large-scale and potentially lengthy grass-roots research projects.

A further hurdle is presented by the multiplicity of informal justice systems, even within a single country. It cannot be taken for granted that processes, practices and outcomes are similar even in communities that are geographically close to each other, nor can it be assumed that the practice of informal justice is purely a rural phenomenon. Further research is needed to ensure that interventions to infuse children's rights and universal principles in these structures are appropriately devised.

As this study shows, the positive features of informal justice systems should not be underestimated. This includes their proximity to the people they serve; their speedy nature; and their avoidance of deprivation of liberty. This does not mean that harmful practices (trials by ordeal, or corporal punishment) should be overlooked, or that children's experiences of injustice (when sexual offences against them are trivialised and perpetrators escape with impunity) left unremedied.

Rather, work should continue to flag the important benefits that people themselves realise when

they prefer an informal system over the formal mechanisms instituted by the state. At the same time, these advantages should serve as a beacon to states to improve the extent, reach, and accessibility of formal systems in the service of their people.

There is need to sensitise stakeholders in informal justice systems to child-friendly justice, the basic elements of human rights, and the rule of law. Sensitisation efforts should be followed by robust monitoring and evaluation to ensure that the training brings about the desired changes at grass-roots level.

Informal justice systems play an invaluable role in rule of law programmes, and as such African governments need to include them in their programmes and their engagements with donor communities.

There should be far more concerted effort to improve the articulation between formal and informal child justice systems. Sexual offence cases – which sometimes require skilled forensic services, sensitive witness preparation, and recompense for victims – are matters that should be dealt with ideally by formal systems. At the same time, the restorative and communitarian nature of informal justice systems could mean that appropriate mechanisms to divert matters involving children to these forums would provide better outcomes and avoid (for instance) the deprivation of liberty of children for minor infringements.

These efforts should not be based on ad hoc plans at the individual level, but should form part of the national access-to-justice policy of African states. In other words, they should be deliberately formulated and driven in a participatory way.

7.1.3 Vulnerable groups

Gender-related themes and issues must be mainstreamed more strongly into the theory and practice of child-friendly justice initiatives. The position of **girls** should be explicitly articulated in all programming, and training programmes for role-players involved in child-friendly justice should include a specific component to foster gender-sensitivity.

Similarly, sensitivity to **children with disabilities** needs to be mainstreamed more intensively into the development and implementation of child-friendly justice initiatives. Consideration of the needs of such children should be explicitly built into all programming, and training in this regard given to all role-players involved in child-friendly justice. Where facilities are built or repurposed, addressing accessibility issues for children with disabilities should be a required consideration. Measures to enable children with disabilities to testify should pay particular heed of the challenges these children face. Children in conflict with the law who have mental health difficulties necessitate specialised responses informed by a multisectoral approach.

Community education is key to diminishing the risk that children who are targeted as **witches** face and to address their denial of access to justice systems.

Given the centrality of proof of age for both children in conflict with the law and child victims and witnesses, states should intensify efforts to improve **birth registration** systems, which is also a key tenet of AU policy.

Comprehensive proposals for improving access to justice for **children living on the streets** are provided in General Comment No. 21 of the CRC Committee and endorsed by this study. Additionally, child protection systems-strengthening initiatives should take specific account of the needs of street children to access child-friendly justice in Africa.

With regard to **child victims of sexual violence**, this study endorses recommendations made in the research it canvassed. The recommendations are to

- enhance the reach of community awareness campaigns that highlight the prevalence of violence against children, including sexual violence, and seek to shift social norms;
- discourage informal justice systems from handling sexual assault cases;
- train all frontline personnel involved in the receiving of reports of sexual abuse and their investigation (police, health, forensic authorities, prosecutors, the judiciary);
- establish and support specialised police units to deal with sexual offences; and
- pay attention to physical safety issues in all urban design and planning projects.

Above all, in order to achieve child-friendly justice for victims, there must be accountability among stakeholders involved in investigations, prosecutions must be effected and enforced, and the impunity of perpetrators must end.

With regard to **children living in rural areas**, the capacity of rural populations to access justice must be constantly kept in mind in rule of law interventions and programmes. The location of specialised facilities – care facilities, secure facilities for children in conflict with the law, vocational and other residential facilities for their rehabilitation and reintegration, and specialised courts for children – must be assessed bearing these accessibility issues in mind.

Where children do find themselves far away from their families due to their contact with child justice and care and protection proceedings, staff must make concerted efforts to ensure that children maintain contact with their families and communities.

There is already a wealth of information on good practices relating to **refugee, migrant and unaccompanied children**, including from well-known agencies and organisations such as UNICEF, UNHCR, IOM and INGOs like the International Committee of the Red Cross, Save the Children International, and Doctors without Borders. This study recommends that, in addition to the existing guidance, the particular needs of these children must be explicitly identified and catered for in addressing child protection systems-strengthening.

While this study does not engage with the many well-documented strategies to prevent and combat **child trafficking**, it recommends that in strengthening child protection systems the particular needs of child victims of trafficking must be explicitly identified and catered for.

National Action Plans and child protection systems strengthening initiatives must specifically take account of the needs of **orphans**. Alternative care systems throughout the continent need

improved governmental oversight, and the UN Guidelines on the Alternative Care of Children (2009) must be robustly implemented. Social protection and poverty alleviation projects should be extended, bearing in mind this vulnerable group of children.

7.2 Overall recommendations and conclusions

In conclusion, African countries have made progress since the Kampala Conference of 2011 in achieving child-friendly justice on the continent. However, this progress is piecemeal and insufficiently embedded in justice systems, with the result that it has reached too few children. Furthermore, it has left informal and religious justice systems unaccountable.

It is hoped, therefore, that this study serves as a timely clarion call to governments and all others involved in child justice in Africa to intensify their efforts, to reach out to the most vulnerable children, and to ensure the implementation of agreed universal standards for the rights and protections of our children.

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ENDNOTES

- ¹ The full scope of children’s involvement in justice systems is discussed in the course of the report.
- ² The study deals with this issue only to a limited extent.
- ³ See Chapter 6 of this study.
- ⁴ See, for example, Equal Education and Centre for Child Law (2017) Joint submission on the Draft Code of Good Administrative Conduct – GG 40450 GN 5 OF 2017 - Department of Justice and Constitutional Development.
Available at https://eelawcentre.org.za/wp-content/uploads/2017/03/eelc_ccl_paja-submission_final.pdf (accessed 17 November 2017).
- ⁵ Human Rights Council, *Access to justice for children Report of the United Nations High Commissioner for Human Rights*, A/HRC/25/35 (2013) paragraph 8.
- ⁶ General Assembly Resolution 40/33, adopted 29 November 1985.
- ⁷ General Assembly Resolution 44.25, adopted 20 November 1989.
- ⁸ See the section below on the African Charter on the Rights and Welfare of the Child.
- ⁹ At the time of writing, these are Benin, Cabo Verde, Cote d’Ivoire, Ghana, Guinea-Bissau, Madagascar, Mali, Mauritius, Morocco, Senegal and Seychelles.
- ¹⁰ C/CRC/GC10 (2007).
- ¹¹ At the time of writing. The full list of signatory states is available at the website of the ACRWC’s monitoring body, the African Committee of Experts on the Rights and Welfare of the Child (see www.acewrc.org).
- ¹² See www.acerwc.org/download/continental-study-on-armed-conflict-and-crises-on-children/.
- ¹³ See www.acerwc.org.
- ¹⁴ See www.acerwc.org.
- ¹⁵ General Assembly Resolution 45/112, adopted 14 December 1990.
- ¹⁶ General Assembly Resolution 45/113, adopted 14 December 1990.
- ¹⁷ Economic and Social Council Resolution 1997/30, adopted in 1997.
- ¹⁸ Economic and Social Council Resolution 2005/20, adopted in 2005.
- ¹⁹ National Report: Egypt (2018), p. 15.
- ²⁰ Entry into force on 3 May 2008.
- ²¹ For the list of countries that have signed and/or ratified the Convention and the Protocol, see www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html.

²² Articles 34-39 of the Convention.

²³ See www.hcch.net.

²⁴ African countries that are members of the Hague Conference are Egypt, Mauritius, Morocco and South Africa.

²⁵ Ratified by Burkina Faso, Gabon, Guinea, Lesotho, Mauritius, Morocco, Seychelles, South Africa, Tunisia, Zambia and Zimbabwe.

²⁶ Ratified by Burkina Faso, Burundi, Cape Verde, Cote D'Ivoire, Ghana, Guinea, Kenya, Lesotho, Madagascar, Mali, Mauritius, Namibia, Rwanda, Senegal, Seychelles, South Africa, Swaziland, Togo, and Zambia.

²⁷ Ratified by Lesotho and Morocco.

²⁸ Phillipe Lortie, 1st Secretary of the Hague Permanent Bureau, in a paper presented at the Miller Du Toit Cloete/ University of the Western Cape conference, March 2017.

²⁹ Welcomed by the UN General Assembly on 20 November 2009.

³⁰ General Assembly Resolution 65/229.

³¹ UN Doc A/Res/70/175 of 17 December 2015.

³² See www.achpr.org/instruments/principles-guidelines-right-fair-trial/.

³³ See www.kampalaconference.info.

³⁴ See, for example, ACERWC (2014) Concluding Observations Mozambique: '[T]he Committee recommends the State Party to make its juvenile justice system a child-friendly system by consulting the Guidelines on Action for Children in the Justice System in Africa, to expand the children courts in other provinces and to continue implementing alternative discipline measures. Diversion of children away from formal court proceedings should be introduced to ensure that detention remains an option of last resort' (para 30). See, too, the Committee's Concluding Observations in the case Gabon: 'Moreover, the Committee recommends the State Party to establish child-friendly courts across the country and to increase the working pool of psychologists and social workers in the juvenile justice system. To this effect, the Committee recommends the State Party to refer to the Guidelines on Action for Children in the Justice System in Africa' (para 47).

³⁵ Clark, T. (undated) The Guidelines on Action for Children in Justice Systems in Africa: An explanatory note. *Article 40*, 14(2), pp. 6-7.

³⁶ A/HRC/18/1.9, adopted on 23 September 2011.

³⁷ Resolution 9.

³⁸ Resolution 19 and Resolution 12.

³⁹ A/HRC/21/25 (2012), para 51.

⁴⁰ See https://www.unodc.org/documents/justice-and-prison-reform/Justice_Matters_Involving-Web_version.pdf.

⁴¹ UNODC (2013) Justice in matters involving children in conflict with the law: Model law on juvenile justice and related commentary, p. viii.

⁴² See <https://sustainabledevelopment.un.org/?menu=1300>.

⁴³ A/Res/70/1, adopted on 25 September 2015.
[Available at http://www.un.org/sustainabledevelopment/sustainable-development-goals/](http://www.un.org/sustainabledevelopment/sustainable-development-goals/) (accessed 3 November 2017).

⁴⁴ See <https://cdn.penalreform.org/wp-content/uploads/2017/05/Oral-statement-Sustainable-Development-Goals-and-criminal-justice-reform.pdf>.

⁴⁵ A/HRC/36/28.

⁴⁶ Para 5. Concluding Observations of the CRC Committee to several African countries are cited in support of some of these observations.

⁴⁷ Paras 6-7.

⁴⁸ Para 12.

⁴⁹ Para 27.

⁵⁰ Para 22.

⁵¹ Para 52.

⁵² Deprivation of liberty involves more severe restriction of motion within a narrower space than mere interference with liberty of movement: it includes police custody, remand detention, imprisonment after conviction, house arrest, administrative detention, involuntary hospitalization and institutional custody. It also includes children deprived of their liberty by private individuals or entities that are empowered or authorized by a State to exercise powers of arrest or detention'. See para 21 of the Report referred to in note 53 below.

⁵³ In March 2015, the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment released a report on children deprived of their liberty from the perspective of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment (A/HRC/28/68). After exploring the international legal framework and standards protecting children deprived of their liberty from being subjected to torture or other ill-treatment and from experiencing developmentally harmful and torturous conditions of confinement, the report notes that the unique vulnerability of children deprived of their liberty requires higher standards and broader safeguards for the prevention of torture and ill-treatment. Specific practices and conditions that require attention and modified standards include segregation, the organisation and administration of detention facilities, disciplinary sanctions, opportunities for rehabilitation, the training of specially qualified personnel, family support and visits, the availability of alternative measures, and adequate monitoring and oversight (para 17). Amongst the report's conclusions and recommendations are that the particular vulnerability of children imposes a heightened obligation of due diligence on states to take additional measures to ensure human rights to life, health, dignity and physical and mental integrity; that one of the most

important sources of ill-treatment of children in institutions is the lack of basic resources and proper government oversight; that alternatives to detention must be given priority in order to prevent torture and the ill-treatment of children; and that children should be charged, tried and sentenced within a state's system of juvenile justice, affording them adequate forms of protection, and never within adult criminal justice systems.

- ⁵⁴ Wulczyn, F., Daro, D., et al. (2010). Adapting a systems approach to child protection: Key concepts and considerations. New York: UNICEF.
Available at [https://www.unicef.org/protection/Conceptual_Clarity_Paper_Oct_2010\(4\).pdf](https://www.unicef.org/protection/Conceptual_Clarity_Paper_Oct_2010(4).pdf) (accessed 17 March 2017).
- ⁵⁵ See, for example, ACERWC (2014) Concluding Observations Mozambique: 'The Committee recommends the State Party to strengthen its child protection system along with increased attention to the training of social workers' (para 6).
- ⁵⁶ Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice, adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies. See <https://rm.coe.int/16804b2cf3>.
- ⁵⁷ ACPF, "Achieving Child Friendly Justice in Africa" 2012 16.
- ⁵⁸ Sloth-Nielsen, J. and Mushohwe, B. (forthcoming, 2018) Access to justice for children in Zimbabwe, p. 4.
- ⁵⁹ Section 61 of the Children's Act 38 of 2005.
- ⁶⁰ Emphasis added.
- ⁶¹ See also sections 7 and 9 of the South African Children's Act 38 of 2005.
- ⁶² See www.wipo.int/edocs/lexdocs/laws/en/ao/ao001en.pdf
- ⁶³ See www.acerwc.org/download/concluding_observations_south_africa/?wpdmdl=8754.
- ⁶⁴ 2008 (3) SA 232 (CC) at para 15.
- ⁶⁵ 2008 (3) SA 184 (CC) at para 55.
- ⁶⁶ Committee on the Rights of the Child: Consideration of Reports Submitted by States Parties under Article 44 of the Convention; Third periodic report of the States Parties due in 2004. Tunisia CRC/C/Tun/3 10 November 2008.
- ⁶⁷ *Mudzuru and others v Minister of Justice, Legal and Parliamentary Affairs*, CCZ 12/2015. Discussed in Sloth-Nielsen, J. and Hove, K. (2016) Some implications of the decision of the Zimbabwe Constitutional Court in Madzuru and ors v Minister of Justice Parliamentary and Legal Affairs. *African Human Rights Law Journal*, 2, pp. 554-568.
- ⁶⁸ See, for a general discussion, Sloth-Nielsen, J. (forthcoming, 2018) Southern African perspectives on banning corporal punishment: A comparison of Namibia, Botswana, South Africa and Zimbabwe. In B.J. Saunders, B. Naylor and P. Leviner (eds), *Comparative Social and Legal Developments in Dealing with Corporal Punishment of Children*. The Netherlands: Brill.

⁶⁹ 2008 (3) SA 232 (CC) para 18.

⁷⁰ Subsequent sections of this study discuss vulnerable groups and access to justice in further detail.

⁷¹ Section 5(1) and 5(2).

⁷² Sections 5 and 32(1)(h) of the Children's Act.

⁷³ Section 5(2) of the Children's Act.

⁷⁴ Sections 9(1), 15(3), 26(2)(b) and 93(1) of the Child Act.

⁷⁵ Section 7 of the Children's Act 8 of 2009 states that 'no decision or action shall be taken whose result or likelihood is to discriminate against any child on the basis of sex, family, colour, race, ethnicity, place of origin, language, religion, economic status, parents, physical or mental status, or any other status'.

⁷⁶ Section 5 of the Children's Protection and Welfare Act states: 'A child shall not be discriminated against on the grounds of gender, race, age, religion, disability, health status, custom, ethnic origin, rural or urban background, birth, socio-economic status, refugee status or other status'.

⁷⁷ The Children's Status Act 6 of 2006.

⁷⁸ The Family Law of 2004.

⁷⁹ Article 4 of Act 6 of 2012.

⁸⁰ Act 51 of 7 July 2003 supplementing Act 98-75 of 28 October 1998.

⁸¹ 2005 (1) SA 580 CC.

⁸² Section 16(1) and (2) of the Thirteenth Schedule to the Children's Act.

⁸³ As cited in National Report: Egypt (2018).

⁸⁴ National Report: Tunisia (2018), p. 15.

⁸⁵ Declaration on admissibility 02/2017.

⁸⁶ National Report: Mauritania (2018), p. 5.

⁸⁷ Personal knowledge of the chapter author as the developer of the modules on, first, the child in conflict with the law and, secondly, child protection.

⁸⁸ National Report: Liberia (2018), p. 3.

⁸⁹ Sloth-Nielsen, J. and Mwambene, L. (2013) Malawi justice for children 2013. (Unpublished report, Community Law Centre, University of the Western Cape.)

⁹⁰ Malawi Ministry of Gender, Children and Community Development, '2011 baseline report for key child protection indicators' (report and PowerPoint), cited in Sloth-Nielsen and Mwambene (2013).

⁹¹ National Report: Tunisia (2018), p. 17.

⁹² Article 95 of the Child Protection Code.

⁹³ Republic of Zimbabwe (2013) Initial Country Report to the African Committee of Experts on the Rights and Welfare of the Child, p. 33.

⁹⁴ Republic of Zimbabwe (2013) Initial Country Report to the African Committee of Experts on the Rights and Welfare of the Child, p. 33.

⁹⁵ Para 29.

⁹⁶ Section 186(a) of the Children's Act of 2001.

⁹⁷ Act 653 of 2003.

⁹⁸ Section 47 Act 75 of 2008.

⁹⁹ Section 90(a) of the Child Care, Protection and Justice Act of Malawi.

¹⁰⁰ Section 48 of the Child Rights Act of Sierra Leone.

¹⁰¹ Section 81(4) of the Child Rights Act of Sierra Leone.

¹⁰² Para 43.

¹⁰³ *Johncom Media Investments Limited v M (Media Monitoring Project as Amicus Curiae)* 2009 (4) SA 7 (CC).

¹⁰⁴ Case 238171/15 (decision of 11 July 2017 of the Gauteng North High Court).

¹⁰⁵ At the time of writing, plans were under way to appeal the decision.

¹⁰⁶ National Report: Tunisia (2018), p. 18.

¹⁰⁷ National Report: Tunisia (2018), p. 20. However, the report points out that 'in practice, it is evident that the laws are not sufficient to safeguard the confidentiality of child cases and the sanctity of the child's privacy and identity. The identity of the child, whether a suspect or a victim, is disclosed to all, not only to investigators, prosecutors, judges, social workers, child protection actors, and others who are required to be informed of the child's identity. The identity shall also be disclosed to a wide range of other individuals, mostly because child files are handled by caregivers without any guarantees of maintaining confidentiality. Thus, information contained in files leak to other parties that are not involved in the case, and become accessible to everyone and often ends up being covered by the media in detail. Such information becomes effective media material to attract more viewers and an easy way to boost advertising. This constitutes a grave violation of children's human rights, in particular the child's right to privacy' (p. 21).

¹⁰⁸ Section 60(2) and 60(3) of the Children's Act 38 of 2005.

¹⁰⁹ Section 170A of the Criminal Procedure Act 51 of 1977.

- ¹¹⁰ Section 114 of the Children's Act 38 of 2005.
- ¹¹¹ Sections 118 and 126 of the Children's Act 38 of 2005.
- ¹¹² Section 54(1)(a) and 54(2)(a) of the Criminal Law (Sexual Offences) Amendment Act of 2007. See Sloth-Nielsen, J. (2017) Chapter 18: Section 54: Obligation to report commission of sexual offences against children or persons who are mentally disabled. In B. Pithey and D. Smythe (eds), Commentary on the Sexual Offences Act. Cape Town: Juta.
- ¹¹³ See www.legalbrief.co.za.
- ¹¹⁴ Third Periodic Report to the CRC (CRC/C/TUN/3, November 2008).
- ¹¹⁵ See [www.unicef.org/evaluation/files/lesotho_2006\(2\).doc](http://www.unicef.org/evaluation/files/lesotho_2006(2).doc).
- ¹¹⁶ ACERWC (2015) Concluding Observations Namibia.
- ¹¹⁷ The commentary to the Rules provide a detailed guide to their interpretation.
- ¹¹⁸ Guidelines for Action, Guidelines 40-42.
- ¹¹⁹ Ethiopia, Malawi, Namibia, South Africa, Swaziland and Zambia.
- ¹²⁰ JDLs Rule 81.
- ¹²¹ JDLs Rule 82.
- ¹²² Guidelines for Action, Guideline 8.
- ¹²³ Guidelines on Justice for Child Victims and Witnesses of Crime, Guideline 43.
- ¹²⁴ Guidelines on Children in Alternative Care, Guideline 56.
- ¹²⁵ Section 22(b).
- ¹²⁶ Section 25(11).
- ¹²⁷ Tunisia National Report (2018), p. 16.
- ¹²⁸ Tunisia National Report (2018), p. 15.
- ¹²⁹ Sloth-Nielsen, J. and Mwambene, L. (2013) Malawi justice for children 2013. (Unpublished report, Community Law Centre, University of the Western Cape.)
- ¹³⁰ Section 89 of the Child Justice Act 75 of 2008.
- ¹³¹ Section 89(3) of the Child Justice Act 75 of 2008.
- ¹³² Section 89(6) of the Child Justice Act 75 of 2008.
- ¹³³ See www.childjustice.org.za/downloads/factsheets/one%20stop%20fact%20sheet.pdf.
- ¹³⁴ Section 89(2) of the Child Justice Act 75 of 2008.
- ¹³⁵ JDLs, Rule 17.
- ¹³⁶ JDLs, Rules 19-80.
- ¹³⁷ See further CRC Committee General Comments Nos. 22 and 23 (2018) on children affected by migration.

- ¹³⁸ For more information, see Chapter 2 of this report.
- ¹³⁹ Pinheiro, P.S. (2006) Report of the independent expert for the United Nations study on violence against children (A/61/299).
- ¹⁴⁰ UNODC and UNICEF (2007) Manual for the measurement of juvenile justice indicators. New York: United Nations.
- ¹⁴¹ Section 119(1) outlaws imprisonment for children, while section 120(1) states that where a child is convicted of an offence which if committed by an adult would have been punishable by a custodial sentence, the court may order that the child be committed to custody at an approved school.
- ¹⁴² Defence for Children International (2010) Beyond the law: Assessing the realities of juvenile justice in Sierra Leone., p. 40.
- ¹⁴³ Section 95 and 96 of the Child Care, Protection and Justice Act of Malawi.
- ¹⁴⁴ For an extended discussion, see Odala, V. (2018) Measuring the conformity of the Malawi child justice law against contemporary interpretations of international and regional instruments. LLD thesis, University of Pretoria.
- ¹⁴⁵ Article 94 of the Child Protection Code.
- ¹⁴⁶ National Report: Tunisia (2018), p. 20.
- ¹⁴⁷ National Report: Tunisia (2018), p. 17.
- ¹⁴⁸ National Report: Liberia (2018), p. 17.
- ¹⁴⁹ Section 30.
- ¹⁵⁰ Sloth-Nielsen, J. (2017) Chapter 23: Child justice. In T. Boezaart (ed) Introduction to Child Law in South Africa. Cape Town: Juta.
- ¹⁵¹ As above. The extent to which imprisonment has been replaced by a sentence to the other form of custodial sentence – in a Child and Youth Care Centre (CYCC) – is not easy to establish as the Department of Social Development which oversees CYCCs does not keep separate data on children in CYCC’s awaiting trial and those serving a sentence.
- ¹⁵² 2016 (2) SACR 540(CC).
- ¹⁵³ National Report: Egypt (2018), p. 17.
- ¹⁵⁴ National Report: Nigeria (2018), p. 33.
- ¹⁵⁵ Responses to the Mauritania Questionnaire (2018), p. 22.
- ¹⁵⁶ In a survey of eight courts (peri-urban and rural) of all cases concerning children between June and December 2017, the national report on Sierra Leone conducted for this study found as follows: corporal punishment is still applied as a sentence in rural traditional courts, representing almost 10 per cent of all sentencing decisions. It can be observed that the levying of fines and compensation or restitution represents 50 per cent of all sentencing decisions made by traditional courts. Cases involving compensation and/or restitution (27%)

mainly capture the practice of diversion: chiefs decide to divert cases when both the victim and alleged offender, or at least one of them, make a plea for an out-of-court settlement. This happens mainly when families of the parties concerned decide to resolve the matter between themselves. In such cases, the child avoids a criminal record. Referral to the police/Family Support Unit occurs almost in one-third of the cases in peri-urban communities, but only 10 per cent of the time in rural communities, which can be explained partly by the proximity (or lack thereof) of police stations in rural areas. In total, 82 per cent of the cases brought to the attention of the chiefs are settled at community level, meaning that only 18 per cent are referred to the police/Family Support Unit and therefore to the formal justice system. These figures align well with estimations of various researchers who claim that about 70 per cent of cases are being resolved at community level (National Report: Sierra Leone (2018), p. 14.)

¹⁵⁷ Guidelines for Action for Children in Criminal Justice, Guideline 15.

¹⁵⁸ General Assembly Resolution 45/110.

¹⁵⁹ Informal diversions to traditional justice processes are discussed in Chapter 5 of this study.

¹⁶⁰ Section 112 of the Child Care, Protection and Justice Act of Malawi.

¹⁶¹ Sloth-Nielsen, J. and Mwambene, L. (2013) Malawi justice for children 2013. (Unpublished report, Community Law Centre, University of the Western Cape.)

¹⁶² Sections 47-54 of the Child Rights Act of Sierra Leone.

¹⁶³ National Report: Sierra Leone (2018) p 4.

¹⁶⁴ Section 74 of the Child Rights Act of Sierra Leone.

¹⁶⁵ Section 75 of the Child Rights Act of Sierra Leone.

¹⁶⁶ National Report: Sierra Leone (2018), p. 5.

¹⁶⁷ National Report: Sierra Leone (2018), p. 5.

¹⁶⁸ Commenced in 2009. [See www.accesstojustice.org.zm/](http://www.accesstojustice.org.zm/).

¹⁶⁹ Evaluation Report on Diversion in Zimbabwe, January 2017 (copy on file with the chapter author) pp. 8-9.

¹⁷⁰ In 2016, figures were collected before the end of the year and are therefore incomplete. Nonetheless, it is highly encouraging that over the period of project implementation, 80 per cent of children in conflict with the law (n=1728 out of n=2157) were diverted.

¹⁷¹ In the sense that it can be used in the cases of adults and children.

¹⁷² Skelton, A. (2008) Restorative justice in child justice systems in Africa, pp. 134-138, and Odongo, G. (2008) The impact of international law on juvenile justice, p. 154. In J. Sloth-Nielsen (ed), *Children's Rights in Africa*, Farnham: Ashgate. See too Sloth-Nielsen, J. (2017) Chapter 23: Child justice. In T. Boezaart (ed) *Introduction to Child Law in South Africa*. Cape Town: Juta.

¹⁷³ National Report: Mauritania (2018), p. 6.

- ¹⁷⁴ National Report: Tunisia (2018), p. 31.
- ¹⁷⁵ Sections 44 and 45.
- ¹⁷⁶ UNICEF and NAMPOL (2017) Training module: the child in conflict with the law, p. 21.
- ¹⁷⁷ Section 94 of the Child Care, Protection and Justice Act 22 of 2010.
- ¹⁷⁸ National Instruction on Children in Conflict with the Law, South African Government Gazette No. 3350B, 2 September 2010.
- ¹⁷⁹ Instructions 9, 10 and 19 of the National Instruction on Sexual offences, Government Gazette No. 31330, November 2008.
- ¹⁸⁰ Annexure F to the National Instruction on Sexual offences, Government Gazette No. 31330, November 2008.
- ¹⁸¹ Section 23 of the Juvenile Justice Law of Somaliland.
- ¹⁸² Guideline B.4.
- ¹⁸³ For a fuller discussion, see Sloth-Nielsen, J. and Mushohwe, B. (forthcoming, 2018) Access to justice for Children in Zimbabwe.
- ¹⁸⁴ Skelton, A. (2009) The development of a fledgling child-rights jurisprudence in Eastern and Southern Africa. *African Human Rights Law Journal*, 9(2), p. 482.
- ¹⁸⁵ Sections 68 and 83 of the Child Protection Act of 2007.
- ¹⁸⁶ Several sections of the South African Children's Act 38 of 2005 clearly state that children have a right to take matters to court, such as applications to amend, vary or terminate parental responsibilities and rights, agreements and parenting plans in terms of sections 22 and 34, respectively.
- ¹⁸⁷ 2008 (1) SA 474 (CC) 494E-G para 56.
- ¹⁸⁸ *RM (suing thro' next friend) JK Cradle (The Children's Fund) Millie and Gao v the Attorney General Nairobi*, Civil Case 1351 of 2002.
- ¹⁸⁹ *Loveness Mudzuru & Ruvimbo Tsopodzi vs Minister of Justice, Legal & Parliamentary Affairs N.O; Minister of Women's Affairs, Gender & Community Development & Attorney General of Zimbabwe*, Case CCZ 12/2015.
- ¹⁹⁰ 2009 (2) SA 262 (D).
- ¹⁹¹ See www.lrfzim.com/legal-services/. Cited in Sloth-Nielsen, J. and Mushohwe, B. (forthcoming, 2018) Access to justice for Children in Zimbabwe.
- ¹⁹² ACPF, Report of the Documentation of the Children's Legal Protection Centre in Ethiopia, (2018), p. 21.
- ¹⁹³ National Report: Sierra Leone (2018), p. 7.
- ¹⁹⁴ Permanent Bureau of the Hague Conference, Guide to Good Practice No. 1 of the Hague Convention on the Civil Aspects of International Child Abduction.

- ¹⁹⁵ For a discussion of permanency planning, see Gallinetti, J. and Loffel, J. (2010) Foster care. In C.J. Davel and A. Skelton (eds), *Commentary on the Child Care Act*, ss. 12-25 to 12-27.
- ¹⁹⁶ Section 66 of the Child Justice Act 75 of 2008.
- ¹⁹⁷ Section 99(1) of the Children's Act of Uganda.
- ¹⁹⁸ C/CRC/GC/12 (2009).
- ¹⁹⁹ Section 13 of the Children's Protection and Welfare Act of Lesotho.
- ²⁰⁰ Section 205(3) and (4)(c). The Child Care, Protection and Justice Act 22 of 2010 of Malawi contains the following similar provision: '8(4) Child custody application: In addition to the matters under subsection (3), a child justice court shall consider (a) The views of the child ...
- ²⁰¹ See too section 233 of the South African Children's Act, which states: 'A child may be adopted only if consent for the adoption has been given by (c) the child, if the child is (i) 10 years of age or older; or (ii) under the age of 10 years, but is of an age, maturity and stage of development to understand the implications of such consent.'
- ²⁰² Article 81(2) of the Sierra Leone Child Law.
- ²⁰³ In terms of section 101 of the Uganda Children's Act, the words 'conviction' and 'sentence' shall not be used in reference to a child appearing before a family court, and instead the words 'proof of an offence against a child' and 'order' shall be substituted for 'conviction' and 'sentence', respectively. A similar provision appears in section 189 of the Children's Act of Kenya.
- ²⁰⁴ See, for a discussion, Sloth-Nielsen, J. (forthcoming, 2018) Southern African perspectives on banning corporal punishment: A comparison of Namibia, Botswana, South Africa and Zimbabwe. In B.J. Saunders, B. Naylor and P. Leviner (eds), *Comparative Social and Legal Developments in Dealing with Corporal Punishment of Children*. The Netherlands: Brill.
- ²⁰⁵ 1995 (3) SA 632 (CC).
- ²⁰⁶ Para 45.
- ²⁰⁷ Para 47.
- ²⁰⁸ See Sloth-Nielsen, J. (2017) Chapter 23: Child justice. In T. Boezaart (ed) *Introduction to Child Law in South Africa*. Cape Town: Juta.
- ²⁰⁹ National Report: Egypt (2018), p. 27.
- ²¹⁰ National Report: Liberia (2018), p. 9.
- ²¹¹ National Report: Tunisia (2018), p. 25.
- ²¹² Sone, P. (2016) Relevance of traditional methods of conflict resolution in the justice systems in Africa'. *African Insight*, 46(3), p. 52 (hereafter, Sone).

- ²¹³ Danish Institute for Human Rights and Ayiera, E. (2013) Justice be our shield and our defender: Local Justice mechanisms and fair trial rights in Kenya, p. 8. *Matters of Concern* working paper series. Copenhagen: Danish Institute for Human Rights (hereafter DIHR 2013).
- ²¹⁴ Campistol, C., Hope, K., Colliou, Y. and Aebi, M.F. (2017) Customary justice for children in Egypt: An overview of the situation in the Governorate of Assyt. *Restorative Justice*. 5(1), pp. 29-52 (hereafter Campistol et al.).
- ²¹⁵ DIHR 2013, p. 34.
- ²¹⁶ Office of the High Commissioner for Human Rights (2016) Human rights and traditional justice systems in Africa. New York and Geneva: United Nations (hereafter OHCR 2016).
- ²¹⁷ UN Women, UNICEF and UNDP (2012) Informal Justice systems: Charting a course for human rights-based engagement. New York: United Nations (hereafter UN Women).
- ²¹⁸ Karuiki, F. (2017) African traditional justice systems, p. 2.
Available at <http://www.kmco.co.ke/index.php/publications/192-african-traditional-justice-systems> (accessed 12 November 2017; hereafter Karuiki).
- ²¹⁹ Karuiki, p. 2.
- ²²⁰ DIHR 2013, p. 39.
- ²²¹ In a survey conducted for this study in Sierra Leone, the following results were reported: 'Findings reveal significant variations between rural and peri-urban communities. First, while the majority (68%) of people in rural communities preferred to first take the case to their traditional leaders (Chiefs), this is only true for 18.7% of people in peri-urban communities. On the contrary, peri-urban communities seem more inclined to first report cases to either the SLP/FSU (35%) or paralegals and justice centres (27.5%). Rural communities therefore rely much more on the traditional justice system, which can partially be explained by the following factors: trust, proximity, availability, costs and response' (National Report: Sierra Leone (2018), p. 11).
- ²²² The National Report: Liberia (2018) records that there are not enough WACPS (specialised police units set up in 2005 to deal with crimes against women and children) and that their coverage is still very limited in the country, meaning they are not easily accessible by the majority of the population, particularly in rural areas. As a result, Chiefs who lack the requisite legal knowledge to handle such criminal cases are still adjudicating the majority of the cases that would fall within the jurisdiction of WACPS (p. 4).
- ²²³ National Report: Ethiopia (2018).
- ²²⁴ Danish International Development Agency (Danida) (2010) How to note: Informal justice systems, pp. 2-3. Ministry of Foreign Affairs of Denmark.
Available at <http://www.danidadevforum.um.dk> (accessed 10 April 2018).
- ²²⁵ OHCR 2016.

²²⁶ OHCR 2016.

²²⁷ National Report: Liberia Report (2018), p. 10.

²²⁸ Karuiki, p. 4.

²²⁹ Karuiki, p. 5.

²³⁰ Karuiki, p. 3.

²³¹ Karuiki, p. 7. The UN Declaration on the Rights of Indigenous Peoples (UNDRIP) (General Assembly Resolution 61/295, UN. Doc. A/61/295(2007)) recognises the rights of indigenous peoples and requires these rights to be determined in accordance with their own indigenous decision-making institutions and customary laws.

²³² Ubink, J. (2011) Stating the customary: An innovative approach to the legally legitimate recoding of customary law in Namibia. In J. Ubink and T. MacInerney (eds), *Customary Justice: Perspectives on Legal Empowerment*. Rome: International Law Development Association.

²³³ Campistol et al., p. 6.

²³⁴ Campistol et al., pp. 48-49.

²³⁵ OHCR 2016, p. 29.

²³⁶ Sone, p. 55.

²³⁷ Sone, p. 55.

²³⁸ Sone, p. 55.

²³⁹ Sone, p. 55.

²⁴⁰ 'The vast majority of penalties issued by the customary justice system in Egypt are financial. They consist of an economic compensation for the harm done. For example, a stitch on the head is valued at 500 Egyptian Pounds (EGP), a multiple fracture is valued at 25,000 EGP. In murder cases, arbitrators involved in this research stated that Islamic thought and traditions are the main source for establishing the amount of compensation, known as *diyyah* in Arabic' (Campistol et al., p. 7).

²⁴¹ National Report: Sierra Leone (2018), p. 8. The report records further that '[m]eanwhile, the government, NGOs and other actors [...] have played a key role in training traditional authorities on children's rights, principles and best practices, including criminal proceedings involving children. Although this does not make them fully competent to handle cases involving children, it reduces the chances of injustice and further harm and human rights violations. In communities where CWCs exist and are functional, training has paved the way for effective advocacy and boosted the integration and application of child rights principles by traditional justice actors when dealing with cases involving children. The presence of CWCs and NGO child protection programmes has helped the promotion of child-friendly measures and accountability within the traditional justice system. However, in the absence of CWCs and/or NGOs in many communities, the reality can be very different' (p. 10).

²⁴² The Dakar Declaration on the Right to a Fair Trial in Africa, adopted by the African Commission on Human and Peoples' Rights in 1999, addressed this question: 'Traditional courts are not exempt from the provisions of the African Charter relating to fair trial' (para 4). The Human Rights Committee's General Comment No. 32 (2007) provides that article 14 dealing with fair trial rights is applicable only when a state has made customary courts part of its system of the administration of justice (OHCR 2016, p. 52).

²⁴³ 'Any unequal bargaining power of the parties may also undermine the process in less conspicuous ways. Distinctions along the lines of family, wealth or gender may play a greater role ...' (OHCR 2016, p. 56).

²⁴⁴ See www.allafrica.com/stories/201604040747.html. Trial by ordeal has been defined as 'a primitive method of determining a person's guilt or innocence by subjecting the accused person to dangerous or painful tests believed to be under divine control'. One method involves requiring the suspect to imbibe a poisonous substance called 'sassywood' – a lethal potion made from the bark of a tree which many Liberians believe holds mystical powers. The brew is widely used in cases involving suspected witches and accusations of theft, adultery and murder: those who vomited it up and survived were deemed innocent. Other forms of trial by ordeal included burning the skin with a hot cutlass or dunking the hand in boiling oil. Although it has been formally outlawed for more than a century, instances of trial by ordeal continue to be reported.

²⁴⁵ Campistol et al., p. 8.

²⁴⁶ OHCR 2016, p. 37.

²⁴⁷ DIHR 2013.

²⁴⁸ DIHR 2013, p. 45.

²⁴⁹ Campistol et al. at p. 17 record that the views of lawyers were sought in a measurable percentage of cases in their sample; however, they do not indicate whether the lawyers were involved as legal representatives (or as advisors to the arbitrators).

²⁵⁰ See UN Women, p. 129. However, the research in Egypt discussed below found that arbitrators indicated that they took into account the point of view of the children in practically all the cases in which children participated, which goes against previous research (Campistol et al., p. 16).

²⁵¹ UN Women, p. 129.

²⁵² UN Women, p. 14.

²⁵³ Harper, E. (2011) Customary justice: From programme design to impact. In J. Ubink and T. MacInerney (eds), *Customary Justice: Perspectives on Legal Empowerment*, p. 23.

²⁵⁴ Personal interview, Angela Mutema, legal practitioner and Lecturer, Kenya and LLD student on informal justice systems in Kenya, University of the Western Cape (interview 7 November 2017).

²⁵⁵ OHCR 2016, p. 75.

- ²⁵⁶ OHCR 2016, p. 75.
- ²⁵⁷ Matakala, L. (2012) The legal and practical challenges of addressing the case of child sexual abuse through Zambia's informal and traditional justice system. Copenhagen: Danish Institute for Human Rights (hereafter Matakala).
- ²⁵⁸ Ifunya, A.D. (2013) The challenges to children's rights in the mtaa mediation system, Tanzania: A case study of kombo mtaa mediation committee, Ilala municipality, Dar es Salaam region, Tanzania. Copenhagen: Danish Institute for Human Rights.
- ²⁵⁹ Sone, p. 54.
- ²⁶⁰ Section 18(2) provides that (2) the provisions of subsection (1)(a) shall not (a) affect the jurisdiction of a Kadhi's Court as set out in section 6 of the Kadhi's Courts Act, No. 3 of 1985 to determine questions of Muslim law relating to (i) personal status; (ii) marriage; (iii) divorce and maintenance; or (iv) inheritance proceedings, involving children of parents subscribing to the Islamic religion.
- ²⁶¹ Nwauche, E. (2008) Law, religion and human rights in Nigeria. *African Human Rights Law Journal*, 8(2), p. 568.
- ²⁶² Al-Fiqh Al-Malikiyya Adiccatu u, Mu'assat al-ma'arif, Beirut, (2009), Vol. 7 Ps.109-100 cited by DRs. Maryam Dikko & Muhammad Muntaqa Mahboub in their paper 'The Nature and Scope of the Testimony of Children in Judicial Proceedings under Islamic Law at the 18th Annual Judges Conference themed 'Role of Sharia/Area Courts in the Administration of Justice in Cases Involving Children' NJI in collaboration with ABU.) Source: Nigeria Report (2018) p16.
- ²⁶³ UN Women, p. 130.
- ²⁶⁴ UN Women, p. 130.
- ²⁶⁵ UN Women, p. 132.
- ²⁶⁶ UN Women, p. 139.
- ²⁶⁷ UN Women, p. 139.
- ²⁶⁸ Personal interview, Kristen Hope (interview 1 December 2017).
- ²⁶⁹ Danish International Development Agency (Danida) (2010) How to note: Informal justice systems. Ministry of Foreign Affairs of Denmark. Available at <http://www.danidadevforum.um.dk> (accessed 10 April 2018).
- ²⁷⁰ Office of the Special Representative of the United Nations Secretary-General on Violence against Children (2015) Safeguarding the rights of girls in the criminal justice system: Preventing violence, stigmatization and deprivation of liberty, p. 4. (hereafter Special Representative).
- ²⁷¹ Special Representative, p. 5.
- ²⁷² Rule 65.
- ²⁷³ Rule 36.
- ²⁷⁴ Rule 37.

²⁷⁵ Special Representative, p. 36.

²⁷⁶ Special Representative, p. 29.

²⁷⁷ Paras 43(a) and 43(b).

²⁷⁸ Special Representative, p. 36.

²⁷⁹ PRI, Ministry of Justice, Legal and Parliamentary Affairs and UNICEF evaluation report on the Pre-Trial Diversion Pilot in Zimbabwe (January 2017) (copy on file with the author; the author is indebted to UNICEF Zimbabwe for providing access to this report).

²⁸⁰ For both boys and girls, theft and assault were the most common offences committed. However, only a handful of girls committed violent, or what could be termed more 'serious offences', such as robbery and unlawful entry with theft. Furthermore, most of the 15 cases of 'public fighting' by girls were cases where there had been a fight at school. It is unknown if the cases of boys being arrested for public fighting were under the same circumstances.

²⁸¹ Boezaart, T. and Skelton, A. (2011) From pillar to post: Legal solutions for children with debilitating conduct disorder. In Ilze Grobbelaar-du Plessis and Tobias van Reenen (eds), *Aspects of Disability Law in Africa*. Pretoria: Pretoria University Law Press.

²⁸² ACERWC (2016) Report on investigative mission on the situation of children with albinism in temporary holding shelters – Tanzania.
Available at <http://globaldisability.org/wp-content/uploads/2016/01/Report-on-the-Investigative-Mission-on-the-Situation-of-Children-with-Albinism-ACERWC-March-2016.pdf> (accessed 10 April 2018).

²⁸³ Recommendation 11. 6.

²⁸⁴ Recommendation 111.1

²⁸⁵ National Report: Sierra Leone (2018), p. 15.

²⁸⁶ Regulation 3(7).

²⁸⁷ National Report: Ethiopia (2018).

²⁸⁸ OHCR 2016, p. 64. See too Ashforth, A. (2015) Witchcraft, justice, and human rights in Africa: Cases from Malawi. *African Studies Review*. 58(1), pp. 5-38.

²⁸⁹ See Karuiki (2017).

²⁹⁰ In 2013 in a study of access to justice for children in Malawi, the author encountered a boy who appeared to be about 6 or 7 years old being kept in a secure care facility, on the basis that he had been accused of being a witch and had come into the child protection system for his own safety. There did not seem to be a long-term prognosis for his reintegration into the community.

²⁹¹ OHCR 2016, p. 66.

²⁹² National Report: Sierra Leone (2018), p. 12.

²⁹³ ACERWC (2015) Concluding Observations Gabon, para 19.

²⁹⁴ CRC Committee (2017) General Comment No. 21 on children in street situations, para 41.

²⁹⁵ National Report: Sierra Leone (2018), p. 11.

²⁹⁶ National Report: Liberia (2018), p. 11.

²⁹⁷ CRC Committee (2017) General Comment No. 21 on children in street situations (2017), para 60.

²⁹⁸ CRC Committee (2017) General Comment No. 21 on children in street situations, para 22.

²⁹⁹ See www.ovcsupport.org/wp-content/uploads/2017/11/ProtNat-FINALE-Pour-Web.pdf.

³⁰⁰ CRC/C/GC/21 (June 2017).

³⁰¹ Para 4 delineates the definitional issue: '[T]he terms used to describe children in street situations have included "street children", "children on the street", "children of the street", "runaway children", "throwaway children", "children living and/or working on the street", "homeless children" and "street-connected children". In this General Comment, the term "children in street situations" is used to comprise: (a) children who depend on the streets to live and/or work, whether alone, with peers or with family; and (b) a wider population of children who have formed strong connections with public spaces and for whom the street plays a vital role in their everyday lives and identities. This wider population includes children who periodically, but not always, live and/or work on the streets and children who do not live or work on the streets but who regularly accompany their peers, siblings or family in the streets.'

³⁰² In the 'welfare' approach, the child is perceived as being 'in need of rescue'.

³⁰³ The 'repressive' approach involves '[f]orcible removal and harsh responses from (mainly) criminal justice agencies'.

³⁰⁴ General Comment, para 8.

³⁰⁵ General Comment, para 8.

³⁰⁶ General Comment, para 12.

³⁰⁷ General Comment, para 16.

³⁰⁸ General Comment, para 19.

³⁰⁹ General Comment, para 32.

³¹⁰ General Comment, para 39.

³¹¹ Special Representative, p. 33.

³¹² DIHR 2013, p. 31.

³¹³ Artz, L., Burton, P., Ward, C.L., Leoschut, L., Phyfer, J., Kassanje, R., & Le Mottee, C. (2016).) Optimus Study South Africa: Technical report. Sexual victimisation of children in South Africa. Final report of the Optimus Foundation Study: South Africa. Zurich: UBS Optimus Foundation.

³¹⁴ Children's Institute (2017) Out of harm's way: Tracking child abuse cases through the child protection system in five selected sites in South Africa, p. 8.

³¹⁵ Matakala.

- ³¹⁶ See section 5.4 Human rights principles and informal justice systems.
- ³¹⁷ Matakala.
- ³¹⁸ Matakala, p. 15.
- ³¹⁹ Matakala, p. 35.
- ³²⁰ Kids Rights (2015) The silent majority: Justice for child victims of violence, with a focus on Liberia. Available at <https://kidsrights.org> (accessed 10 April 2018), p. 10.
- ³²¹ At these centres, different duty-bearers operate under one roof, providing integrated services specifically designed for children who are victims of sexual and physical abuse. The centres ensure that victims of crime are treated in a manner that promotes their sense of dignity and worth. There are currently four One -Stop Centres established, in Mzuzu, Lilongwe, Zomba and Blantyre.
- ³²² Sloth-Nielsen, J. and Mwambene, L. (2013) Malawi justice for children 2013, p. 13.
- ³²³ Sloth-Nielsen, J. and Mwambene, L. (2013) Malawi justice for children 2013, p. 13.
- ³²⁴ National Report: Liberia (2018), p. 14.
- ³²⁵ Sloth-Nielsen, J. and Steyn, J. (2015) The protection of unaccompanied migrant children in Zambia: Current challenges, strengths and opportunities. Report to the Leiden University Fund/Schim van der Loeff Fonds.
- ³²⁶ Sloth-Nielsen, J. and Steyn, J. (2015) The protection of unaccompanied migrant children in Zambia: Current challenges, strengths and opportunities. Report to the Leiden University Fund/Schim van der Loeff Fonds.
- ³²⁷ National Report: Egypt (2018) p14.
- ³²⁸ See <https://developafrica.org/blog/child-trafficking-africa> (accessed 15 November 2017) citing United Nations Office on Drugs and Crime (2014, November 24).
- ³²⁹ Including Benin, Burkina Faso, Cameroon, Côte d'Ivoire, Gabon, Mali, Nigeria and Togo. See UNICEF (2002) Child trafficking in West Africa: Policy responses. *Innocenti Insight*. Florence: Innocenti Research Centre.
- ³³⁰ (accessed 2 December 2017). See www.untoldstoriesonline.com/human-trafficking-in-sub-saharan-africa.
- ³³¹ See www.untoldstoriesonline.com/human-trafficking-in-sub-saharan-africa.
- ³³² Better Care Network (2014) Rwanda care profile (draft report). (Copy on file with chapter author.)
- ³³³ Sloth-Nielsen, J. and Mushohwe, B. (forthcoming, 2018) Access to justice for Children in Zimbabwe.
- ³³⁴ Kang, K.T. and UNICEF Zimbabwe (2017) Implementing and improving: A national case management system for child protection in Zimbabwe. Harare: UNICEF. Available at https://www.unicef.org/zimbabwe/CPF_Case_Management_Reflections.pdf (accessed 10 April 2018).



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