

The protection of children's rights under international law from a Namibian perspective

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I dedicate this article to all the children under the Namibian sun and stars and in particular to my lovely children Franziska Freyja Nicolette and Sophia Emma Antoinette Mandisa

Introduction

International provisions relating to the protection of children's rights exist within various legal systems. For the purpose of this chapter, these legal systems are subdivided into three levels, namely global, regional and sub-regional. Before turning to the protection of children's rights within these levels, however, the paper briefly introduces the application of international law in Namibia.

The focus within the protection of children's rights on a global level will be on the legal framework of the United Nations (UN). Being a member of the UN since 1990, Namibia is party to many UN Conventions and has shown a strong commitment towards the protection of children's rights. Although the UN legal framework offers broad protection of children's rights, legal instruments by other global institutions also play a key role in the field of children's rights in Namibia, and will therefore be outlined accordingly.

Besides the global level, children's rights are also laid down on the regional and sub-regional level. In this context, the systems to be discussed from a Namibian perspective are those of the African Union (AU) and the Southern African Development Community (SADC).

The application of international law in Namibia

There is no task more important than building a world in which all of our children can grow up to realize their full potential, in health, peace and dignity.¹

International law has developed rapidly over the past few decades, especially since the dawn of the UN, when rules and norms regulating activities carried on outside the legal boundaries of nations were developed. Numerous international agreements – bilateral, regional or multilateral in nature – have been concluded and international customary rules, as evidence of a general practice accepted as law, have been established. But how

1 Annan (2001).

do these sources of international law apply domestically? In this regard, two approaches can generally be followed.² The first, the monist approach, assumes that international laws are automatically incorporated into domestic law; the second, the dualist approach, follows the rule that international laws are not automatically incorporated into domestic law and are said to require an act of legal transformation into domestic law.

In Namibia, Article 144 of its Constitution explicitly incorporates international law and makes it part of the law of the land. Thus, public international law is part of the law of Namibia: it needs no transformation or subsequent legislative act to become so.³ However, as the Constitution is the supreme law of Namibia, international law has to be in conformity with the provisions of the Constitution in order to apply domestically. Where a treaty provision or other rule of international law is inconsistent with the Namibian Constitution, the latter will prevail.⁴

Article 144 also mentions two sources of international law that apply in Namibia: general rules of public international law, and international agreements binding upon Namibia. General rules of public international law include rules of customary international law supported and accepted by a representatively large number of states. The notion of *international agreement* primarily refers to *treaty* in the traditional sense, i.e. international agreements concluded between states in written form and governed by international law,⁵ but it also includes conventions, protocols, covenants, charters, statutes, acts, declarations, concords, exchanges of notes, agreed minutes, memoranda of understanding, and agreements.⁶ Notably, not only agreements between states, but also those with the participation of other subjects of international law, e.g. international organisations, are covered by the term *international agreement*. In general, international agreements are binding upon states if the consent to be party to a treaty is expressed by signature followed by ratification; or by accession, where the state is not a signatory to a treaty; or by declaration of succession to a treaty which was concluded before such a state existed as a subject of international law.

A treaty will be binding upon Namibia in terms of Article 144 of its Constitution if the relevant international and constitutional requirements have been met. A treaty must have entered into force in terms of the law of treaties, and the Namibian constitutional requirements must have been met for such treaty to be binding on Namibia. International agreements, therefore, will become Namibian law from when they come into force for Namibia.⁷ The conclusion of or accession to an international agreement is governed

2 Cf. Dugard (2005:47f.).

3 Erasmus (1991:94).

4 (ibid.).

5 Definition in Article 1 of the Vienna Convention on the Law of Treaties of 1969, which entered into force in 1980.

6 Cf. the definition of *treaty* proposed by the International Law Commission; Article 2(a) of the Draft Articles on the Law of Treaties, with commentary, available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf; last accessed 12 October 2009.

7 Erasmus (1991:102f).

by Articles 32(3)(e), 40(i) and 63(2)(e) of the Namibian Constitution. The Executive is responsible for conducting Namibia's international affairs, including entry into international agreements. The President, assisted by the Cabinet, is empowered to negotiate and sign international agreements, and to delegate such power. It is required by the Constitution that the National Assembly agree to the ratification of or accession to an international agreement. However, the Constitution does not require the promulgation of an international agreement in order for it to become part of the law of the land.⁸

The global level

Children's rights within the UN

One basic human rights principle laid down in the Universal Declaration of Human Rights is that all human beings are born free and equal in dignity and rights.⁹ However, specifically vulnerable groups such as women, indigenous people, and children have been assigned special protection by the UN legal framework.

The protection of children's rights under international treaty law can be traced back to the first Declaration of the Rights of the Child adopted by the League of Nations in 1924, which was a brief document containing only five principles by which member were invited to be guided in the work of child welfare.¹⁰ An extended version of this text was adopted by the General Assembly in 1948, which was followed by a revised version adopted by the General Assembly in 1959 as the UN Declaration on the Rights of the Child.¹¹ In 1978, however, a proposal for a new convention on children's rights was made by Poland,¹² which had consistently raised issues with regard to children's rights being binding.¹³ Poland's draft, with minor amendments, served as the basis for the 1989 Convention on the Rights of the Child (CRC). The reasons for an international change of heart towards the protection of children's rights were manifold,¹⁴ but all signatories fundamentally recognised that the 1959 Declaration on the Rights of the Child no longer reflected the needs of many of the world's children.¹⁵

Although legal instruments were developed that targeted the protection of children in particular, it has to be emphasised that basic human rights instruments already recognise these rights. The so-called International Bill of Human Rights,¹⁶ for example, contains a

8 Hinz & Ruppel (2008:8ff).

9 Article I, Universal Declaration of Human Rights.

10 Fortin (2005:35).

11 For further details on the 1959 Declaration and its ten principles see Fortin (2005:35).

12 Poland submitted a draft resolution to be recommended for adoption by the UN Economic and Social Council. The resolution contained a draft text for the Convention on the Rights of the Child. Cf. Detrick (1999:14f.).

13 Cf. Van Bueren (1998:13).

14 Van Bueren lists seven principal reasons; see Van Bueren (1998:13f.).

15 (ibid.).

16 Three documents – the Universal Declaration of Human Rights, the International Covenant on

broad bundle of human rights also applicable to children, and many of its principles are reflected and substantiated in children-specific legislation. Children enjoy protection by way of general human rights provisions, and their relevance should not be underestimated. The Universal Declaration of Human Rights, as the most prominent and fundamental UN human rights document, provides in its Article 25 that childhood is entitled to special care and assistance. Furthermore, the UN International Covenant on Civil and Political Rights, a legally binding document which came into force in 1978, contains provisions specifically referring to children.¹⁷ The Human Rights Committee has emphasised that –¹⁸

... the rights provided for in Article 24 are not the only ones that the Convention recognizes for children and that, as individuals, children benefit from all of the civil rights enunciated in the Covenant.

The International Covenant on Economic, Social and Cultural Rights contains several child-specific provisions,¹⁹ with a focus on the right to education and protection from economic and social exploitation. Moreover, the Convention on the Elimination of All Forms of Discrimination against Women also contains child-protective provisions. For example, it encourages States Parties to specify a minimum age for marriage,²⁰ and it emphasises that the interests of children are paramount.²¹ Another important legal document also applicable to children is the Convention on the Rights of Persons with Disabilities, which establishes the principle of respect for the evolving capacities of children with disabilities. The same applies to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Committee established under the latter Convention has already expressed its concern about the general vulnerability of abandoned children who are at risk of torture and other cruel, inhuman or degrading treatment or punishment, especially children used as combatants.²² After all, it can be stated that children's rights are covered by a multitude of general human rights provisions. However, due to the physical and mental immaturity or dependent status of

Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights – are recognised as covering the core of universal human rights and are collectively labelled the *International Bill of Human Rights*.

17 Articles 14(1), 23(4) and 24.

18 Human Rights Committee (1989:para 2).

19 Articles 10(3) and 13.

20 Article 16(2).

21 Articles 5(b) and 16(1)(g).

22 In this context, the Committee referred specifically to children used as combatants by the armed groups operating on the territory of the Democratic Republic of Congo and urged the State Party to adopt and implement emergency legislative and administrative measures to protect children, especially abandoned children, from sexual violence and to facilitate their rehabilitation and reintegration. The Committee further recommended that the State Party take all possible steps to demobilise child soldiers and facilitate their rehabilitation and reintegration into society. Cf. Committee against Torture (2005).

children,²³ the legal instruments to be discussed in the next few paragraphs have been adopted to more specifically enhance children's rights.

The systems of the UN encompass four legally binding instruments tailored to protect children's rights, namely –

- the Convention on the Rights of the Child (CRC)
- the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (CRC–OPSC)
- the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (CRC–OPAC), and
- the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime.

The following paragraphs will outline these legal instruments, before turning to some international soft law documents addressing issues of juvenile justice in particular.²⁴

Convention on the Rights of the Child

The most prominent UN manifestation to advance children's rights is the CRC. The Convention was adopted by Resolution 44/252 of 20 November 1989 at the Forty-fourth Session of the UN General Assembly, and entered into force on 2 September 1990, in accordance with Article 49(1) of the CRC. To date, the Convention has 193 parties.²⁵ Namibia ratified the CRC on 30 September 1990.

The CRC, which consists of 54 Articles, incorporates the full range of human rights – civil, cultural, economic, political and social – and creates the international foundation for the protection and promotion of human rights and fundamental freedoms of all persons under the age of 18.²⁶ The Convention represents widespread recognition that children should be fully prepared to live an individual life in society, and brought up in the spirit of peace, dignity, tolerance, freedom, equality and solidarity.

Although the Articles of the CRC are interrelated and should be considered together, the Committee on the Rights of the Child has accorded four provisions contained in the

23 Cf. Brett (2009:227).

24 For a detailed discussion of the juvenile justice system in Namibia, see the contribution by Stefan Schulz elsewhere in this volume.

25 As of October 2009, the Convention had not been ratified by Somalia or the United States; see http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en; last accessed 27 October 2009.

26 The definition of *child* as being a person under the age of 18 is contained in Article 1 of the CRC. However, this principle may be inapplicable where, under the law applicable to the child, majority is attained earlier.

Convention, namely Articles 2, 3, 6 and 12, the status of general principles.²⁷ The CRC is, therefore, founded on the following principles, which build the foundation for all children's rights:

- **The right to equality:** No child may be discriminated against on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
- **The best interest of the child²⁸** has to prevail: Whenever decisions are being taken which may have an impact on children, the best interest of the child has to be taken into account at all stages. This applies to the family as well as to state action.
- **The right to life and development:** Every Member State has to ensure, to the maximum extent possible, the survival and development of the child by, inter alia, providing access to health care and education, and by protecting the child from economic and social exploitation.
- **Respect for children's own views:** Children should be respected and taken seriously, and they should be involved in decision-making processes according to their age and maturity.

The CRC follows a holistic approach to children's rights, recognising that the rights anchored in the Convention are indivisible and interrelated, and that equal importance must be attached to each and every right contained therein.

However, since the rights derived from the basic principles outlined above are multifaceted, they can be clustered into eight categories,²⁹ namely –

- general measures of implementation
- definition of *child*
- general principles
- civil rights and freedoms
- family environment and alternative care
- basic health and welfare

27 See Fortin (2005:37).

28 The concept of *the best interest of the child* is considered to be the provision underpinning all other provisions, even though, theoretically, none of the four principles is considered to be more important than another. Cf. Fortin (2005:37).

29 This classification is used by the Committee on the Rights of the Child for the reporting by and questioning of States Parties; cf. Committee on the Rights of the Child (2005). It has to be noted, however, that the rights contained in the Convention have been categorised in a variety of ways. LeBlanc, for instance, has grouped the rights into "survival rights", "membership rights", "protection rights" and "empowerment rights" (LeBlanc 1995:65ff). Hammarberg developed a classification scheme applicable exclusively to the CRC, calling his scheme the "three P's" of "provision" (the fulfilment of basic needs such as the rights to food, health care, and education), "protection" (the right to "be shielded from harmful acts or practices" such as commercial or sexual exploitation and involvement in warfare), and "participation" (the right "to be heard on decisions affecting one's own life"); cf. Hammarberg (1990:99ff). On "the four P's", see also Van Bueren (1998:15).

- education, leisure and cultural activities, and
- special protection measures.

General measures of implementation refer to the CRC's Articles 4, 42 and 44(6). Inter alia, these cover the thematic issues of bringing domestic legislation and practice into full conformity with the principles and provisions of the Convention. This includes an obligation to make remedies available and accessible to children in cases where the rights recognised by the Convention have been violated. The Convention foresees the granting of international assistance or development aid for programmes geared at children where such cooperation is needed to properly implement the provisions of the CRC and thereby advance the social, economic and cultural rights of children. Raising awareness of the CRC is another core issue: States Parties are obliged to make the principles and provisions of the Convention widely known to both adults and children. A further obligation for States Parties is to make their reports widely available to the public. Appropriate measures in this regard may include the translation of the concluding observations of the Committee into official and minority languages, and their wide dissemination, including through the print and electronic media.³⁰

The second cluster refers to the **definition of child** according to Article 1 of the CRC, as domestic laws may differ from the general rule of the Charter, namely that children are all persons under the age of 18.

The group of **general principles** contained in the Convention makes reference to its Articles 2, 3, 6 and 12, and covers the issues of non-discrimination; the best interests of the child; the right to life, survival and development; and respect for the views of the child. Appropriate measures to implement these rights have to be taken by States Parties, e.g. by way of measures to protect children from xenophobia and other related forms of intolerance. Furthermore, States Parties are required to ensure that persons under the age of 18 are not subject to the death penalty; that the deaths of children are registered; and, where appropriate, that such deaths are investigated and reported. Moreover, States Parties are encouraged to take measures to prevent suicide among children and to monitor its incidence; to ensure the survival of children at all ages; and to make every effort to ensure the risks to which adolescents in particular may be exposed, such as sexually transmitted diseases or street violence, are minimised.

The fourth broad category of rights contained in the CRC refers to **civil rights and freedoms**, as laid down in its Articles 7, 8, 13–17 and 37(a). The rights referred to within this group include the right to a name and nationality; the right to the preservation of identity; the right to freedom of expression, thought, conscience and religion, association and of peaceful assembly; the right to the protection of privacy; the right to access to appropriate information; and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment, including corporal punishment.

30 For further information, see Committee on the Rights of the Child (2002, 2003c).

The fifth group of rights under the CRC relate to **family environment and alternative care**, covering the Convention's Articles 5, 9–11, 18(1) and (2), 19–21, 25, 27(4) and 39. This cluster addresses the fields of parental guidance; parental responsibilities; separation from parents; family reunification; recovery of maintenance for the child; children deprived of a family environment; adoption; illicit transfer and non-return; and abuse and neglect including physical and psychological recovery and social reintegration.

The group of **basic health and welfare** summarises the Convention's Articles 6, 18(3), 23, 24, 26, and 27(1)–(3), namely the right to survival and development; the right to special protection of children with disabilities; the right to health and health services; the right to social security and child care services and facilities; and the right to an adequate standard of living. In this context, national efforts to combat HIV and AIDS and diseases such as malaria and tuberculosis, particularly among special groups of children at high risk, are of high relevance as well as measures to be taken to prohibit all forms of harmful traditional practices,³¹ such as female genital mutilation.³²

The following rights fall under the cluster of **education, leisure and cultural activities** referring to Articles 28, 29 and 31: the right to education, including vocational training and guidance; and the right to rest, leisure, recreation and cultural and artistic activities. Especially in countries where children do not or do not fully enjoy the right to education, either due to a lack of access or because they have left or been excluded from school, this group of rights is of high relevance.³³

The last group of rights contains **special protection measures** as laid down in Articles 22, 30, 32–36, 37(b)–(d), 38, 39 and 40. Special protection measures are provided for, among others, children in situations of emergency; refugee children; children in armed conflicts, including physical and psychological recovery and social reintegration; children in conflict with the law with regard to the administration of juvenile justice; children deprived of their liberty, including any form of detention, imprisonment or placement in custodial settings; children in situations of exploitation, including child labour; and children belonging to minority or indigenous groups.

The institution responsible for monitoring compliance with and implementation of the provisions of the CRC is the Committee on the Rights of the Child. Provision for this UN treaty body is made in Articles 43 and 44 of the CRC. The Committee is an independent body consisting of 18³⁴ international experts in the field of children's rights.

31 With regard to harmful traditional practices, it was the Committee on the Elimination of Discrimination against Women which expressed its concern that Namibia's Traditional Authorities Act, 2000 (No. 25 of 2000) may have a negative impact on women in cases where customary laws perpetuate the use of customs and cultural traditional practices that are harmful to and discriminate against women, Cf. Visser & Ruppel-Schlichting (2008:153).

32 For further information, see Committee on the Rights of the Child (2003a, 2003b).

33 For further information, see Committee on the Rights of the Child (2001).

34 Prior to the amendment to the CRC (UN General Assembly Resolution 50/155 of 21 December 1995) which entered into force on 18 November 2002, the Committee only consisted of ten experts.

The monitoring mechanism is a special reporting system as provided for in Article 44 of the CRC, according to which States Parties undertake to submit reports on the measures they have adopted which give effect to the rights recognised in the Convention and on the progress made on the enjoyment of those rights. States Parties are obliged to submit an initial report within two years after acceding to the Convention, and periodic reports every five years after that. After submission, the reports of the States Parties are reviewed by the Committee, which is entitled to request further information from its authors if necessary. In its 'concluding observations', the Committee addresses progress that has been made by the State Party concerned in implementing the Convention, identifies areas of concern or outright incompatibilities of national law, and makes recommendations on how to improve the implementation of the Convention's provisions.³⁵ One major problem in the CRC reporting process – as in other UN human rights treaties – is the delay in governments submitting their periodic reports in time. Currently, a total of 97 government reports are overdue in respect of the CRC, while there are 96 overdue on the two Optional Protocols.³⁶

States Parties may request technical assistance and advisory services from the UN Centre for Human Rights in preparing their reports. Where reports by States Parties are overdue, the Committee issues regular reminders. Where a State Party persists in not reporting to the Committee, the Committee may decide to consider the situation in the country in the absence of a report, on the basis of the information available.

However, individual complaints or cases to the Committee cannot be addressed and the CRC does not have its own enforcement mechanism. The fact that the CRC does not provide for specific enforcement mechanisms giving a right of individual petition similar to the systems of the European Convention on Human Rights or the African Charter on the Rights and Welfare of the Child is considered to be one of the CRC's major weaknesses.³⁷ However, the drafters of the CRC refrained from establishing enforcement procedures because they feared many countries, particularly developing countries, would be reluctant to ratify the Convention if such mechanisms were in place. Individual complaints (including those of children, if legally represented) or complaints by third States Parties are required to be brought before other UN legal bodies, e.g. –

- the Human Rights Committee, which hears complaints under the International Covenant on Civil and Political Rights
- the Committee to Eliminate Racial Discrimination, which hears complaints under the Convention on the Elimination of All Forms of Racial Discrimination
- the Committee against Torture, which deals with complaints under the

35 Scheinin (2009:605).

36 These figures include multiple overdue reports by the same state. Statistical data with regard to the seven major human rights treaties, including the CRC and its Optional Protocols, is available at <http://www.unhcr.ch/tbs/doc.nsf/newhvovertimebytreaty?OpenView&Start=1&Count=250&Collapse=3#3>; last accessed 19 October 2009.

37 Fortin (2005:48).

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, or

- the Committee to End Discrimination against Women, which deals with complaints under the Convention on the Elimination of all Forms of Discrimination against Women.

In sum, it can be stated that, although the CRC is a legally binding instrument according to the principles of public international law, there is no supervisory body to compel States Parties to comply with the provisions of the Convention. Moreover, individual complaints cannot be considered by the Convention's treaty body, the Committee on the Rights of the Child, and there is no judicial organ established under the Convention to which violations of children's rights could be brought.³⁸ However, the Convention is an important instrument as it has heightened awareness of children's rights violations and, in many cases, has resulted in improved national law and policy in terms of the protection of children's rights.

As regards Namibia and the CRC, the country has been a State Party since 1990. Namibia issued its initial State Party Report³⁹ to the CRC in 1993. The respective concluding observations⁴⁰ were adopted by the Committee in 1994. In its responding report, the Committee welcomed Namibia's political commitment to improving the situation of children, pointing out that activities had been undertaken to promote greater public awareness of the rights of the child and that several initiatives had been realised to promote and protect these rights. Such initiatives included the Early Childhood Protection and Development Programme and the development of Youth Councils. However, the Committee also expressed its concern on a number of issues. For example, it saw the reasons for the identified deficiencies in the implementation of the Convention in a combination of the consequences of colonial administration, apartheid and war and the problems of poverty. In its concluding observations the Committee drew specific attention to the legacy of laws from the pre-Independence period which it considered to be contrary to the provisions of international instruments and the Namibian Constitution. It was observed that, at that stage, Namibia had not yet become a State Party to all the major international human rights instruments, and that much national legislation still needed to be reformed in order to bring it in line with the provisions of the CRC. Some of the issues that the Committee addressed critically included –

- the definition of *child*
- the extent of discrimination on the ground of gender as well as against children born outside marriage and children in especially difficult circumstances
- discrimination practised against children with disabilities

38 There are, however, ongoing campaigns by several agencies supporting a communications procedure under the CRC.

39 See CRC doc. CRC/C/3/Add.12 22/01/1993; available at <http://daccessdds.un.org/doc/UNDOC/GEN/G93/152/69/IMG/G9315269.pdf?OpenElement>; last accessed 15 October 2009.

40 Committee on the Rights of the Child (1994).

- teenage pregnancies
- the high incidence of households headed by a single person
- the apparent lack of widespread understanding among parents of their joint parental responsibilities
- the quality of education
- the incidence of child labour, particularly on farms and in the informal sector
- the number of children dropping out of school, and
- the system of juvenile justice.

In order to improve the rights of children in Namibia, the Committee recommended, *inter alia*, that consideration be given to the possibility of Namibia becoming a party to all the major international human rights instruments, to integrate the CRC into the national legal framework and into national plans of action, and to adopt a new Children's Act.

Among the positive remarks the CRC made was that Namibia had instituted an Ombudsman, who had the mandate to deal with complaints about human rights violations, including those relating to children. The important role being played by community leaders was underlined by the Committee as well, particularly with respect to –⁴¹

... [overcoming] the negative influences of certain traditions and customs which may contribute to discrimination against the girl child, children suffering from disabilities and children born out of wedlock.

Unfortunately, Namibia has not yet issued any further State Party reports to the Committee. Taking into consideration the numerous efforts Namibia has made in terms of law, policy reform, and child-related initiatives and activities since the adoption of the Committee's last concluding observations, it can be expected that the situation with regard to compliance with the provisions of the CRC has improved considerably.

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

The above Optional Protocol, abbreviated as *CRC-OPSC*, was adopted by the UN in May 2000 and entered into force on 18 January 2002, in accordance with its Article 14(1). To date, the *CRC-OPSC* has 132 States Parties. Namibia is among these, having ratified the Protocol on 16 April 2002.

The *CRC-OPSC* consist of 17 Articles aiming to extend the measures that States Parties should undertake in order to guarantee the child protection from being sold, prostituted, or used for pornography. Although some voices questioned the need for the Protocol,⁴² it was adopted due to the concern with regard to the significant and increasing

41 (ibid.).

42 The lack of clarity as to the need for the Protocol was criticised by both the Committee on the Rights of the Child and non-governmental organisations (NGOs) working on these issues.

international traffic in children for the purposes stated in the Protocol.⁴³ One major aim of this document is to address the need for legislation to hold citizens accountable in cases of 'sex tourism' i.e. if sexual crimes are committed in countries other than those of the offender's nationality or residence. Such accountability can be established by either determining the extent of extraterritorial jurisdiction or by extraditing the offenders to be tried in the country in which the crime has been committed. The CRC–OPSC is monitored by the Committee on the Rights of the Child.

Namibia will address the issue of commercial sexual exploitation in the envisaged Child Care and Protection Act. The envisaged Act makes it a crime to use, procure, offer or employ a child for purposes of commercial sexual exploitation.⁴⁴

Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict

The above Optional Protocol, abbreviated as *CRC–OPAC*, was adopted in May 2000 and entered into force on 12 February 2002, in accordance with its Article 10(1). Today, the *CRC–OPAC* has 130 States Parties. Namibia is among this number, having ratified the Protocol on 16 April 2002. The *CRC–OPAC*, which is monitored by the Committee on the Rights of the Child, comprises 13 Articles aiming at strengthening the implementation of the CRC and increasing the protection of children during armed conflicts.

The motivation for this Protocol lay in a conflict that arose during the drafting process of the CRC. The CRC drafters had agreed on the age of 18 as regards the definition of *child*. However, the two Additional Protocols to the 1949 Geneva Conventions, which were adopted in 1977, set a minimum age of 15 years for recruitment by armed forces; some States Parties insisted on the possibility to recruit those under 18. Thus, the relevant provision contained in the CRC⁴⁵ needs to be seen as a compromise: while the CRC urges governments to take all feasible measures to ensure that children under 15 have no direct part in hostilities, and sets 15 years as the minimum age at which an individual can be voluntarily recruited into or enlist in the armed forces, the *CRC–OPAC* goes one step further by obliging States Parties to raise the minimum age for voluntary recruitment into the armed forces, however, without explicitly requiring a minimum age of 18. States Parties are reminded that children under 18 are entitled to special protection. The *CRC–OPAC* bans compulsory recruitment below the age of 18 and States Parties are compelled to take legal measures to prohibit independent armed groups from recruiting and using children under the age of 18 in conflicts.

They argued that the issues addressed in the Protocol were "adequately covered in the CRC itself, and time would be better spent on strengthening the interpretation and implementation of existing provisions than in another drafting exercise". Cf. Brett (2009:241).

43 Cf. Preamble, *CRC–OPSC*.

44 See GRN (2009:74).

45 Article 38, *CRC*.

According to Article 3 of the CRC–OPAC, States Parties are obliged to deposit a binding declaration upon ratification of the Protocol that sets forth the minimum age at which they will permit voluntary recruitment into their national armed forces, as well as a description of the safeguards that they have adopted to ensure that such recruitment is not forced or coerced. The respective declaration may only be withdrawn if it is substituted by a declaration prescribing a higher minimum voluntary recruitment age, not a lower one.

Pursuant to this provision, Namibia has declared that it does not practise conscription or any form of forced obligatory service. Voluntary recruitment to the Namibian Defence Force is permitted at the minimum age of 18. Candidates are required to prove their age by showing a certified copy of a legally recognised Namibian identity document as well as a birth certificate.

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime

This Protocol was adopted on 15 November 2000 and entered into force on 25 December 2003 in accordance with its Article 17. To date, it has 124 States Parties, including Namibia, who ratified the Protocol on 16 August 2002.

Despite the existence of a variety of international instruments containing rules and practical measures to combat the exploitation of persons, especially women and children, there was still no universal instrument that addressed all aspects of trafficking in persons. The Protocol, therefore, intends to prevent and combat trafficking in persons, paying particular attention to women and children, to protect and assist the victims of such trafficking, and to promote cooperation among States Parties in order to meet those objectives.⁴⁶ The Protocol urges States Parties to adopt legislative and any other measures necessary to establish the trafficking in persons as a criminal offence. Namibia has addressed this obligation by enacting the Prevention of Organised Crime Act,⁴⁷ which still has to come into force. Furthermore, the Child Care and Protection Bill, which is currently in the process of being finalised, will address the issue of child trafficking. The envisaged Act makes child trafficking a criminal offence, and provides for extraterritorial jurisdiction to address trafficking by citizens or permanent residents of Namibia outside Namibia's borders.⁴⁸

The Beijing Rules

The so-called Beijing Rules are officially entitled *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*. The Beijing Rules were adopted by the

46 Article 2, Optional Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.

47 No. 29 of 2004.

48 See GRN (2009:65).

UN General Assembly on 29 November 1985, –⁴⁹

... recognizing that the young, owing to their early stage of human development, require particular care and assistance with regard to physical, mental and social development, and require legal protection in conditions of peace, freedom, dignity and security

One aim is to avoid treating young offenders in an over-aggressive and inhumane way.⁵⁰ The Beijing Rules are not of a binding nature per se; however, this is considered a major weakness.⁵¹ Nonetheless, this legal instrument provides a detailed framework for the operation of national juvenile justice systems. The broad fundamental principles contained in the Beijing Rules are aimed at promoting juvenile welfare to the greatest possible extent, minimising the necessity of intervention by the juvenile justice system and, in turn, reducing the harm that may be caused by any intervention that is required. The Beijing Rules are deliberately formulated in order to apply within different legal systems, regardless of the definition of *juvenile* under those systems. For example, for historical and cultural reasons, the minimum age for criminal responsibility differs widely among members of the UN. Indeed, so far, no lowest age limit for criminal responsibility has been agreed upon internationally. Nonetheless, what has been agreed on are the most important objectives of juvenile justice, as laid down in the Beijing Rules, namely –

- the promotion of the well-being of the juvenile
- the principle of proportionality between just desert in relation to the gravity of the offence
- the right to the presumption of innocence
- the right to be notified of the charges
- the right to remain silent
- the right to counsel
- the right to the presence of a parent or guardian
- the right to confront and cross-examine witnesses
- the right to appeal⁵²
- the right to privacy⁵³
- the right to be represented by a legal adviser,⁵⁴ and
- the prohibition of capital punishment.⁵⁵

In sum, one could say that the Beijing Rules display what an ideal juvenile justice system should aim to achieve at the different stages of a process involving children who have committed crimes.

49 Cf. Preamble, Beijing Rules.

50 Cf. Fortin (2005:35).

51 (ibid.:34).

52 Rule 7.1.

53 Rule 8.

54 Rule 15.

55 Rule 17.

The Riyadh Guidelines and the UN Rules for the Protection of Juveniles Deprived of their Liberty

The UN Guidelines for the Prevention of Juvenile Delinquency,⁵⁶ referred to as the *Riyadh Guidelines*, and the UN Rules for the Protection of Juveniles Deprived of their Liberty⁵⁷ are the main results of the Eighth UN Congress, held in Havana in 1990, on the Prevention of Crime and the Treatment of Offenders. The Riyadh Guidelines and the said Rules complement the Beijing Rules. The General Assembly called for the development of standards for the prevention of juvenile delinquency⁵⁸ in order to assist Member States to formulate and implement specialised programmes and policies, amongst other things. The Riyadh Guidelines have taken up this issue.

The Riyadh Guidelines constitute a comprehensive legal document promoting a proactive approach to preventing juvenile delinquency, and considering children to be fully-fledged participants in society. Like the two other UN instruments on juvenile justice, the Riyadh Guidelines are soft law, i.e. they are not legally binding on international, national and local legislative bodies. The Guidelines set forth fundamental principles, including provisions on the interpretation and recognition of the need for and importance of progressive delinquency prevention policies and the systematic study and elaboration of measures. The Guidelines address the issue of general prevention, emphasising that prevention plans should be instituted at every level of government. Further provisions of specific importance are those on legislation and juvenile justice administration, which encourage States Parties to enact and enforce specific laws and procedures to promote and protect the rights and well-being of all young persons. Such laws and procedures include –

- legislation to prevent the victimisation, abuse, exploitation and the use for criminal activities of children and young persons
- legislation and enforcement aimed at restricting and controlling access to and the accessibility of weapons of any sort to children and young persons, and
- legislation to protect children and young persons from drug abuse and drug traffickers.

The Guidelines also encourage governments to consider the establishment of an office of ombudsman⁵⁹ or similar independent organ that would ensure the status, rights and interests of young persons are upheld. The Ombudsman would supervise the implementation not only of the Riyadh Guidelines, but also of the Beijing Rules and the Rules for the Protection of Juveniles Deprived of their Liberty.

56 UN doc. A/RES/45/112.

57 UN doc. A/RES/45/113.

58 UN Resolution 40/35 of 29 November 1985.

59 On the institution of an Ombudsman for Children, see the contribution by Agata Rogalska-Piechota elsewhere in this volume.

The UN Rules for the Protection of Juveniles Deprived of their Liberty establish minimum standards for the protection of juveniles deprived of their liberty, consistent with human rights and fundamental freedoms, and with a view to counteracting the detrimental effects of all types of detention and to fostering integration in society. The rules contain provisions with regard to juveniles under arrest or awaiting trial, as well as on the staffing and management of juvenile facilities. Within the context of the management of juvenile facilities, the rules contain provisions regulating, inter alia, the physical environment and accommodation requirements for juveniles deprived of their liberty,⁶⁰ the juvenile's right to education,⁶¹ the right to a suitable amount of time for daily free exercise,⁶² the right to practise his or her religious and spiritual life,⁶³ and the right to adequate medical care.⁶⁴ The Rules furthermore prohibit the physical restraint of or use of force against a juvenile deprived of his/her liberty, save in exceptional cases, and only where all other control methods have been exhausted and have failed, and only as explicitly authorised and specified by law.⁶⁵ According to the Rules, facilities in which juveniles are detained are subject to inspection, and every juvenile should have the opportunity of making requests or complaints to the director of the detention facility and to his or her authorised representative.⁶⁶

The Millennium Development Goals: Indicators for the national and international progress on children's rights?

The eight Millennium Development Goals (MDGs)⁶⁷ were adopted in 2000 to address the most serious challenges to global development. The MDGs are all, at least to some extent, related to the general situation and rights of children. However, MDG1 (Eradicate extreme poverty and hunger), MDG2 (Achieve universal primary education), MDG4 (Reduce child mortality), and MDG6 (Combat HIV and AIDS, malaria and other diseases) are considered to be of particular relevance for children. The progress made as regards children's rights, therefore, correlates to some extent with the situation of children in the context of the MDGs. Thus, at a Special Session of the UN General Assembly held in 2002, some 180 nations adopted a new agenda – entitled *A World Fit for Children* – for, and with, the world's children. The agenda contains 21 specific goals and targets to be reached within the next decade. These goals and targets can be

60 Rules 31–37.

61 Rules 38–46.

62 Rule 47.

63 Rule 48.

64 Rules 49–55.

65 Rules 63 and 64.

66 Rules 72ff.

67 The eight MDGs are as follows: 1. Eradicate extreme poverty and hunger; 2. Achieve universal primary education; 3. Promote gender equality and empower women; 4. Reduce child mortality; 5. Improve maternal health; 6. Combat HIV and AIDS, malaria and other diseases; 7. Ensure environmental sustainability; 8. Develop a global partnership for development.

subsumed under four categories, as follows:⁶⁸

- Promoting healthy lives
- Providing a quality education
- Combating HIV and AIDS, and
- Protecting against abuse, exploitation and violence.

Statistical data with regard to these issues⁶⁹ shows that considerable progress has been made with regard to the situation of children. In 2006, for the first time, the number of children dying before their fifth birthday fell below 10 million, to 9.7 million. Around 1960, an estimated 20 million children under the age of five were dying every year.⁷⁰ Yet, there are many countries that still have very high levels of child mortality, particularly in sub-Saharan Africa.

Taking available data on the situation of children as indicators for the progress made since the adoption of the CRC in 1989, it can be stated that, at least from a global perspective, the progress is considered to be positive. Child mortality and education will be analysed in the following table as token indicators in this respect. Table 1 demonstrates that considerable progress that has been made taking the issue of child mortality as indicator.

Table 1: Infant and under-5 mortality rates, 1990–2007

Geographic location	Under-5 mortality rate, 1990	Under-5 mortality rate, 2007	Infant mortality rate (under 1), 1990	Infant mortality rate (under 1), 2007
Namibia	87	68	57	47
Sub-Saharan Africa	186	148	109	89
World	93	68	64	47

Source: UNICEF, http://www.unicef.org/statistics/index_step1.php; last accessed 12 October 2009.

However, it can be observed in Namibia, as in Africa in general, that infant and under-five mortalities have begun to increase again. Although these mortality rates had been decreasing up to 2000,⁷¹ infant mortality increased from 38 deaths per 1,000 live births in 2000, to 46 deaths in 2006,⁷² while under-five mortalities were at 69 deaths per 1,000

68 UNICEF (2007:2).

69 UNICEF (2007).

70 UNICEF (2007:2).

71 Kamwi (2009).

72 These figures were revealed in a UNICEF report released in Windhoek on 28 January 2008; cf. Bause (2008).

live births.⁷³ The increase is mainly due to the combination of HIV and AIDS, malaria, pneumonia, diarrhoea, low birth weight and prematurity and inadequate nutrition. It is estimated by the Government of Namibia, that the MDG targets with regard to infant (2012 target for infant mortality rate deaths per 1,000 live births: 38) and child mortality (2012 target for under-five mortality rate deaths per 1,000 live births: 45) are unlikely to be achieved.⁷⁴

A general positive trend can be observed with regard to data available on education, as reflected in Table 2.

Table 2: School attendance, 2000–2006

Geographic location	Primary school enrolment ratio 2000–2006, net, male	Primary school enrolment ratio 2000–2006, net, female	Secondary school enrolment ratio 2000–2006, net, male	Secondary school enrolment ratio 2000–2006, net, female
Namibia	69.0	74.0	33.0	44.0
Sub-Saharan Africa	75.0	70.0	30.3	25.4
World	91.0	87.0	58.8	57.6

Source: UNICEF, http://www.unicef.org/statistics/index_step1.php; last accessed 12 October 2009.

While worldwide increases in enrolment and attendance can be seen to have reduced, from 115 million in 2002 to 93 million in 2005–2006, the number of children who are old enough to attend primary school but do not, some regions – including sub-Saharan Africa – have net enrolment/attendance ratios of less than 90%.⁷⁵ The respective figures for Namibia revealed by Namibia's reports regarding the MDGs reflect this situation to some extent as well:

Table 3: Education progress indicators, Namibia, 1992–2008

Progress indicator: Education	1992	2003	2008
Net primary school enrolment (%)	89.0	92.0	92.3
Survival rate Grade 5 (%)	75.0	94.0	93.0

73 GRN (2008a:XII).

74 (ibid.).

75 UNICEF (2007:2f).

Youth literacy rate, 15–24 years (%)	89.0	89.0	94.0
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Source: GRN (2004, 2008a).

The Namibian government estimates that the 2012 targets for *Net primary school enrolment* (99.1%) and for *Youth literacy rate* (100%) are unlikely to be achieved, while the 2012 target *Survival rate Grade 5* (99.2%) seems feasible.⁷⁶

In sum, it can be stated that the situation of children and of children's rights, measured against performance in respect of the MDGs and the "World Fit for Children" agenda, has improved considerably. Yet, especially in sub-Saharan Africa, including Namibia, much more must be done. As underlined in *The State of the World's Children 2008*,⁷⁷ it is essential to put children's survival, health, development and rights first.

Children's rights under the International Labour Organisation

Human rights in general are at the core of the ILO's mandate. The Declaration on Fundamental Principles and Rights at Work adopted in 1998 states that Members of the ILO, even if they have not ratified the relevant Conventions, have an obligation arising from their very membership to respect, promote and realise the principles of –

- freedom of association and the effective recognition of the right to collective bargaining
- the elimination of all forms of forced or compulsory labour
- the effective abolition of child labour, and
- the elimination of discrimination in respect of employment and occupation.

These principles are reflected in eight⁷⁸ Conventions that are fundamental to human rights within and outside the ILO. The two most relevant of these Conventions on the protection of children's rights will be outlined below. As to reporting and monitoring of the ILO Conventions, Article 22 of the ILO Constitution provides that Members are obliged to submit periodic reports to the ILO.

The ILO Minimum Age Convention, 1973 (No.138)

According to the ILO's global figures, a total of 182 million children under 14 years of age work. The Minimum Age Convention is one of the eight fundamental human rights Conventions under the ILO umbrella, and has currently been ratified by 151 countries. The Convention, which was agreed in 1973, was upheld by the Committee on the Rights

76 GRN (2008a:XII).

77 UNICEF (2008a).

78 The eight fundamental human rights Conventions under the ILO relate to fields of freedom of association and collective bargaining (Conventions 87 and 98); the elimination of forced and compulsory labour (Conventions 29 and 105); the elimination of discrimination in respect of employment and occupation (Conventions 100 and 111); and the abolition of child labour (Conventions 138 and 182).

of the Child as an appropriate standard, providing principles which apply to all sectors of economic activity.

All signatories to the Convention are required to fix a minimum age for admission to employment, and have to undertake to pursue a national policy designed to ensure the effective abolition of child labour. Furthermore, Members are obliged to progressively raise the minimum age for admission to employment to a level that is suited to the fullest physical and mental development of young people.

Namibia ratified the Convention on 15 November 2000, and set the minimum age for admission to employment or work at the age of 14.

ILO Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, 1999 (No. 182)

This ILO Convention bans the worst forms of child labour, including –

- slavery, sale and debt bondage
- forced labour
- recruitment for armed forces, prostitution, drug trafficking or other illicit activities, or
- recruitment for other work which harms the health, safety or morals of children.

The Convention was adopted on 17 June 1999, and has enjoyed a fast pace of ratification. Currently, the Convention has been ratified by 171 Members. Namibia ratified the Convention on 15 November 2000.

Convention No. 182 was adopted in recognition of the fact that the effective elimination of child labour depends on economic factors and may, therefore, take time to be accomplished. Nonetheless, there are certain forms of child labour that cannot be tolerated. Therefore, the Convention calls for immediate action to secure the prohibition and elimination of the worst forms of child labour, irrespective of the level of development or economic situation of the country. These “worst forms” against which all persons under the age of 18 must be protected comprise –

- all forms of slavery or similar practices, such as sale and trafficking, debt bondage, serfdom, and forced or compulsory labour
- the use of children in armed conflicts
- the use of a child for prostitution or pornography
- the use of a child for illicit activities such as drug trafficking, and
- work likely to harm the health, safety or morals of children, as determined at the national level.

Namibia and the ILO Conventions

Namibia's obligations under the ILO Conventions are reflected by specific child-

related provisions in its new Labour Act.⁷⁹ Section 3 of the Act outlines the prohibition and restriction of child labour, and provides that children under the age of 14 are not permitted to be employed. Furthermore, Article 3 refers to the Constitution's Article 15 on children's rights, and sets down specific restrictions for children between 14 and 16 years of age in terms of working hours and the structure of premises where such children work. The Act further provides that it is an offence to employ, or require or permit, a child to work in any circumstances prohibited by the Act, and that a person who is convicted of such an offence is liable to a fine.

Apart from statutory law on child labour,⁸⁰ Namibia gives effect to its commitment under the ILO Conventions by means of special projects. In this context, with the assistance of the ILO's Programme Towards the Elimination of the Worst Forms of Child Labour, Namibia has developed a National Action Programme geared towards the Elimination of Child Labour⁸¹ to address the most intolerable forms of such labour. In order to reduce child labour and to eliminate all of its worst forms in Namibia, the National Action Programme provides information on child labour in Namibia and assesses the existing legislative and policy framework as well as the challenges facing an effective response to child labour.

Children's rights under the Hague Conference on Private International Law

The Hague Conference on Private International Law held its first meeting in 1893 and became a permanent inter-governmental organisation upon its Statute entering into force in 1955. To date, the Hague Conference has 69 members; Namibia is not among them. However, without having to a member of the organisation, it is possible to become a State Party to its Conventions. The Hague Conference has adopted various Conventions relevant to the international protection of children, including –

- the Hague Convention on the Protection of Children and Cooperation with Respect to Inter-Country Adoption
- the Hague Convention on the Civil Aspects of International Child Abduction, and
- the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children.

Namibia is not as yet a State Party to any of these Conventions.⁸²

79 No. 11 of 2007.

80 For a more detailed discussion of child labour in Namibia, see the contribution by Clever Mapaure elsewhere in this volume.

81 GRN (2008b).

82 So far, Namibia is a State Party to only one of the Hague Conference's Conventions, namely the 1961 Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, which Namibia ratified on 21 April 2000. Efforts are currently being made with regard to Namibia's membership of these Hague Conference Conventions.

The African regional level

Africa is considered to be the 'youngest' continent in the world, with nearly 50% of sub-Saharan Africa's citizens being under 18. Some 147 million children under five live in Africa. However, it is a sad reality that more than half of the world's deaths among children under five occur on the African continent.⁸³

On the situation of children in Africa, the Committee of Experts on the Rights and Welfare of the Child⁸⁴ made the following remark:⁸⁵

African children represent more than half of the continent's population and their vulnerability cannot be over-emphasised. Africa's children are most disadvantaged in many ways: their life chances are limited; they are exposed to violence; they are used as child soldiers; they are vulnerable to malnutrition and diseases, in particular the HIV/AIDS pandemic; they are deprived of education; their rights are violated; they are abused and exploited. While Africa's children are most vulnerable, addressing their vulnerabilities and rights [has] not been prioritised at national level. Governments continue to overlook children[s] issues when formulating national development policies and programmes and the Ministries responsible for implementing activities on children are not allocated sufficient budget.

Therefore, efforts to promote the welfare of the child have to be redoubled, inter alia by efficiently implementing the existing child-related legal instruments.

The history of codified human rights protection on the African regional level dates back to 1963, when the Organisation of African Unity (OAU), the predecessor of today's African Union (AU) was founded. The OAU Charter established as one of the organisation's objectives the promotion of international cooperation as regards the UN Charter and the Universal Declaration of Human Rights.⁸⁶

The AU's constitutive Act, adopted in 2000, reaffirmed Africa's commitment to promote and protect human rights. In accordance with this commitment, since the AU's establishment, several human rights instruments have been adopted.

A fundamental instrument on human rights protection, namely the African Charter on Human and Peoples' Rights, was adopted in 1981 and came into force in 1986. Under this Charter, the AU developed several legal and policy frameworks to promote and protect the rights and welfare of vulnerable groups such as persons with disabilities, the elderly, persons living with HIV and AIDS, refugees, and displaced persons and

83 UNICEF (2008b:49).

84 More details on this Committee will be given below.

85 Cf. ACERWC (2005a).

86 Article 2, OAU Charter.

children.⁸⁷ While these African general human rights instruments are also applicable to children, the most prominent legal instrument specifically targeting the protection of children's rights is the African Charter on the Rights and Welfare of the Child.

The African Charter on the Rights and Welfare of the Child

The year 1979 saw the Assembly of Heads of State and Government of the OAU⁸⁸ recognise the need to take appropriate measures to promote and protect the rights and welfare of the African child by adopting the Declaration on the Rights and Welfare of the African Child. Two decades later, in 1990,⁸⁹ the African Charter on the Rights and Welfare of the Child (ACRWC)⁹⁰ was adopted, and came into force in 1999 according to its Article 47(3). As of February 2009, 45 AU Member States had ratified the Charter. Namibia ratified the Charter in 2004, after having signed it in 1999.

The Charter contains 47 Articles, divided into four Chapters. Chapter 1 deals with the rights and welfare of the child; Chapter 2 establishes and organises the Committee on the Rights and Welfare of the Child; and Chapter 3 describes the Committee's mandate and procedure. Chapter 4 is dedicated to miscellaneous provisions.

The Charter aims to supplement the CRC⁹¹ and additionally addresses issues of particular importance to children in Africa. The Charter was adopted in view of the critical situation in which most African children find themselves in terms of their socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed conflicts, exploitation and hunger. Thus, in its Preamble, the Charter points out that children require particular care and legal protection, and that they deserve freedom, dignity and security due to their physical and mental development.

Some of the compromises that have had a negative impact on the CRC could be addressed and remedied by way of the Charter. Thus, the Charter, clearly and without limitation, defines as a *child* any person under the age of 18;⁹² it completely outlaws the recruitment

87 Gawanas (2009:149ff).

88 At its Sixteenth Ordinary Session in Monrovia, Liberia, from 17 to 20 July 1979.

89 It has been argued that one reason for the timing of the adoption of this instrument shortly after the CRC's adoption was that African States Parties had been underrepresented in the drafting process of the CRC: only Algeria, Egypt, Morocco and Senegal had participated significantly in it. Cf. Keetharuth (2009:203); see also Viljoen (2007:263).

90 Hereinafter referred to as the *Charter*.

91 In its Preamble, the Charter states that OAU Member States agree on the Charter –
REAFFIRMING ADHERENCE to the principles of the rights and welfare of the child contained in ... other instruments of the Organization of African Unity and in the United Nations and in particular the United Nations Convention on the Rights of the Child; ...

92 See Article 2 of the Charter. In contrast, the CRC states that children are all persons under the age of 18 *unless* majority is attained earlier under the law applicable to the child.

and use of child soldiers;⁹³ it sets the minimum age for marriage at the age of 18;⁹⁴ and it includes internally displaced children with regard to the protection of child refugees.⁹⁵

Since the Charter aims to supplement the CRC, the Charter clearly contains no provisions that directly oppose the CRC. On the contrary, as pointed out earlier, the Charter presented an opportunity to address Africa-specific concerns in more detail, which it then did at several stages.⁹⁶

The first 31 Articles of the Charter are dedicated to the rights and welfare of the child. They also contain provisions as to state obligations and children's rights and responsibilities. The Charter contains fundamental children's rights which are also laid down in the CRC on the global level, such as non-discrimination,⁹⁷ the best interest of the child,⁹⁸ survival and development,⁹⁹ and respect for the views of the child.¹⁰⁰ However, the Charter also contains African specificities¹⁰¹ that were not addressed by the CRC. The issues of harmful cultural practices and protection against apartheid are only some of the regional specificities addressed by the Charter. Apart from the fundamental principles outlined above, the Charter can be subdivided into five clusters:¹⁰²

- Civil rights and freedoms¹⁰³
- Family environment and alternative care¹⁰⁴

93 While the CRC allows the use of child soldiers (Articles 38(1) and (2)), Article 22(2) of the Charter provides as follows:

States Parties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain[,] in particular, from recruiting any child.

94 Article 21(2) of the Charter reads as follows:

Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory.

As Article 1 of the CRC gives preference to national law with regard to the definition of *child*, marriages under the age of 18 are not outlawed according to the CRC, although the CRC states as a general rule that children are all persons under the age of 18.

95 See Article 23(4) of the Charter in contrast to Article 22 of the CRC.

96 For a comparison of the CRC and the Charter, showing the main differences and highlighting how the Charter is often more explicit about issues distinctive to an African context, see Sheahan (2009:9ff).

97 Article 3 of the Charter.

98 Article 4 of the Charter.

99 Article 5 of the Charter.

100 Article 7 of the Charter.

101 For a list of omissions from the CRC, see Viljoen (2007:262).

102 The African Committee of Experts on the Rights and Welfare of the Child developed the following categorisation for States Parties' reporting. See ACERWC (2003).

103 The following rights are contained in the group *Civil and political rights*: the right to name, nationality, identity and registration at birth (Article 6); freedom of expression (Article 7); freedom of association and of peaceful assembly (Article 8); freedom of thought, conscience and religion (Article 9); protection of privacy (Article 10); and protection against child abuse and torture (Article 16).

104 The following issues are contained in the group *Family environment and alternative care*:

- Health and welfare¹⁰⁵
- Education, leisure and cultural activities,¹⁰⁶ and
- Special protection measures.¹⁰⁷

It is beyond the scope of this article to discuss all the aforementioned rights in detail.¹⁰⁸ However, the right to education, as provided for in Article 11 of the Charter, may serve as one vivid example demonstrating African uniqueness and progressiveness in many respects.

Education is beyond any doubt one of the most fundamental pillars of sustainable development.¹⁰⁹ The need for education, training and public awareness has been recognised as a key approach to sustainable development.¹¹⁰ The Charter lays particular emphasis on the right to education, giving it in great detail within seven sub-sections of the Charter – in far greater detail, in fact, than the CRC. Besides granting the right to education to every child in Africa, Article 11(2) states, inter alia, that the education

parental guidance (Article 20); parental responsibilities (Article 20(1)); separation from parents, separation caused by State Party, separation caused by internal displacement arising from armed conflict, civil strife, or natural disasters (Articles 19(2) and (3), and 25); family reunification and children deprived of a family environment (Article 25(2)(b)); maintenance of the child (Article 18(3)); adoption and periodic review of placement (Article 24); and abuse, neglect, and exploitation, including physical and psychological recovery and social integration (Articles 16 and 27).

105 The following issues are contained in the group *Health and welfare*: survival and development (Article 5); children with handicaps (Article 13); health and health services (Article 14); social security and child care services and facilities (Article 20(2)(a-c)); and care for orphans (Article 26).

106 This group covers the right to education, including vocational training and guidance (Article 11); and leisure, recreation and cultural activities (Article 12).

107 The following topics are summarised in the final cluster: Refugee, returnee and displaced children (Articles 23 and 25); children in armed conflicts, including specific measures for child protection and care (Article 22); the administration of juvenile justice (Article 17); children deprived of their liberty (Article 17(2)); reformation, family reintegration and social rehabilitation (Article 17(3)); children of imprisoned mothers (Article 30); children in situations of exploitation and abuse, such situations inter alia being economic exploitation, including child labour (Article 15), sexual exploitation and sexual abuse (Article 27), and sale, trafficking and abduction (Article 29); and child victims of harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child (Article 21).

108 For a more detailed discussion of the rights contained in the Charter, see Chirwa (2002); Olowu (2002); Viljoen (2000).

109 See UNESCO (2005:14). Education for Sustainable Development was first described by Chapter 36 of Agenda 21, the world's first action plan for sustainable development adopted at the UN Conference on Environment and Development (the Earth Summit), held in Rio de Janeiro on 14 June 1992.

110 Further paths to sustainable development include environmental protection, good legislation and governance, economic incentives, overcoming corruption, human rights and security, and creating infrastructure.

of the child is directed to the preservation and strengthening of positive African morals; traditional values and cultures; the preservation of national independence and territorial integrity; the promotion and achievements of African Unity and Solidarity; the development of respect for the environment and natural resources; the preparation of the child for responsible life in a free society, in the spirit of understanding tolerance, dialogue, mutual respect and friendship among all peoples ethnic, tribal and religious groups and the promotion of the child's understanding of primary health care.¹¹¹

Free and compulsory basic education, encouragement to develop secondary education, and making higher education accessible to all are only some of the mechanisms set forth by the Charter,¹¹² which are listed as examples to realise the right to education. Specific reference with regard to the right to education is made to vulnerable children in particular, such as female, disadvantaged,¹¹³ and handicapped children.¹¹⁴

In sharp contrast to the CRC, the Charter imposes duties on children. According to Article 31 of the Charter, children have responsibilities towards family and society depending on their evolving capacities. Inter alia, children have the duty to work for the cohesion of the family; to respect their parents, superiors and elders; and to preserve African cultural values. With this provision, the traditional view in international human rights law that States Parties bear primary responsibility as duty bearers is challenged – and this has not escaped criticism. It has been argued that the duties laid down in the Charter may be used to justify violations of children's rights and to legalise corporal punishment.¹¹⁵ However, it has to be considered that the duties are subject to limitations contained in the Charter. Therefore, Article 31 needs to be read in the context with all other rights contained in the Charter.

In sum, with regard to the material rights of children enshrined in the Charter, the instruments succeeds in complementing the CRC and in taking up issues that relate to African specificities. Therefore, the Charter is an important tool for protecting and promoting the rights of children in Africa. However, as is the case for legal instruments in general, the Charter would run the risk of running dry if effective implementation and enforcement mechanisms were not in place.

In its Chapters 2 and 3, the Charter establishes and organises the Committee of Experts on the Rights and Welfare of the Child (ACERWC).¹¹⁶ This Committee consists of 11 experts from

111 Article 11(2)(a)–(h).

112 See Article 11(3)(a)–(e).

113 Cf. Article 11(3)(e) and 11(6), particularly with regard to addressing the issue of the right to education and teenage pregnancies.

114 Article 13(2).

115 Chirwa (2002:169).

116 Hereinafter referred to as the *Committee*.

different Member States, elected by the Assembly of Heads of State of the AU.¹¹⁷ The Committee has been functional since 2001, and operates according to its Rules of Procedure formulated in 2002.¹¹⁸ According to Article 42 of the Charter, the functions of the Committee include –

- promoting and protecting the rights enshrined in the Charter
- monitoring the Charter's implementation and ensuring protection of the rights enshrined in it, and
- interpreting the provisions of the Charter at the request of a State Party, an institution of the AU, or any other person or institution.

Furthermore, the Committee is entitled to conduct investigations according to Article 45 of the Charter and Article 74 of the Rules of Procedure,¹¹⁹ it may give its views and recommendations to governments; and it is the organ responsible for the reporting process as foreseen in the Charter's Article 43. States Parties are obliged to submit an initial report on the measures they have adopted that give effect to the provisions of the Charter, and submit periodic reports every three years after that.¹²⁰ The preparation of such reports offers the opportunity for States Parties to conduct a comprehensive review of the various measures they have undertaken to monitor progress made in the enjoyment of children's rights, and to harmonise national law and policy. In 2003, the Committee developed Guidelines on how to prepare the initial reports submitted pursuant to Article 43.¹²¹ State Party reports are considered by the Committee according to the Procedures for the Consideration of State Party reports.¹²² These reports are treated as public documents and States Parties are encouraged to publicise their reports among all relevant actors on a national level. The first State Party reports received by the Committee¹²³ were considered by the Committee in the context of the 11th Session of the African Committee of Experts on the Rights and Welfare of the Child, held in Addis Ababa on 26 May 2008.¹²⁴

117 Currently, the Committee is composed of Ms Seynabou Ndiaye Diakhaté, Senegal (Chairperson); Ms Koffi Appoh Marie Chantal, Cote d'Ivoire (Deputy Chairperson); Ms Boipelo Lucia Seithlamo, Botswana (Rapporteur); Hon. Lady Justice Martha Koome, Kenya; Ms Mamosebi T Pholo, Lesotho; Mr Moussa Sissoko, Mali; Ms Dawlat Ibrahim Hasssan, Egypt; Mr Cyprien Adébayo Yanclo, Benin; Ms Agnès Kaboré, Burkina Faso; Mr Andrianirainy Rasamoely, Madagascar; Ms Mariam Uwais, Nigeria.

118 ACERWC (2002).

119 On how investigations are conducted see ACERWC (2006b).

120 Pursuant to this provision, the due date for Namibia to submit its initial report was 23 July 2006, with its first periodic report being due on 23 July 2009. However, as of January 2009, no initial report has been submitted as yet. See Sheahan (2009:86).

121 ACERWC (2003).

122 ACERWC (2005b).

123 States Parties reports have so far been received from the following countries: Burkina Faso, Egypt, Kenya, Mali, Mauritius, Niger, Nigeria, Rwanda, Tanzania and Uganda; see Sheahan (2009:24). However, as of December 2006, and for the first round of consideration of reports in 2008, only Egypt, Mauritius, Nigeria and Rwanda had submitted reports to the Committee; see ACERWC (2006a).

124 Cf. Gawanas (2008).

The reporting system as envisaged by the Charter, the Guidelines for States Parties' initial reports, and the Guidelines for the Consideration of State Party Reports all encounter similar weaknesses to those experienced with the CRC reporting system, particularly with regard to the issue of overdue reports. The only mechanism provided by the aforementioned legal instruments is to issue reminders (two reminders followed by a final reminder) to States Parties who fail to submit a report. Where no response is received from the State Party, —¹²⁵

... within a timeframe determined by the Committee, the Committee shall consider the situation, as it deems necessary[,] and shall include a reference to this effect in its report to the Assembly of Heads of State.

The problem of delay in governments submitting their periodic reports in time is also substantive under the CRC, and it seems that neither the Charter nor the CRC has been able to develop an effective mechanism to ensure that reports are submitted in time. However, even though there is no legally enforceable obligation in the classic sense, i.e. by linking non-submission to specific sanctions, persistent non-submission of reports will not throw a positive light on the commitment of States Parties with regard to the protection and promotion of children's rights.

One particular mechanism provided for in the Charter deserves special mention, as it is unique within the framework of the international law of the child. The Charter provides the possibility of addressing communications by individuals, including the victimised child and/or his/her parents or legal representatives, government agencies, or NGOs recognised by the AU, a Member State, or the UN. Such communications can relate to any matter covered by the Charter. For the consideration of communications provided for in Article 44 of the Charter, the Committee has formulated detailed Guidelines,¹²⁶ according to which –

- a communication may not be anonymous
- it has to be submitted in written form
- it has to relate to a signatory to the Charter.

The Committee decides on the admissibility of a communication, and takes into consideration whether —¹²⁷

- national remedies have been exhausted
- no other investigation, procedure or international regulation is dealing with the same issue at that particular time
- the communication was handed in within a reasonable time after the exhaustion of local remedies, and
- the communication is not exclusively be based on information circulated by the media.

125 See section 33 of the Procedures for the Consideration of State Party Reports (ACERWC 2005b).

126 ACERWC (2006c).

127 (ibid.:Chapter 2, Article 1(III)).

Upon deciding that a communication is admissible, the Committee confidentially brings the matter to the attention of the State concerned, and requests an explanation in a written statement.¹²⁸

One feature within the procedure of handling communications has been subject to criticism, namely that the Committee is not permitted to make public any communication, document or information relating to a communication.¹²⁹ It has been argued that confidentiality “has been used by African States under the disguise of facilitating an amicable solution to control human rights monitoring mechanisms”,¹³⁰ which may result in the inefficiency of the Committee. Of course, this is a legitimate concern. However, this directive may also be appropriate for protecting the child subject to the communication from eventual harm, e.g. due to high media involvement or eventual pressure from the alleged perpetrator.

Every two years, the Committee submits a report on its activities and on any communication made under the Charter to the Ordinary Session of the Assembly of Heads of State and Government. After the Assembly has considered such a report, it is published.¹³¹

From a theoretical point of view, it can be summarised, that the Committee has far-reaching powers to promote and protect children's rights. The legal basis has been created with the adoption of the Charter and the related procedural rules and guidelines. However, practice still tells a different story: even though the Charter entered into force in 1999 and initial reports are to be submitted within two years of the entry into force of the Charter for the State Party concerned, the Committee only began consideration of State Party reports in 2008. Although 45 countries have ratified the Charter, as of February 2009 only ten¹³² States Parties had submitted their initial reports to the Committee. So far, only one communication has been received by the Committee¹³³ and a decision has not yet been published. These problems are probably linked to constraints which affect the Committee's work, with the lack of funds and resources leading the way in terms of problems. After having struggled to function without a full-time Secretary for a long time, the Committee has only had one since August 2007. However, so far,

128 (ibid.:Chapter 2, Article 2(II)(4)).

129 (ibid.:Chapter 3, Article 1(2)).

130 Chirwa (2002:170).

131 See Article 45(3). Unfortunately, as of 14 October 2009, neither the reports by the Committee, nor the decisions of the Assembly on the reports of the Committee had been published on the (rather outdated) Committee's website. See <http://www.africa-union.org/child/home.htm>; last accessed 14 October 2009.

132 Burkina Faso, Egypt, Kenya, Mali, Mauritius, Niger, Nigeria, Rwanda, Tanzania and Uganda have so far submitted their initial reports; cf. Sheahan (2009:24).

133 The only communications received so far as one communication submitted against Uganda in 2005 by the Centre for Human Rights at the University of Pretoria, South Africa, for numerous violations on children's rights in the conflict-ridden northern part of the country; see Keetharuth (2009:208).

the Committee has been unable to secure the services of an own legal officer; the AU Legal Advisor currently assumes this role. However, it has to be considered, that the Committee, especially with regard to its reporting and complaint mechanism, is still at its infancy. Only the future will show how effectively children's rights have been enhanced by this treaty body.

The African Youth Charter

The Assembly of Heads of State and Government of the African Union declared 2009–2018 as the decade on youth development in Africa.¹³⁴ In this context, the African Youth Charter (AYC),¹³⁵ which entered into force on 8 August 2009, is a particularly relevant legal instrument for young people in Africa. The AYC was adopted on 2 July 2006,¹³⁶ recognising that –

... Africa's greatest resource is its youthful population and that[,] through their active and full participation, Africans can surmount the difficulties that lie ahead.

By September 2009, the AYC had been ratified by 17 and signed by 32 AU Member States. Namibia signed the AYC on 16 May 2008 and ratified it on 17 July that year.¹³⁷ The AYC creates a legally binding framework for governments to develop supportive policies, and it formulates specific rights, duties and responsibilities of particular relevance to young people in Africa. States Parties are encouraged to adopt such legislative or other measures that may be necessary to give effect to the AYC's provisions.¹³⁸

The Charter consists of a Preamble followed by 31 Articles, the latter being divided into two parts. Part 1 describes rights and duties, while Part 2 encompasses final provisions. The Charter is applicable to the youth or young people. Unlike other legal documents, in defining *the youth* or *young people* the AYC does not draw the decisive line at the age of majority, from which point on young people are treated the same as adults under the law. Instead, the Charter defines *the youth* or *young people* as every person between the ages of 15 and 35 years.¹³⁹ This definition seems to be very broad at first, and the question has been raised¹⁴⁰ whether it would be appropriate to define as *the youth* or *young people* those up to the age of 35, especially since the average life expectancy on the African

134 See Press Release No. 57/2009 of the African Union's Division of Communication and Information dated 18 February 2009; available at <http://www.ayconference.org/AU%20Press%20Release.pdf>; last accessed 10 October 2009.

135 Available at <http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm>; last accessed 10 October 2009.

136 For further background on the drafting process, see Mac-Ikemenjima (2006).

137 For a list of countries that have signed, ratified/acceded to the AYC, see <http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm>; last accessed 10 October 2009.

138 Article 1 on State Obligations.

139 In comparison, the World Bank and the UN, for example, define as *youth* all persons aged 15 to 24.

140 See Mac-Ikemenjima (2009).

continent is only 50.5 years¹⁴¹ and significantly lower in many sub-Saharan countries, and since political, social, cultural and other circumstances in the African context often force the assumption of 'adult' responsibilities at a tender age.¹⁴² However, protecting and supporting the youth and young people must be seen independently from issues of life expectancy or the age of assumption of adult responsibilities; indeed, the provisions of the AYC impressively demonstrate that it is appropriate to equip young people up to the age of 35 with the rights it contains.

Again, the right to education may serve as an example in this respect. This right is one of the focal issues of the AYC. Taking the average duration of primary, secondary and tertiary education, it seems appropriate to grant young people protection by the AYC as it encourages States Parties to create the framework to equip young people with the framework they need to develop their skills rather than treat them differently under the law from 'adults'.

Another example of the broad definition being justified is with regard to juvenile justice. Some may fear that special provisions could treat persons within the 15–35 age bracket who have infringed on the penal law as being different from 'adults'. However, although the AYC makes specific provisions as to law enforcement in Article 18, any privileges compared with the related treatment of adults are only granted to minors, who are defined as being all persons from within the age bracket of 15–18. All other provisions instead emphasise general human rights standards, and encourage States Parties to enhance the social reintegration process for young people – especially with regard to education during imprisonment.

Like the Charter, the AYC contains fundamental principles relating to the group of civil and political rights, such as non-discrimination (Article 2); freedom of movement (Article 3); freedom of expression and association (Articles 4 and 5); freedom of thought, conscience and religion (Article 6); and protection of private life and the family (Articles 7 and 8).

It cannot be said that some of the rights contained in the AYC are more important than others. However, the importance of Articles 13, 14, 15, and 16 need to be pointed out as being of major concern, particularly to young people of African descent.¹⁴³ These four Articles cover the issues of education, skills development, poverty eradication, socio-economic integration of the youth, sustainable livelihoods, employment, and health.

Another vital structural element of the AYC, running through it like a golden thread, is the issue of participation. Thus, Article 11 on youth participation provides, *inter alia*,

141 According to World Bank data. See <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/0,,contentMDK:20266824~menuPK:538117~pagePK:146736~piPK:226340~theSitePK:258644,00.html>; last accessed 10 October 2009.

142 Kabumba (2009:1).

143 See Ubi (2007).

for participation of the youth in Parliament and for strengthening of platforms for youth participation in decision-making at local, national, regional, and continental levels of governance. In the context of States Parties' obligation to develop national youth policies (Article 12), the issue of strengthening youth participation in decision-making is addressed, like it is in many other provisions, such as those relating to education (Article 13), poverty eradication (Article 14), and sustainable development and protection of the environment¹⁴⁴ (Article 19).

The AYC further addresses issues related to health care, employment, security, leisure, recreation, culture, youth with disabilities, the girl child, youth in the diaspora, and the elimination of harmful social and cultural practices. Article 26 also formulates the responsibilities of the youth regarding their own development, and the development of society.

One question that needs to be addressed is the relationship between the AYC and the Charter, which is applicable to children – being defined in the latter as all persons under the age of 18. This eventually results in an overlap between the AYC and the Charter for persons between the ages of 15 to 18. As there is no rule on the relationship between the two documents, and taking the principle of the best interest of the child into account, it is assumed, that persons aged 15 to 18 years may choose which of the documents is more relevant for their specific needs. One factor, which might play a role in this respect is the availability of enforcement mechanisms under the respective instruments.

Mechanisms for enforcement and monitoring are not clearly formulated by the AYC. It is the African Union Commission, which has the duty to ensure that States Parties respect the commitments made and fulfil the duties outlined in the AYC. However, the AYC neither establishes a treaty body, nor does it oblige States Parties to submit reports. Nonetheless, it has been proposed that the African Commission encourage Member States to submit annual “State of the Youth” reports to it, which should eventually together constitute a continental report on the issue.¹⁴⁵

Moreover, the AYC does not explicitly provide for a specific complaint mechanism, which could raise concerns about the enforceability of rights contained the AYC.¹⁴⁶ Here it should be kept in mind that violations of African Union human rights instruments can be heard before its main judicial body. In future, this will be the African Court of Justice and Human Rights, established by the Protocol on the Statute of the African Court of Justice and Human Rights. This court is a result of the merger of the African Court on Human and Peoples' Rights – established by the Protocol to the African Charter

144 It should be noted that the protection of the environment linked to the category of third-generation human rights is explicitly addressed by all AU human rights documents, including the Charter. This is a progressive and future-oriented approach, for which the AU should be applauded. On third-generation rights and the environment, see Ruppel (2008).

145 Mac-Ikemenjima (2006:10).

146 See Kabumba (2009:4).

on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights – and the Court of Justice of the African Union established by the Constitutive Act of the African Union.¹⁴⁷ Once the new court becomes operative,¹⁴⁸ it has jurisdiction on, inter alia, the interpretation and application of the African Charter, the Charter on the Rights and Welfare of the Child, or any other legal instrument relating to human rights that has been ratified by the States Parties concerned.¹⁴⁹ During the transition phase until the merged court starts operating, it is still possible to file a case with the African Court on Human and Peoples' Rights under Article 3 of its statute,¹⁵⁰ or to bring a communication to the African Commission on Human and Peoples' Rights.¹⁵¹

In May 2009, just before the AYC came into force, a working group of 11 countries met to advance the popularisation, ratification and implementation of the AYC. The following conditions for the implementation of the AYC were outlined at that meeting:¹⁵²

- All Member States were required to ratify the Charter by the end of 2010, and have in place national youth policies and action plans that took into account and supported the implementation of the Charter, and
- All Member States were required to have instituted mechanisms for reporting their progress on implementing youth policies and programmes, and to have strengthened their respective representative bodies for youth.

The AYC is a vital, legally binding instrument containing a number of important human rights provisions advancing the rights of young people on the continent. If implementation of the AYC is ensured, it will be decisive in fully empowering and developing Africa's youth.

The Declaration and Plan of Action on Africa Fit for Children

In 2001, the Ministers of the AU Member States responsible for promoting and safeguarding the rights and welfare of children in their respective countries adopted the 2001 Declaration and Plan of Action of Africa Fit for Children. This Declaration and Plan of Action constituted the African Common Position submitted to the 2002 UN General Assembly Special Session on Children.

147 For a detailed discussion on the AU legal bodies, see Hansungule (2009).

148 Pursuant to its Article 9, the Protocol on the Statute of the African Court of Justice and Human Rights as well as the Statute itself will enter into force 30 days after the deposit of the instruments of ratification by 15 Member States. As of July 2009, only Libya had ratified the Protocol.

149 Article 28(c), Statute of the African Court of Justice and Human Rights.

150 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

151 See Hansungule (2009:259ff).

152 Report of the Workshop on the Member States–AUC Strategic Initiative on Youth Policies and the African Youth Charter, 26–27 May 2009. For this and further details on the implementation of the AYC, see Mac-Ikemenjima (2009:2).

The Plan of Action focuses on ten priorities, as follows:

- Overall framework
- Enhancing life chances
- Overcoming HIV and AIDS
- Realising the right to education
- Realising the right to protection
- Participation of youth and children
- Actions at all levels
- International partnership
- Follow-up actions and monitoring, and
- Call to action.

Recognising, however, that the situation of children in Africa remained critical due to socio-economic, cultural, political challenges, in 2007 the Ministers of the AU Member States responsible for promoting and safeguarding the rights and welfare of children in their respective countries signed a Call for Accelerated Action on the Implementation of the Plan of Action on Africa Fit for Children. In their Call, they reaffirmed the commitments they had made in the 2001 Plan of Action, and underlined the need to strengthen mechanisms for accountability to ensure more consistent and comprehensive progress during the five years to come.¹⁵³

The Call for Accelerated Action identifies priorities in each of the areas contained in the Plan of Action. Regarding the legislative and policy framework, for example, by the end of 2008, all AU Member States are envisaged to have ratified the Charter, and to have enacted appropriate or amend existing laws to bring them in line with the Charter by 2010. Furthermore, the acceleration of legal reform is envisaged in order to ensure all children are protected by comprehensive legislation in line with the African Charter and other international human rights standards.¹⁵⁴ On monitoring and evaluation, the Call for Accelerated Action requests Member States to, inter alia, submit biennial reports on how far they have progressed in implementing the Plan of Action and the Accelerated Call to the AU Organs through the African Union Commission. Furthermore, the AU Commission is requested to develop a framework for monitoring and evaluating the Call for Accelerated Action with appropriate baselines, targets and indicators for measuring progress at country level.¹⁵⁵ The Call for Accelerated Action also involves different stakeholders in the process. One specific example are regional economic communities (RECs), which are requested to –¹⁵⁶

- raise awareness on and promote the rights and welfare of the child
- work closely with Member States, the African Committee of Experts on the Rights

153 See AU (2007:1).

154 AU (2007:6).

155 AU (2007:9).

156 AU (2007:10).

- and Welfare of the Child and other stakeholders to implement the Declaration and Plan of Action on Children as well as other children's programmes, and
- develop regional child policies in collaboration with partners, and lead the agenda for children in the region.

It has, therefore, been recognised, that RECs can play a vital role regarding the protection and promotion of human rights in general, and children's rights in particular.¹⁵⁷

In sum, a number of significant achievements have been made in Africa in the promotion of children's rights. A comprehensive legal framework has been put in place to protect the rights of children and of the youth. This is the first step towards –¹⁵⁸

... building a world in which all of our children can grow up to realise their full potential, in health, peace and dignity.

However, from a more practical point of view, the relatively young system of the AU can still be improved upon. The importance of enforcement and reporting mechanisms cannot be overemphasised. In this respect, there is still a long way to go – barricaded with administrative and financial hurdles – on which the cooperation of all Member States, the international community and the engagement of civil society is essential.

The sub-regional level

The SADC Treaty

SADC¹⁵⁹ was established in Windhoek in 1992 as the successor to the Southern African Development Coordination Conference (SADCC), which was founded in 1980. SADC currently counts 15 states among its members, namely Angola, Botswana, the Democratic Republic of Congo (DRC), Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, the Seychelles,¹⁶⁰ South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe.

SADC was established by signature of its constitutive legal instrument, the SADC Treaty. SADC envisages –¹⁶¹

... a common future, a future in a regional community that will ensure economic well-being, improvement of the standards of living and quality of life, freedom and social justice[,] and peace and security for the peoples of Southern Africa. This shared vision is anchored on the common values and principles and the historical and cultural affinities that exist between the peoples of Southern Africa.

157 On the role of RECs in human rights protection, see Ruppel (2009a:275ff).

158 Annan (2001:Preface).

159 For more detail on SADC, see <http://www.sadc.int/>; last accessed 12 October 2008.

160 The Seychelles was a member of SADC from 1997 to 2004; it rejoined SADC in 2008.

161 See SADC's Vision, at <http://www.sadc.int/>; last accessed 12 October 2008.

To this end, SADC's objectives include –¹⁶²

- the achievement of development and economic growth
- the alleviation of poverty
- the enhancement of the standard and quality of life
- support of the socially disadvantaged through regional integration
- the evolution of common political values, systems and institutions
- the promotion and defence of peace and security, and
- achieving the sustainable utilisation of natural resources and effective protection of the environment.

From the above list of objectives, it might appear that the promotion and protection of human rights in general and children's rights in particular are not a top priority for SADC, as an organisation that furthers socio-economic cooperation and integration as well as cooperation as regards political issues and security among its 15 Member States. However, the protection of human rights plays an essential role in economic development as it has an impact on the investment climate, which in turn contributes to growth, productivity and employment creation – all being essential for a sustainable reduction in poverty.¹⁶³ Although SADC's vision does not refer explicitly to children's rights, all the principles contained in it are also relevant to the state of children in the SADC Region.

Many human-rights-related provisions can be found within SADC's legal framework, which – at least indirectly – apply to children. The SADC Treaty itself refers to human rights directly or indirectly at several stages. In its Preamble, the Treaty determines, *inter alia*, to ensure, through common action, the progress and well-being of the people of southern Africa, and it recognises the need to involve the people of the SADC Region centrally in the process of development and integration, particularly through guaranteeing democratic rights and observing human rights and the rule of law. The Preamble's contents are given effect within the subsequent provisions of the Treaty. Chapter 3, for example, which deals with principles, objectives, the common agenda and general undertakings, provides that SADC and its Member States are to act in accordance with the principles of human rights, democracy and the rule of law.¹⁶⁴ Moreover, the objectives of SADC¹⁶⁵ relate to human rights issues – which include children's rights issues in one way or another. For instance, the objective of alleviating and eventually eradicating poverty contributes towards ensuring, *inter alia*, a decent standard of living, adequate nutrition, health care and education – all of which are essential human and children's rights.¹⁶⁶ Other SADC objectives, such as the maintenance of democracy, peace, security and

162 These are some of the SADC objectives laid down in Article 5 of the SADC Treaty.

163 For more detail on the role of RECs in human rights protection, see Ruppel (2009a:277ff).

164 Article 4(c), SADC Treaty.

165 Article 5, SADC Treaty.

166 UNDP (2000:8).

stability, refer to human rights, as do the sustainable utilisation of natural resources and effective protection of the environment – known as third-generation human rights.¹⁶⁷

SADC Protocols

Besides the aforementioned provisions and objectives in the SADC Treaty, the SADC legal system offers human rights protection in many legal instruments as well. One category of such documents constitutes the SADC Protocols. The Protocols are instruments by means of which the SADC Treaty is implemented, and they have the same legal force as the Treaty itself. A Protocol legally binds its signatories after ratification. The Protocols which are of most relevance with regard to children's rights are –

- the SADC Protocol on Education and Training
- the SADC Protocol on Gender and Equality, and
- the SADC Protocol on Health.

The **Protocol on Education and Training** entered into force in 2000. Namibia signed the Protocol in 1997 and ratified it in 1998. The Protocol's objective is to formulate and implement comparable policies and systems of education and training in Member States. The Protocol provides identifies specific areas of cooperation, such as those relating to basic (primary and secondary), intermediate and higher education levels, as well as to research and development, and to lifelong learning. A Human Resource Development Sector Coordinating Unit was established under the Protocol, and is responsible for the Protocol's implementation.

The **Protocol on Gender and Development** was signed during the 28th SADC Summit in August 2008.¹⁶⁸ Recognising that the integration and mainstreaming of gender issues into the SADC legal framework is key to the sustainable development of the SADC Region, and taking into account globalisation, human trafficking of women and children, the feminisation of poverty, and violence against women, amongst other things, the Protocol in its 25 Articles expressively addresses issues such as –

- affirmative action
- access to justice
- marriage and family rights
- gender-based violence
- health
- HIV and AIDS, and
- peace-building and conflict resolution.

The Protocol provides that, by 2015, Member States are obliged to enshrine gender equality in their respective constitutions, and their constitutions are obliged to state that the provisions enshrining gender equality take precedence over any customary,

167 Ruppel (2008).

168 SADC (2008:Section 16).

religious and other laws in the country concerned.¹⁶⁹ The Protocol contains several provisions specifically geared to promoting children's rights.¹⁷⁰ Apart from provisions relating to legislation on marriage (Article 8), the most prominent provision is Article 11 on the girl and boy child. Member States are encouraged to adopt laws, policies and programmes to ensure the development and protection of children by eliminating all forms of discrimination in the family, in the community, in institutions and at state level, and by ensuring equal access to education and health care. Furthermore, it is provided that girls are entitled to enjoy the same rights as boys, and that children are entitled to be protected from harmful cultural attitudes and practices and from abuse. Equal access to information, education, services and facilities on sexual and reproductive health and rights are further issues addressed by the Protocol.

The implementation of the Protocol's provisions is the responsibility of the various SADC Member States,¹⁷¹ and specific provisions as to monitoring and evaluation are laid down in the Protocol.¹⁷² The SADC Tribunal is the judicial body that has jurisdiction over disputes relating to this Protocol.¹⁷³

The **Protocol on Health** entered into force in 2004 and was ratified by Namibia in 2000. The Protocol's general objective is to address the health problems and challenges facing Member States through effective regional collaboration and mutual support. One specific objective formulated in favour of the protection of children's rights is to develop common strategies to address the health needs of children and other vulnerable groups. With regard to childhood and adolescent health, in its Article 17 the Protocol obliges Member States to cooperate in improving the health status of children and adolescents, and to develop coherent and standardised policies with regard to child and adolescent health. Furthermore, Member States are required to encourage adolescents to delay engaging in early sexual activity which may result in unwanted teenage pregnancies. The Protocol established the Health Sector Coordinating Unit, which is responsible for the Protocol's implementation.

Other instruments

Apart from the Treaty and Protocols, SADC has other instruments at different levels. These are not binding, and do not require ratification by SADC Member States. The relevant instruments with respect to children's rights include the Charter of Fundamental and Social Rights in SADC, the Declaration on Agriculture and Food Security, and the Declaration on HIV and AIDS.

169 Article 4, SADC Protocol on Gender and Development.

170 The Protocol defines children as being all persons under the age of 18.

171 Article 14, SADC Protocol.

172 Article 17, SADC Protocol.

173 Article 18, SADC Protocol.

The 2003 **Charter of Fundamental and Social Rights in SADC**, although not legally binding, is an important human rights document that specifies the objectives laid down in Article 5 of the SADC Treaty for the employment and labour sector. The Charter enshrines the following rights, among others:

- The right to equality
- The right to a safe and healthy environment
- The right to remuneration, and
- The right to the protection of specific groups in society, such as children, the youth, the elderly, and persons with disabilities.

For the purpose of this publication, Article 7 on the protection of children and young people is of particular interest. In it, reference is made to the ILO Convention on the Minimum Age of Entry into Employment (No. 138) and Member States are requested to create an enabling environment consistent with this legal instrument. Provisions are furthermore made with respect to vocational training and to the remuneration of young people who are in gainful employment.

With the 2003 **Declaration on Agriculture and Food Security**, Heads of State and Government gave substantial means to some specific objectives laid down in Article 5 of the SADC Treaty, namely –

- the promotion of sustainable and equitable economic growth and socio-economic development to ensure poverty alleviation, with the ultimate objective of its eradication
- the achievement of sustainable utilisation of natural resources and effective protection of the environment, and
- mainstreaming of gender perspectives in the process of community- and nation-building.

It goes without saying that these principles are of utmost importance for the future of children living in the SADC Region. By this Declaration, SADC Member States committed themselves to promote agriculture as a pillar of strength in national and regional development strategies and programmes, in order to attain their short-, medium-, and long-term objectives on agriculture and food security. The Declaration is of specific importance for the child's right to food, and covers a broad range of human-rights-relevant issues such as the sustainable use and management of natural resources, the enhancement of gender equality and human health, and the mitigation of chronic diseases and HIV and AIDS.

Similarly, the 2003 **Declaration on HIV and AIDS** strives to realise the objectives set forth in the SADC Treaty to –

- promote sustainable and equitable economic growth and socio-economic development in order to ensure poverty alleviation
- combat HIV and AIDS and other deadly and communicable diseases, and
- mainstream gender in the process of community- and nation-building.

The Declaration describes specific areas as urgent priorities in terms of attention and action. These areas include –

- prevention
- social mobilisation
- improving care
- improving access to counselling and testing services
- improving treatment and support
- accelerating development
- mitigating the impact of HIV and AIDS
- intensifying resource mobilisation, and
- strengthening institutional, monitoring and evaluation mechanisms.

SADC has a broad range of cross-cutting programmes and activities pertinent to children's rights such as gender equality and development; poverty eradication; and combating HIV and AIDS. Among the most devastating effects of the HIV and AIDS pandemic as far as southern Africa is concerned is that it is orphaning generations of children. The crisis of orphans and other vulnerable children (OVC) is one of the biggest challenges for children's rights in the SADC Region, therefore. For this reason, the SADC Parliamentary Forum's¹⁷⁴ HIV and AIDS Programme has prioritised the OVC crisis in its agenda.¹⁷⁵

One further document relevant to children's Rights in the SADC Region was drawn up in 2009,¹⁷⁶ namely the **Draft Strategic Plan of Action on Combating Trafficking in Persons, especially Women and Children in the SADC Region**.¹⁷⁷ This Plan of Action clearly lays out methods and areas of cooperation in an effort to combat all areas of human trafficking, especially of women and children. Children in the SADC Region are prone to trafficking as a result of vulnerabilities created by war, endemic poverty, minimal access to health and education, gender inequality, and unemployment. These scourges affect children, particularly orphans, and the youth. The priority areas addressed by the Plan of Action include the following:

- legislation and policy measures, including the development of national policies and the enactment of legislation to combat trafficking in persons

174 The SADC Parliamentary Forum is a regional inter-parliamentary organisation established in 1997 under Article 9(2) of the SADC Treaty as an effort to further integrate parliaments into an even closer cooperation with the executive, and to enhance popular participation in SADC's regional integration efforts. The aim of these efforts is to facilitate the objectives of eradicating poverty and achieving sustainable development. SADC-PF's mandate is translated into a number of priority areas, including regional integration, democracy and governance, gender equality, human rights, capacity-building and inter-parliamentary cooperation, and HIV and AIDS.

175 For further details, see <http://www.sadcpf.org/hiv aids/page.php?pn=aboutus>; last accessed 12 October 2008.

176 See SADC (2009).

177 Available at <http://www.santac.org/eng/Conferences/2009-SADC-Ministerial-Conference-on-Combating-Trafficking-in-Persons>; last accessed 12 October 2008.

- training for skills enhancement and capacity-building regarding the investigation, prevention and prosecution of trafficking in persons, and the protection of the trafficked victims, especially women and children
- prevention and raising of public awareness, and
- victim support and witness protection.

The ten-year Regional Strategic Plan of Action was adopted by SADC Ministers responsible for combating trafficking in persons, submitted to the SADC Council of Ministers, and approved in August 2009.

Enforcement of children's rights on the sub-regional level

The programmes and provisions sketched above, other than those of the Treaty and the Protocols, are beyond any doubt important steps for practically improving the situation of children within SADC. However, given that, in the legal sense, only provisions of a binding nature can be enforced, the SADC Treaty and its Protocols are pivotal to enforcing children's rights within SADC. The judicial institution within SADC is the SADC Tribunal, which was established in 1992 by Article 9 of the SADC Treaty. The inauguration of the Tribunal and the swearing in of its members took place on 18 November 2005 in Windhoek, Namibia. The Council also designated the Seat of the Tribunal to be in Windhoek. The judicial body began hearing cases in 2007, but no case dealing specifically with children's rights has been received so far.

The Tribunal has the mandate to adjudicate disputes between states, and between natural and legal persons in SADC. Furthermore, the Tribunal has jurisdiction over all matters provided for in any other agreements that Member States may conclude among themselves or within the community, and that confer jurisdiction to the Tribunal.¹⁷⁸ In this context, the SADC Tribunal also has jurisdiction over any dispute arising from the interpretation or application of the Protocols relevant for the protection and promotion of children's rights. The Tribunal was primarily set up to resolve disputes arising from closer economic and political union, rather than human rights.¹⁷⁹ However, recent judgements by the Tribunal¹⁸⁰ impressively demonstrate that it can also be called upon to consider the human rights implications of economic policies and programmes.¹⁸¹

Conclusion

Overall, therefore, it can be concluded that Namibia has strongly committed herself to the protection of children's rights by incorporating a broad variety of international legal instruments into the domestic system. Namibia is a State Party to the most relevant legal

178 Article 15(2), Protocol on the Tribunal and Rules of Procedure thereof.

179 Viljoen (2007:503).

180 *Mike Campbell & Another (PVT) Limited v The Republic of Zimbabwe*, SADC (T) 2/2007.

181 For more details on the SADC Tribunal's human rights jurisdiction, see Ruppel & Bangamwabo (2008); Ruppel (2009b); Ruppel (2009c).

instruments dealing with the protection of children's rights on a global, regional and sub-regional level. These instruments contain a broad variety of material rights for children. Thus, the statutory side offers a comprehensive system of children's rights applicable in Namibia. However, from a procedural perspective, there is still room for improvement. This applies to reporting processes as well as to the question of complaints in case of children's rights violations.

The reporting mechanisms for States Parties under the CRC have a longer history than those on the regional and sub-regional level, so it is not surprising that reporting seems to be more effective under the CRC. One indication of this is the higher number of initial and periodic State Party reports submitted to the CRC Committee.

On the level of the AU, financial and administrative hurdles still hinder progress, but this will hopefully improve in near future. Since overdue reports are a particular problem under the CRC and the AU Charter, Member States should be encouraged persistently to submit their reports in time. Since deficiencies can only be addressed and resolved once they have been identified, the whole reporting system needs to be seen as imperative for enhancing the situation of children in Namibia and on the continent as a whole. Change will only come if the parties to the relevant legal instrument collaborate.

Another critical issue is the complaint mechanism under the respective instruments. While it is questionable that the CRC does not provide for the option of bringing individual complaints before its treaty body, the Committee on the Rights of the Child, it is laudable that under the AU Charter, individuals including the victimised child and/or his parents or legal representatives, governments or NGOs recognised by the AU, by a Member State, or the UN, can bring complaints to the ACERWC relating to any matter covered by the Charter. However, it seems that individuals are still reluctant to bring such communications to the ACERWC. This is most probably not due to the fact that violations of children's rights are always efficiently and satisfactorily addressed by national courts, but rather because the system of bringing communications to the ACERWC is not commonly known or not considered as a fruitful avenue for children or those who assist children in enforcing their rights to take.

Statistical data on the situation of children in Namibia and in Africa in general still reflect the sad reality that children belong to the most vulnerable groups and that, de facto, their rights remain at risk. A more active approach is required from the international community and all stakeholders, particularly from governments and civil society, to redouble their efforts in order to make the future a better place for today's children and their children's children.

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