

# Surveying the research landscape to promote children's legal rights in an African context

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## Summary

*This article represents an initial attempt to identify research themes and topics of special relevance to the furtherance of children's rights in the African context in order to sharpen and strengthen our capacity to promote good practice and promising solutions. It surveys an array of possibilities for research to promote the implementation of children's rights in an African context. A number of theme areas are detailed, spanning from general legal reform processes and children's participation therein, to matters of social and economic policy in so far as they feed into the implementation and advancement of children's socio-economic rights. The article incorporates information from a number of different African jurisdictions, comparing and contrasting efforts at child reform in respect of children's rights.*

## 1 Introduction

Whereas until recently 'children's rights' were viewed as falling within

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the realm of charity, under the United Nations (UN) Convention on the Rights of the Child<sup>1</sup> (CRC) they have come to be regarded as part and parcel of international human rights law. The rapid accession to CRC by states all over the world — with only two exceptions: the United States and Somalia — signals that the rights which contribute towards the protection of children have outgrown the discretionary power of national legislators. As persons entitled to protection under an increasing range of international law provisions, children cannot be regarded merely as subject to their own national law. In their vulnerability, and in their need for protection and justice, children have a place on the international legal platform, growing up as world citizens.

In Africa, CRC is not alone in the quest for expanded boundaries of children's rights. It is supplemented by the African Charter on the Rights and Welfare of the Child (African Children's Charter).<sup>2</sup> It was in order to give CRC specific application within the African context that the African Children's Charter — the first regional treaty on the human rights of the child — was adopted by the Organisation of African Unity OAU (now African Union (AU)) Heads of State and Government on 11 July 1990.<sup>3</sup>

The African Children's Charter, while upholding all the universal standards outlined in CRC, speaks to the specific problems that African children confront, for example the impact of armed conflicts, harmful traditional practices, apartheid that prevailed at the time and so forth. For instance, within the African culture and value system, the Children's Charter provides for the responsibilities of children to their parents, communities and to society as a whole relative to their age and ability.<sup>4</sup> The African Children's Charter came into force on 29 November 1999 and has now been ratified by 41 countries on the continent.<sup>5</sup>

The popularity of CRC and the Children's Charter suggests a high level of normative consensus among the various nations of the world (particularly in Africa) on the idea and content of children's rights as human rights. In addition, the fact that a significant number of African countries have either completed or are in the process of completing major children's law reforms also shows commitment for the furtherance of children's rights on the continent. However, it should be noted

<sup>1</sup> Entry into force 1990.

<sup>2</sup> Entry into force 1999.

<sup>3</sup> One of the reasons for a separate African Charter on the Rights and Welfare of the Child was that during the drafting process of the CRC, Africa was underrepresented. Only Algeria, Egypt, Morocco and Senegal participated meaningfully in preparatory meetings. Furthermore, specific provisions on aspects peculiar to Africa were not sufficiently addressed in the UN instrument. For further details, see D Chirwa 'The merits and demerits of the African Charter on the Rights and Welfare of the Child' (2002) 10 *International Journal of Children's Rights* 157.

<sup>4</sup> Art 31 African Children's Charter.

<sup>5</sup> List of countries available at <http://www.africa-union.org/root/au/Documents/Treaties/List/African%20Charter%20on%20the%20Rights%20and%20Welfare%20of%20the%20Child.pdf> (accessed 28 July 2007).

that the degree to which these instruments and laws will improve children's lives depends greatly on how state parties implement them and adopt domestic measures to comply with their treaty obligations. The list of adverse factors that the implementation and enforcement of children's rights has to contend with, especially in Africa, is still very long.<sup>6</sup>

Moreover, although the concept of children's rights is more widely accepted today than was the case three decades ago, it may still not have become a primary societal value informing social policy in countries in Africa. Although much of contemporary moral, political and legal discourse pertaining to children is conducted in terms of a 'rights' agenda, there is still considerable divergence of opinion about the need for research concerning the nature of the rights, their foundation and practical implications, their content, scope and, increasingly, the locus of the duties and responsibilities, that correlate with the rights. It cannot be asserted authoritatively that there is an overarching international philosophy guiding children's rights that can give meaning to what every right means in law and practice. The competing rights and duties of parents, children, and the state continue to create disharmony which ultimately can prejudice the rights of children.

The purpose of this article is to generate discussion on a rights and policy-based research agenda on the African child. It attempts to identify important issues surrounding the legal rights and empowerment of children in Africa. Thus, in the following sections, this article explores issues including, but not limited to, assessing law reform processes in support of child rights in African context; mainstreaming rights-based approaches in general legal frameworks; strengths and weaknesses in legal approaches to children's rights issues; culture, customary law and children's rights; socio-economic rights; strategies for enhancing child participation in legal and policy processes; the role of the judiciary, courts and national monitoring mechanisms; and regional mechanisms and children's rights. A conclusion on the desired orientation of research to develop children's rights on the continent sums up the work.

## **2 Assessing law reform processes in support of child rights development in African context**

Many African countries have a plethora of existing legislation relating to matters which affect children. Increasingly, inherited colonial legislation is being overhauled and replaced with modern, more accessible and

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<sup>6</sup> Notwithstanding a children's rights discourse, many children — particularly in Africa — continue to suffer the effects of war, poverty, population growth and rapid urbanisation, and exploitation.

often more comprehensive dedicated children's statutes. Whilst some of these law reform processes are complete and the final statutes passed by parliament, others are not yet at that stage and are either under development or in parliamentary processes. Examples of the former are Ghana, Kenya, Madagascar, Nigeria and Uganda, whilst examples of the latter are Botswana, Lesotho, Mozambique, Namibia, South Africa, South Sudan and Swaziland (where the review and redrafting processes are just commencing). As has been pointed out on earlier occasions,<sup>7</sup> there has been a fair degree of cross-continental collaboration in law reform endeavours, especially since the turn of the millennium. Hence, members of the Lesotho Law Reform Commission visited South Africa and Ghana. South Africans were involved in the initial phase of law reform in Mozambique and Swaziland, and the Botswana processes commenced with a South African giving input on local experiences. A South African visited South Sudan at the early stage of the development of a children's statute there, and a delegation from South Sudan visited Lesotho. There has been regular contact with Namibia as well.<sup>8</sup>

Generally speaking, these new statutes cover the broad areas of child protection and children's status, including their relationships within the family. Commonly, therefore, issues such as guardianship or affiliation, custody of and access to children (both those born in and out of wedlock), are dealt with within the new children's rights framework heralded by CRC and the African Children's Charter, that is, premised on the rights of the child rather than the powers of the parents. Child protection aspects include measures for the protection of children from abuse and neglect, as well as the interventions required to investigate and prevent child abuse. Provision for one (or more) specialised children's decision-making forum is also a fairly universal phenomenon, be it a local tribunal or a more specialised court following different procedures. It is also usual for the 'new generation' statutes to include provisions aimed at ensuring a broader array of children's rights, enshrining the principles of the best interests of the child, and children's participation rights, in particular. All these law-making endeavors are an explicit attempt to domesticate CRC and the African Children's Charter.

Some examples on the continent exist of further 'specialist' areas of concern being covered in a fair degree of detail, such as inter-country adoption and trafficking. Here the South African, Lesotho and Malawian experiences stand out. Further, there is an ongoing debate about the inclusion of juvenile justice legislation in comprehensive child law enactments, a debate which has not been resolved. Kenya, Nigeria and

<sup>7</sup> Comment by Dr I Kimane (Chairperson of the Child Law Reform Committee, Lesotho) at the African Child Policy Forum conference on Harmonisation of Child Law in Africa, Nairobi, Kenya, October 2006.

<sup>8</sup> See, eg, J Sloth-Nielsen 'Strengthening the promotion, protection and fulfilment of children's rights in African context' in A Alen *et al* (eds) *The UN Children's Rights Convention: Theory meets practice* (2007) 103.

Uganda provide examples of composite approaches to the issue, with child justice being included in the overall Children's Act. Lesotho, too, has adopted the strategy of linking child justice to child protection and welfare generally, possibly arising from the strategic concern, linked to harsh public and political perceptions about crime in Southern Africa, that separation of child offenders legislatively-speaking might eventually result in a punitive criminal justice response to children in conflict with the law.<sup>9</sup> In Ghana, a proposed joint bill was ultimately split, and two enactments passed by parliament. In Mozambique, despite initial indications that a composite statute was under development,<sup>10</sup> the bills that have been prepared subsequent to the review and consultation process separate the jurisdiction of the *Tribunales des Mineurs* (the juvenile court) from the overarching children's bill.<sup>11</sup> The Gambia proceeded to enact juvenile justice legislation under the auspices of the Attorney-General's office in 2005, but in the absence of a broader children's welfare and protection focus, as far as is known.<sup>12</sup> Finally, the South African process has been characterised by two main enactments, initially caused largely by historical events — a strong non-governmental organisation (NGO) lobby for separate juvenile justice legislation which had commenced campaigning before the end of apartheid. This led to the appointment of a project committee of the South African Law Reform Commission to investigate proposals for a new juvenile justice system shortly after the entry into force of the 1996 Constitution which ushered in a democratic government. Only subsequently was the broader need for child law reform realised, at which stage a separate project committee to undertake a more comprehensive legal review commenced work.<sup>13</sup>

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<sup>9</sup> This has been the experience in South Africa, where a Child Justice Bill that was initially premised on a child rights approach was, upon entry into the parliamentary process, imbued with increasingly punitive characteristics, especially regarding offenders aged 16 or older charged with serious offences. For a recent discussion of this, see L Ehlers 'Child Justice: Comparing the South African child justice reform process and experiences of juvenile justice reform in the United States of America' (2006) Occasional Paper 1, Open Society Foundation for South Africa. The South African Child Justice Bill has still not been finalised by parliament, with the last debates on it having occurred in 2003. Ironically, though, the original version has served as a model for several subsequent bills elsewhere, such as Lesotho, Malawi and South Sudan.

<sup>10</sup> The first author was one of the two consultants contracted by UTREL (a governmental law reform agency) and UNICEF to undertake a legal review and consultation process with the view to the development of a new children's statute. In July 2007, a national workshop was organised to discuss the way forward in the enactment and implementation of the bills.

<sup>11</sup> The bills are scheduled to proceed to parliament in October 2007.

<sup>12</sup> See M Saine 'The new law on juvenile justice in The Gambia' (2005) 7 *Article 40* 4.

<sup>13</sup> See, eg, Childline South Africa 'Submission on the Sexual Offences Bill to the Parliamentary Portfolio Committee on Justice and Constitutional Development' <http://www.childlinesa.org.za/SexualOffences.htm> (2003) (accessed 27 November 2006).

However, there is a lack of a comprehensive assessment of the extent to which both similarities and differences have emerged in the respective statutes upon conclusion by national parliaments. A valuable initial study in one area, namely juvenile justice, was completed as a doctoral dissertation in 2005,<sup>14</sup> comparing law reforms specific to juvenile justice in six African countries, but this type of research needs to be broadened, both regionally and with respect to widening the subject areas for comparison. For instance, there is a great need for a regional study of the laws and policies pertaining to children in alternative care — both in family or community type care, and, as will be discussed in more depth below, children in institutional care.<sup>15</sup> Similarly, given the widespread growth of HIV/AIDS in Africa, and its disproportionate impact on children, there is a need to examine the extent to which recent statutes address or incorporate HIV/AIDS-related issues to ameliorate the plight of affected children. This too is elaborated below.<sup>16</sup> The impression, at this preliminary stage, is that generally statutes either do not address issues flowing from the HIV/AIDS pandemic, or that if they do, they do not do so comprehensively. Also, a trend has been noted that HIV/AIDS issues crop up at a policy level, for example with orphans and vulnerable children (OVC) policies in place in many countries, but questions remain about the extent to which these are filtered into enforceable national legislation. As the continent's law-making activities are to quite a large extent 'work in progress', all of the above would need to be further explored though, and best practice models identified. An assessment of the 'optimal' or 'ideal' mix of legal and policy provisions to promote children's rights is impossible to provide in the absence of such further detailed examination of concrete legal provisions.

A further research area emerging from the ongoing law reform processes is an examination of how law is operationalised upon finalisation, and which best practices can be identified in regard to implementation. This is because there is a marked tendency for children's legislation to be implemented only in a piece-meal fashion, or in large towns or capital cities only. Uganda, the first African country to adopt 'new generation' children's legislation, is a case in point, with limited implementation outside of Kampala having taken place in the 11 years since the adoption of the Children's Act (1996).<sup>17</sup>

Third, of some importance in the African context is the extent to which legal reforms deal with customary law and issues related to cus-

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<sup>14</sup> See G Odongo 'The domestication of international law standards on the rights of the child with specific reference to juvenile justice in the African context' unpublished LLD thesis, University of the Western Cape, 2005.

<sup>15</sup> See sec 4 below for further discussion.

<sup>16</sup> As above.

<sup>17</sup> See G Odongo 'Report on a field trip to Uganda' (2003) unpublished, copy on file at the Community Law Centre, University of the Western Cape.

tom and culture. In Namibia, for instance, debates are still raging about law reform concerning the issue of guardianship and contact of unmarried fathers with their extramarital children, which have been strongly influenced by cultural considerations, especially the perceptions of men.<sup>18</sup> In South Africa, a proposed prohibition on virginity testing and the regulation of male circumcision met with fierce resistance from traditionalists in parliament, necessitating further public hearings in the National Council of Provinces (the second chamber of parliament) which drew wide publicity.<sup>19</sup> As a result, the Children's Act 28 of 2005 permits virginity testing for persons 16 years and older, provided that they consent and that it is performed in accordance with the manner spelt out in the (still to be formulated) regulations.<sup>20</sup>

Fourth, it has been lamented that the legislative processes are often time-consuming, with bills languishing for many years before parliaments. Namibia and South Africa — in respect of the Child Justice Bill 49 of 2002 — provide concrete examples of this, and Lesotho too completed the law review and drafting process in 2004, yet the Lesotho Child Care and Protection Bill has not yet been introduced into the parliamentary process. This signals a possible parliamentary lack of concern for, or prioritisation of, children's rights. The fact that in the Kenyan Children's Act process, parliamentarians could not be swayed to increase the minimum age for criminal capacity beyond eight years, is arguably also relevant.<sup>21</sup> It points to a certain disjuncture between the drafters' intentions and those of the politicians required to vote on legislation, and here a useful analysis could be made of parliamentary debates when child-related laws are considered. Such research would of necessity have to reflect the cultural and other contexts within which children are portrayed in African parliamentary discussions.

Fifth, a gap in the substantive framework for child protection relates to the ratification of the Hague Conventions, notably the Hague Convention in respect of Inter-Country Adoption.<sup>22</sup> Only Burkina Faso, Burundi, Mauritius and South Africa have ratified this Convention, widely regarded as providing a sound and carefully considered protective structure for the regulation of this form of alternative care of children. Since African countries have become the main 'sending' countries in the last decade, lobbying for further ratifications and examining the

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<sup>18</sup> Personal Communication, D Hubbard, Advocacy Co-ordinator, Legal Assistance Centre, Windhoek (November 2006).

<sup>19</sup> See, eg, L le Roux 'Do the provisions of the Children's Act 38 of 2005 on virginity testing and male circumcision adequately protect children?' unpublished LLM thesis, University of the Western Cape, 2006.

<sup>20</sup> Sec 12 Children's Act 38 of 2005.

<sup>21</sup> It must be pointed out that General Comment No 10 of the CRC Committee on Children's rights in juvenile justice (2007) provides 12 to be the internationally acceptable minimum age of criminal responsibility.

<sup>22</sup> Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (concluded 29 May 1993 and entered into force 1 May 1995).

manner of implementation of the Hague Convention via the establishment of Central Authorities would be a valuable adjunct to other child protection efforts. In addition, following the example set by the first conference of judges from Southern and Eastern Africa on the Hague Conventions,<sup>23</sup> judicial and other forms of co-operation (for example between designated central authorities) regarding the specificity of inter-country child protection collaboration should be promoted with the view to addressing not only relations with countries external to Africa, but as importantly, relationships between countries within Africa.

Further to the above, scope exists for further promotion of the ratification of the two optional protocols to CRC<sup>24</sup> and ILO Convention 182 on the Elimination of the Worst Forms of Child Labour in African context. ILO Convention 182 provides centrally for the adoption at country level of concrete, time-bound programmes of action to reduce the involvement of children both in the specified (worst) forms of child labour, and in those forms of labour identified by individual countries as being especially harmful to children's well-being and development.

### **3 Mainstreaming rights-based approaches in general legal frameworks (ie outside of dedicated children's legislation)**

Child-related issues may crop up in relation to a vast array of laws and policies, outside of legislation developed specifically for child protection or child justice, and in relation to policies that do not necessarily have as their primary purpose to impact directly on children. Examples in point are succession and inheritance; immigration control; prisons; criminal procedures impacting on children, for instance as witnesses; labour laws; legislation dealing with drug control, publication or possession of pornographic material, and regulation of the media in general; licensing laws in spheres which may have a bearing on child protection, for example nightclubs, places of sale of alcohol or tobacco; environmental safety laws and urban planning legal issues; health and mental health laws, and so forth.

All too frequently, the children's rights dimension inherent in other legislation where children are not the specific focus is overlooked or accorded minimal weight. A recent South African example in this regard was in the process development of the mandatory and minimum sentencing laws in 1997, when the issue of their applicability to

<sup>23</sup> Convened by the Permanent Bureau of the Hague Conference and held in The Hague, September 2006.

<sup>24</sup> Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (entered into force in January 2002) and Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (entered into force in February 2002).



sentenced children was not even considered until directly raised in parliament by NGO advocates who got wind of the pending legislation.<sup>25</sup> Other countries are overhauling criminal justice legislation (Ethiopia), sexual offences laws (Malawi), inheritance laws (Mozambique), to mention but three areas where children's rights issues, although not central, play a role. This is indicative of the fact that there is a need to audit the child's rights interest in legal frameworks more broadly.

In regard to criminal justice legislation, for instance, the UN Guidelines on Justice for Child Victims and Witnesses of Crime, 2005,<sup>26</sup> provide a practical framework for achieving more child-sensitive responses to child victims and witnesses, including through legal reforms, rules of procedure and evidence, attitudes and training of professionals, and through elaborating the right to effective assistance for victims and witnesses who are aged below the age of 18 years. An 'assessor toolkit' describing the application of these guidelines at a country-specific level, including requirements pertaining to the need for special measures for child witnesses, was recently released by the UN Office for Drug Control and Criminal Justice and UNICEF.<sup>27</sup> Obviously, the correct place for provisions of this sort would be legislation governing the criminal procedure and hearing of testimony.

In summary, there is probably a need for quite considerable further research in specialised sectors to assess where opportunities and gaps exist for ensuring that the rights of children are included. Transport and planning issues come to mind, as do health services, approaches to disability, and country strategies affecting food security. This research should aim to identify how linkages between the children's rights sector and others outside that sector can be fostered in order to mainstream children's rights perspectives in law and policy initiatives outside of dedicated child law reform efforts.

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<sup>25</sup> See J Sloth-Nielsen 'The influence of international law on South Africa's juvenile justice reform process' unpublished LLD thesis, University of the Western Cape, 2001; J Sloth-Nielsen & L Ehlers 'A pyrrhic victory? Mandatory and minimum sentencing legislation in South Africa' (2005) ISS Occasional Paper 111; A Skelton 2005 'The influence of the theory and practice of restorative justice in South Africa with special reference to child justice' unpublished LLD thesis, University of Pretoria, 2005.

<sup>26</sup> UN Guidelines on Justice for Child Victims and Witnesses of Crime, 2005.

<sup>27</sup> See this toolkit, entitled 'Cross-cutting measures: Juvenile justice' <http://polis.osce.org/library/f/2709/541/UN-AUS-RPT-2709-EN-Juvenile%20Justice.pdf> (accessed 10 July 2007). See further J Sloth-Nielsen 'UNODC develops juvenile justice assessor toolkit' (2006) (8) art 40(3) for a basic analysis of the contents of the toolkit and how it can advance children's rights.

## 4 Strengths and weaknesses in legal approaches to children's rights issues

Apart from the considerations mentioned under section 2 above, notably the fact that legal reform is very much 'work in progress', a significant number of possibilities emerge in answering this question. Answers may also be heavily influenced by the approach of the observer concerned. For instance, it is quite common at international fora and conferences to hear papers delivered by (African) academics either describing the applicable legal architecture formalistically without reference to practicalities or to implementation-related issues, or, in a contrary vein, to listen to accounts of the dire situation that children face at grass roots level (as child soldiers, victims of war and hostilities, as refugees, children exposed to debt bondage and serfdom, and so forth), legislative enactments notwithstanding.<sup>28</sup> This latter approach is premised on the belief that 'the law' constitutes mere words on paper, and that it is ultimately of little use in addressing children's plight.

However, we are of the view that neither of these approaches is particularly helpful. The law should rather be viewed as a primary tool of development, especially (but not only) in post-conflict and post-colonial societies. Since the enactment of legal rules can and should determine a host of implementation-related, governance and procedural issues, legal research should primarily be orientated towards the assessment of the efficacy of legal measures at a practical level to highlight developmental best practices.

An example in point relates to Southern Sudan, in respect of which in 2005, consultations with legal drafters of a new Children's Protection Act were held by one of the authors. It could have been contended that, in a society which lacked even basic data on its population, and where the very bedrock of governance was still being ironed out, the development of children's protection law was not a priority. However, a different stance would proceed from the premise that starting out with the basics of a children's rights framework is crucial to ensuring the eventual fulfilment — and not marginalisation of — children's rights. Thus, issues such as birth registration, implementation of the right to education, access to primary health care as well as maternal health care, primary measures aimed at ensuring child protection, and so forth, should be elaborated statutorily even where fulfilment of more resource-intensive 'luxuries', such as specialised courts and child-dedicated legal services, are not really on the horizon yet.<sup>29</sup>

<sup>28</sup> Eg R Winter 'Child soldiers' Paper presented at the International Conference on the Rights of the Child, 14-17 March 2007, Ottawa, Canada.

<sup>29</sup> Sloth-Nielsen (n 8 above).

Another developmental example derives from the implementation of an embryonic social grant system to provide social assistance to orphaned and vulnerable children in some regions of Kenya. This has been assessed to be beneficial, and not merely because the children concerned benefited directly, but because additional donor efforts were harnessed to the project and government was able to begin to mainstream implementation of the right to social assistance at a policy level too.<sup>30</sup>

Research on children's rights, legal issues and policies which promote and further sustainable development, and which extends to the maximum extent the protection of children, should therefore be the focus of any research agenda, rather than merely narrow, technocratic analyses of legal provisions. The capacity of the law to 'add value' to development is a key theme in this endeavour.

In this regard, a useful lesson can be learnt from experiences in the field of juvenile justice, which is currently a priority area in the international arena. Starting in the early 1990s, inter-country skills transfers in the area of diversion, social work practice with youth in conflict with the law, restorative justice, reintegration work, the legal regulatory environment to protect the due process rights of children in the juvenile justice system, effective monitoring structures for juvenile justice, and judicial training have been occurring at an ever increasing rate. Sharing between countries such as Ghana, Lesotho, Malawi, Mozambique, Namibia, Somaliland, South Africa and Zambia, to name but a few, has enhanced the conclusion that there is an emergence of a pan-African approach to children in conflict with the law and one that has been 'home-grown' (rather than being borrowed from the north).<sup>31</sup> It is therefore recommended that further research and capacity building should seek to expand this area of collaborative best practice.<sup>32</sup>

Further to the issues surrounding diversion and programming for children at risk or in conflict with the law, there is a great need for research into the regulation of, and prevailing conditions at, alternative institutions for sentenced children, which, it is suggested, is an area of weakness in the region as a whole. Some preliminary work has been

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<sup>30</sup> South Consulting 'Evaluation of SIDA support to UNICEF and the government of Kenya 2004-2006' (November 2006, copy on file with the author).

<sup>31</sup> Eg, the experience of handling children in conflict with the law by local councils in Uganda is exemplary (B Mezmur 'It takes a village to raise a child' (2007) 9 *Article 40* 1).

<sup>32</sup> J Sloth-Nielsen & J Gallinetti (eds) 'Child justice in Africa: A guide to good practice' Children's Rights Project, Community Law Centre, University of the Western Cape (2004); Odongo (n 14 above); F Steyn (2005) 'Review of South African innovations in diversion and reintegration of youth at risk' Open Society Foundation for South Africa <http://www.osf.org.za/Publications/default.asp?PubCatID=30> (accessed 31 July 2007).

done in regard to children in prisons,<sup>33</sup> but the whole field of borstals, reformatory schools, juvenile training centres, schools of industries and so forth remains largely unexplored in regional context.<sup>34</sup> The issue of the treatment of children in trouble with the law who are deprived of their liberty is one which has merited special attention under international law, and host of treaties, non-binding (but comprehensive) UN rules and guidelines can be cited in this regard. The UN Standard Rules for Children Deprived of their Liberty (1990) are the most specific and comprehensive, but there is also a need to look at more recent documents such as the Optional Protocol to the Convention against Torture (OPCAT) which is finding comparatively widespread acceptance on the African continent<sup>35</sup> and entered into force in November 2006. The national and international visiting mechanism proposed by this treaty, and which ratifying states will have to set up and maintain, applies to all forms of deprivation of liberty. Hence, monitoring of the treatment of children in alternative institutions will have to be covered by the mechanisms of OPCAT as well, and we submit that this represents an emerging area for further examination.

However, apart from OPCAT, there is a larger challenge when looking at the transformation of children's institutions, institutions that were frequently established under colonial rule.<sup>36</sup> The challenge is to begin to grapple with questions such as what 'African' alternative institutions should look like. What skills should they convey or impart, and what are acceptable levels of provisioning to comply with international standards, yet not create the impression that children have to offend in order to access services and skills development? What should the role of donor agency and intergovernmental aid be in relation to institutions, which at the end of the day may well require long term maintenance and support? Is there a role for private interests, and if so, what then is the role of government?<sup>37</sup>

<sup>33</sup> See J Sloth-Nielsen 'Born free: Children in prison in Africa' Paper presented at the XIV Conference of the International Association of Youth and Family Court Judges and Magistrates, Belfast, September 2006.

<sup>34</sup> The authors are aware of some country specific-studies, eg one in Kenya, one in Zambia and one in Egypt, and one pertaining to juvenile facilities managed by the provincial government of the Western Cape, South Africa in 2004. But these have generally been evaluations for donors, rather than being a comprehensive assessment of the alternative care environment for children in conflict with the law.

<sup>35</sup> Having already been ratified by Benin, Liberia, Mali, Mauritius, Senegal and South Africa.

<sup>36</sup> This is also noted against the context of the fact that many new children's statutes (ie post-1996) provide for sentencing to alternative institutions, Kenya, The Gambia, Ghana, South Africa and Uganda, being cases in point. See Odongo (n14 above) ch 7.

<sup>37</sup> The last is mentioned because of the increasing involvement of private sector companies in the management of outsourced South African juvenile institutions (at least 7 so far) and there is some evidence that the same companies who are involved in this sector have made approaches to other Southern African countries to market their capabilities.

Also located in the juvenile justice sphere are issues concerning restorative justice. Although much international fanfare has been accorded the restorative justice approach which characterises traditional African decision-making processes, and although some documented work in South Africa exists,<sup>38</sup> as well as considerable acclaim that has been accorded the Gacaca courts in Rwanda<sup>39</sup> as a best practice response to post-conflict situations because of their restorative focus, there is undoubtedly further research that can be done to unearth and record best practice examples of the use of restorative justice principles (both in relation to juvenile justice and in the child protection sphere). The focus here should include both an examination of legal frameworks for restorative justice (either in civil or in customary law) as well as documenting actual case studies and real-life examples which can inspire and create best practice replication.

Street children, an increasing phenomenon in the era of HIV/AIDS and growing urbanisation, are to be found in most major cities and towns. Some country-specific and regional work on legal and policy responses to street children has been undertaken,<sup>40</sup> but, as an issue which is cross-cutting with juvenile justice, child welfare, trafficking and a host of other issues, much more regional work in this thematic area is recommended. The problem of refugee and migrant children, which is showing new trends of being mostly caused by internal displacement, also calls for attention. Again, cross-regional best practice in legal and policy responses would be a fruitful avenue of enquiry.

In a similar vein, as mentioned earlier, there is a need to document legal and policy responses to the impact of HIV/AIDS upon children in sub-Saharan Africa. A valuable starting point is provided by the recently released book *Legal and policy frameworks to protect the rights of vulnerable children in Southern Africa*, compiled for Save the Children (United Kingdom), and analysing the position in 10 Southern African countries.<sup>41</sup> This document explores the applicable legal and policy responses with reference to birth registration; inheritance; physical

<sup>38</sup> J Redpath *et al* 'Race, class and restorative justice in South Africa: Achilles heel, glass ceiling or crowning glory?' (2004) 17 *South African Journal of Criminal Justice* 17-40; See, too, the Lesotho Children's Protection and Welfare Bill, 2004, which contains extensive restorative justice provisions, warranting the conclusion that it represents the most restorative justice-oriented children's protection and welfare legislation developed so far in Africa.

<sup>39</sup> See eg C le Mon 'Rwanda's troubled Gacaca courts' (2007) (14) 2 *Human Rights Brief* 16; L Tully 'Human rights compliance and the Gacaca jurisdictions in Rwanda' (2003) 26 *Boston College International and Comparative Law Review* 385.

<sup>40</sup> B Owasanoye & M Wernham (eds) *Street children and the juvenile justice system in Lagos State* (2004); G Odongo 'Report on a field trip to Kenya' (2003) unpublished, copy on file at the Community Law Centre, University of the Western Cape; LM Muntingh 'Report to Unicef Zambia on an evaluation of the street children programme' (2006) (copy on file with the author).

<sup>41</sup> Angola, Botswana, Lesotho, Mozambique, Namibia, South Africa, Swaziland, Tanzania and Zambia.

and sexual abuse; the age of marriage (focusing on early marriage in particular); social assistance to orphaned and vulnerable children; movement across national borders, especially focused on unaccompanied children; and education, more particularly the access of orphans and vulnerable children to education.

In summary, a legal and policy research agenda in African context should be embedded in an approach which is informed by two variables. First, where areas of strength have been identified, such as in relation to juvenile justice and restorative justice practices, as well as the emergence of concrete OVC policies throughout the region, the focus should be on documenting sustainable and indigenous solutions for replication. Second, the obvious need to focus on especially vulnerable groups (migrant children, street children, children deprived of their liberty, OVCs and so forth) dictates that this is where energies should be spent on improving legal and policy frameworks, not to mention programmatic responses.

## 5 Children's socio-economic rights

Although not very common, the issue of children's access to socio-economic rights is mentioned in some African constitutions.<sup>42</sup> However, generally, what can be discerned from constitutional analysis<sup>43</sup> in African countries is that socio-economic 'rights' (of children) tend rather to be included as 'directive principles of state policy' which are not directly justiciable<sup>44</sup> but serve only as guiding principles.

Nevertheless, one notable socio-economic right that often finds its way into African constitutions and legislation is the right to education and particularly the right to free and compulsory primary education.<sup>45</sup> Although a good number of African countries have nominally provided for the right to free and compulsory primary education, according to the former Special Rapporteur on the Right to Education, only three African countries<sup>46</sup> could be declared, in 2006, to provide a 'proper' free and compulsory primary education. There seems to be a lack of guidance in what constitutes free primary education as an obligation of

<sup>42</sup> See, eg, Constitution of the People's Democratic Republic of Algeria art 59, Constitution of the Republic of Angola art 31, Constitution of the Republic of Burundi art 39. For further discussion, see Sloth-Nielsen (n 8 above).

<sup>43</sup> See Sloth-Nielsen (n 8 above) 91-96.

<sup>44</sup> It needs to be noted that this assertion must be qualified in so far as case law from abroad, notably India, has supported the use of such directives of state policy as a basis for elaborating the normative content of socio-economic rights.

<sup>45</sup> Arts 28(1)(a) of CRC and 11(3)(a) of the African Children's Charter clearly provide for this right.

<sup>46</sup> Madagascar and Mauritius are the two examples.

governments.<sup>47</sup> Questions pertaining to the real cost to the family of the child's education and incentives provided to encourage school entrance; regular school attendance and school retention; the purchase of uniforms and school books, at least for children of poor families; transportation; voluntary contributions by parents; school meals; payments for extracurricular activities; and the responsibility for building and maintaining schools are crucial issues that make themselves available for further research and better understanding of the normative content of the right.<sup>48</sup>

Because economic upliftment and gradual recovery of financial health can rightly be identified as continental priorities, research on measures to enhance the fulfilment of children's socio-economic rights must be regarded as a key objective. In regard to South Africa, mention must be made of the work done to assess the effects of the child support grant which was rolled out from 1998, and which currently reaches 7,2 million children, and extent to which this programme has impacted on child poverty.<sup>49</sup> Extensive work has been done in the sphere of looking at barriers to accessing education, for example by the Child Education Policy Unit at the University of the Witwatersrand,<sup>50</sup> and there is a vibrant body of work on notable other areas within the sphere of social and economic rights, such as the right of access to water, the right to food, and environmental rights.

Although South Africa's Constitutional Court has not been persuaded by arguments that international bodies (such as the body responsible for oversight of the International Covenant on Economic Social and Cultural Rights)<sup>51</sup> have propounded concerning a possible 'minimum core' content which should attach to each social or economic right,<sup>52</sup> it cannot be denied that nuanced research on the nature, scope and

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<sup>47</sup> See generally J Sloth-Nielsen & BD Mezmur 'Free education is a right for me: A report on free and compulsory primary education' (2007) (Save the Children).

<sup>48</sup> As above.

<sup>49</sup> Eg Children's Institute (2005) 'Child gauge, 2005'.

<sup>50</sup> See ch 11 'Education rights' in S Khosa (ed) (2007) *Socio-economic rights manual* Community Law Centre, University of the Western Cape.

<sup>51</sup> The UN Committee on Economic, Social and Cultural Rights (ESCR Committee). The ESCR Committee has said that it 'is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights, is incumbent upon every state party'. General Comment No 3, The nature of state parties' obligations (5th session, 1990) UN Doc E/1991/23, annex III 86 (1991), para 10. For further discussion, see S Russell 'Minimum state obligations: International dimensions' in D Brand & S Russell (eds) *Exploring the core content of socio-economic rights: South African and international perspectives* (2002) 15; D Bilchitz 'Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence' (2003) 19 *South African Journal on Human Rights* 1—26.

<sup>52</sup> See, eg, C Mbazira & J Sloth-Nielsen 'Incy wincy spider went climbing up again: Prospects for constitutional interpretation of section 28(1)(c) in the next decade of democracy' paper presented at the conference 'Law in a Transformative Society' University of Fort Hare, 4-6 October 2006.

content of socio-economic rights in African context would dovetail well with regional agendas concerning economic integration and sustainable development. This area should therefore not be neglected in any overarching research agenda.

In the view of the authors, all countries in Africa would probably struggle to give effect to a minimum core content of any socio-economic rights, even though discernable efforts have recently been adopted to give effect to the rights to free compulsory basic education in various countries (Ethiopia, Kenya, Lesotho and Mozambique being recent examples). The universality of coverage must, however, be questioned. But with children as a focus, there is potentially vast scope — and need — for the continued expansion of research on the nuances of the realisation of children's socio-economic rights within the context of African realities, focusing on minimising the all too frequent reliance on resource constraints as barriers to their realisation, and turning instead to programmatic approaches which promote progressive realisation of socio-economic rights.

## 6 Strategies for enhancing child participation in legal and policy processes

Both CRC and the African Children's Charter recognise that rights talk is of particular value for children, providing them with a status and a stake in the debates about issues which affect them. It is no longer feasible to ignore children's voices and child-centered perspectives that recognise children as individual persons.<sup>53</sup>

There is some documented evidence of child participation in legal and policy processes, and limited initial analysis of the benefits a child participation process can hold, as well as the pitfalls that can be encountered along the way.<sup>54</sup> Examples present themselves from around the continent. For instance, in Uganda, NGOs have used participatory research with children and their families as a basis for planning policies and programmes that respond to their concerns and give children priority.<sup>55</sup> In The Gambia, the Children Protection Agency has developed a National Plan of Action on Child Protection which includes children's participation and raising awareness of child abuse.<sup>56</sup> Regionally, the African Forum in Cairo (in the preparatory process for the

<sup>53</sup> See the provisions of art 12 of CRC.

<sup>54</sup> L Ehlers 'Children's participation in law reform in South Africa and Mozambique' unpublished MPhil thesis, University of Cape Town, 2005.

<sup>55</sup> J Boyden 'Childhood and the policy makers: A comparative perspective on the globalisation of childhood' in A James & A. Prout (eds) *Constructing and reconstructing childhood: Contemporary issues in the sociological study of childhood* (1997) 223.

<sup>56</sup> See for details the website of the organisation <http://www.cpagambia.gm/Aboutus.htm> (accessed 31 July 2007).



Special Session on Children), held in May 2001, marked the discovery by the African community (ministries, civil society, international institutions and all kind of experts), of the 'healthy' nature of children's self-expression and participation in a debate that was going to lay down the fundamental guidelines for action towards building an 'Africa fit for children'.

Key research was undertaken by Ehlers, in describing child participation processes in law reform initiatives in South Africa (both in relation to child justice and child protection law reform processes) and Mozambique.<sup>57</sup> The Lesotho law reform process was characterised by innovative ways in which youth participated in formulating and providing their views, and a permanent youth group that was established has continued to be part of the ongoing process as the bill moves into parliament. A child participation study of 600 children in prisons and institutions awaiting trial (with one control group of children in a school setting) was crucial to the findings of a situational analysis on the extent to which children are used by adults in the commission of offences, one of the targeted worst forms of child labour referred to in ILO Convention 182.<sup>58</sup> Zambian children were involved in a participation exercise on violence and the use of corporal punishment, commissioned by Save the Children Sweden. An extensive child participation process characterised the recent UN Study on Violence, and during which the voices of African children were heard in all three regional consultative meetings. Mention can also be made of Egypt, where children participated in making a video about corporal punishment and violence to provide their views,<sup>59</sup> and there are doubtless many other examples from around the continent where useful exercises to involve children have been undertaken.

As part of the right to participation, it is encouraging to note that more and more children are being given the possibility of filing complaints in cases of violations of their rights, either via specially-created procedures (for example, the limited opportunities for children in institutions to register complaints) or more generally via independent institutions for the monitoring of children's rights like child commissioners or a children's ombudsperson.<sup>60</sup> There are a growing number of these

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<sup>57</sup> Ehlers (n 54 above). Also see C Frank & L Ehlers 'Child participation in African context' in J Sloth-Nielsen (ed) 'Children's legal rights in African context' forthcoming, 2007 and 'What the children said . . .' Community Law Centre, University of the Western Cape, 1998 .

<sup>58</sup> C Frank & LM Muntingh 'A consultation with children on their use by adults in the commission of offences' (2005) Programme towards the Elimination of Child Labour, Community Law Centre, University of the Western Cape.

<sup>59</sup> Referred to in Frank & Ehlers (n 57 above).

<sup>60</sup> 'Ombudsman' (a Scandinavian word) describes a person or office which deals with complaints from a defined group of people. The Ombudsman is an independent, non-partisan agent, spokesperson, arbitrator or referee, ensuring that the authorities and others fulfil their duties and obligations. MG Flekkoy *A voice for children, speaking out as their ombudsman* (1991) 225.

institutions, particularly in Europe, as well as in other parts of the world,<sup>61</sup> and their further development and possible adaptation in Africa in a cost-effective and culturally sensitive way could further facilitate child participation.

The areas and contexts in which children participate need to be expanded from the conventional 'family matters', such as in adoption and in custody disputes, to a broader child-centered range of interventions. These could include criminal proceedings, civil proceedings, education, health, child protection, placement in alternative care, reviews under article 25 of CRC, immigration and asylum-seeking hearings, town and housing planning, and environmental upliftment, social security, employment and so forth.<sup>62</sup> The specific details of how participation is to be guaranteed in a child-centered manner and the extent to which views of the child are given due weight might be an area that needs to be explored particularly within the African context, building on the limited research available, and focusing in addition on meta-analyses of existing evaluations.

The growing involvement of children in law reform processes, as well as in policy assessment and policy formulation, appears to be a key strength on a continent where children are more likely to be seen than heard, and focus on analyses of the implementation of children's right to participate in this sphere would be advantageous.

## 7 Culture, customary law and children's rights

It is said that, in Africa, traditional value systems recognise human dignity and human dignity entails that all humans, including children, are entitled to humanity, respect and dignity by virtue of being human.<sup>63</sup> The African view of human rights manifests itself in the recognition that children are a valuable constituency in society,<sup>64</sup> and recognises

<sup>61</sup> See UNICEF Research Centre Florence, *Independent Institutions Protecting Children's Rights*, (2001) 8 *Innocenti Digest* and the website of the European Network of Ombudspersons for Children (ENOC) <http://www.ombudsnet.org>. See also The role of independent national human rights institutions in the protection and promotion of the rights of the child (General Comment No 2, UN CRC, 32nd session, UN Doc CRC/GC/2002/2 (2002)).

<sup>62</sup> R Hodgkin & P Newell *Implementation handbook for the Convention on the Rights of the Child* (2002) 183.

<sup>63</sup> DW Wai 'Human rights in sub-Saharan Africa' in A Pollis & P Schwab (eds) *Human rights: cultural and ideological perspectives; A quest for consensus* (1991) 19; see also A Pollis 'A new universalism' in A Pollis & P Schwab (eds) *Human rights: New perspectives, new realities* (2000).

<sup>64</sup> See generally Wai (n 63 above).

childhood as a special, precarious and fragile stage which requires special protection.<sup>65</sup>

Nurturing this cultural understanding of children to further promote and protect their rights is important, and some instances where this is under way have been recorded. For example, communities in Malawi have a history of caring collectively for children and community-based programmes, such as community crime prevention committees, have been re-formed, in a return to traditional ways of handling children's issues.<sup>66</sup> Another example supporting the idea that culture and tradition can be mobilised to promote children's rights is to be found in the relationship of grandparent-grandson in some traditional African cultures (for instance among the Tonga of Zambia). This relationship functioned as an intergenerational bridging institution for the benefit of children.<sup>67</sup> For instance, a child who got into trouble with his or her parent could confide his troubles in the grandparent, and even seek redress for his grievances with his or her parents via the grandparent, thereby promoting child participation and the best interests of the child. How to identify and support similar instances in Africa to implement measures that respect children's rights within traditional practice calls for further thought. This is all the more cogent as a large number of African children are regulated by customary law rather than growing up under the formal law.

The question of cultural relativism and children's rights in Africa cannot be separated from the problem of harmful cultural practices, such as female circumcision, as the 2 000 year-old practice is widespread on this continent.<sup>68</sup> Many harmful traditional practices are gender-biased,<sup>69</sup> in that they affect the girl child because she is female and a child — both positions of vulnerability in many African societies.<sup>70</sup> The need for comparative research, for instance, that examines different legal frameworks, particularly to indicate effective strategies to prohibit and ultimately eliminate the harmful effect of the practice on children, could be worthy of perusal. Indeed, in so far as other forms of violence

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<sup>65</sup> W Ncube 'The African cultural fingerprint? The changing concept of childhood' in W Ncube (ed) *Law, culture, tradition and children's rights in Eastern and Southern Africa* (1998).

<sup>66</sup> (2006) 15 *Chronicle* 15.

<sup>67</sup> See A Armstrong *et al* 'Towards a cultural understanding of the interplay between children's and women's rights: An Eastern and Southern African perspective' (1995) 3 (3) and (4) *International Journal of Children's Rights* 333-368.

<sup>68</sup> An estimated 80 million women and girls in more than 25 countries are circumcised. A Funder 'De minimis non curat lex: The clitoris, culture, and the law' (1993) 3 *Transnational Law and Contemporary Problems* 435.

<sup>69</sup> Female excision, bride burning, female infanticide, sex slavery and servile marriage all affect the female child because she is female and a child.

<sup>70</sup> Eg, most mothers (communities) circumcise their daughters because they believe in the procedure and want their daughters to have the social benefits and acceptance that come with circumcision.

against children are concerned, including corporal punishment in the home, the recent Global Study on Violence against Children released in 2006 has illustrated the knowledge gap that currently exists in relation to children's experiences of violence, and the report of the independent expert should be carefully studied to examine the extent to which it suggests further research topics.

Religious law also sometimes poses a problem. For instance, in states that apply Shari'a law, challenges of ensuring implementation of the principle of non-discrimination principle as it pertains to children born out of wedlock appears problematic.<sup>71</sup> However, a recent publication of UNICEF<sup>72</sup> provides a good illustration of how Islamic jurisprudence pays special attention to children and childhood. Research of this sort which analyses religious practices and interpretations from a child rights perspective will prove helpful in harmonising children's rights and religious practices.

Another difficulty arises when customary law co-exists (legally speaking) with statutory law, as is the case in a large number of African countries including Ethiopia, Nigeria, South Africa, Swaziland, and others. In countries like Swaziland, civil and criminal courts have the mandate to apply customary law and this may impact on children's rights, sometimes negatively (for example when courts impose corporal punishment). But where customary law is clearly regulated, such as in the case of Botswana, where the Customary Law Act<sup>73</sup> attempts to incorporate the concept of the best interest of the child, the degree of possible negative impact on children's rights could be minimised. On the positive side, some African countries<sup>74</sup> have incorporated CRC and the African Children's Charter's standards in their constitutions, and it is clear that a constitutional guarantee cannot and should not be overridden by custom.

In summary, human rights documents continually recognise that culture is an area that must be protected. However, culture should not be relied on as a basis for diminishing protected rights. Where positive, culture should be harnessed for the advancement of children's rights. But when it appears that children are disadvantaged or disproportionately burdened by a cultural practice, the benefits of the cultural practice and the harm of the human rights violation must be weighed

<sup>71</sup> S Syed 'The impact of Islamic law on the implementation of the Convention on the Rights of the Child: The plight of non-marital children under Shari'a' (1998) 6 *International Journal of Children's Rights* 391.

<sup>72</sup> UNICEF and Al-Azhar University *Children in Islam: Their care, upbringing and protection* (2005).

<sup>73</sup> 1969, Laws of Botswana: Act 51, Cap 16:01.

<sup>74</sup> These include Ethiopia, South Africa, and the draft constitutions of Kenya and Zambia. In South Africa, the case of *Bhe & Others v Magistrate, Khayelitsha & Others* 2004 1 BCLR 27 (C) is a good example of the transformative nature of a rights-based approach in the Constitution.

against each other. How to strike the necessary balance between culture and children's rights is an issue that should continue to engage the minds of scholars.

## 8 The role of the judiciary and courts and national monitoring mechanisms

South Africa has been hailed as a best practice model in regard to the role of the judiciary in giving effect to children's rights.<sup>75</sup> In relative terms, the courts' appreciation of human rights in general and children's rights in particular is improving as time goes by. The reasons for this are varied. There has been some evidence of judicial training and specialisation on children's rights-related issues, and reference has already been made to the first seminar on the Hague Conventions on inter-country adoption and inter-country abduction convened in The Hague in September 2006, an initiative which is to be followed up by a regional conference in 2008. A similar event covering the judiciary from Western and Central African countries is scheduled to take place in August 2007. Increased judicial collaboration at the regional and continental level might well see judges outside of South Africa expanding their sphere of activity concerning children's rights. Research to investigate the potential strengthening of the role of the judiciary and courts in furthering children's rights could be valuable.

Apart from courts, the role of other supplementary institutional machineries for the promotion and protection of children's rights calls for some attention. In general, no fewer than 20 countries in Africa have established national human rights commissions or institutions.<sup>76</sup> Some are provided for in constitutions while others are enacted by statutes with no explicit mention in the constitutions. Their role — or

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<sup>75</sup> J Sloth-Nielsen 'Children's rights in the South African courts: An overview since ratification of the UN Convention on the Rights of the Child' (2002) 10 *International Journal of Children's Rights* 137; African Child Policy Forum 'Best practice: Harmonisation of child law in Eastern and Southern Africa' (2007) <http://www.africanpolicyforum.org>; J Sloth-Nielsen & B Mezmur '2 + 2 = 5? Exploring the domestication of the CRC in South African jurisprudence 2001-2006' *International Journal of Children's Rights* (2007, forthcoming).

<sup>76</sup> CRC Committee General Comment No 2: The role of independent national human rights institutions in the promotion and protection of the rights of the child provides, under art 1, that '[i]ndependent national human rights institutions (NHRIs) are an important mechanism to promote and ensure the implementation of the Convention, and the Committee on the Rights of the Child considers the establishment of such bodies to fall within the commitment made by state parties upon ratification to ensure the implementation of the Convention and advance the universal realisation of children's rights. In this regard, the Committee has welcomed the establishment of national human rights institutions and children's ombudspersons/children's commissioners and similar independent bodies for the promotion and monitoring of the implementation of the Convention in a number of state parties.'

potential role — in children's rights protection warrants further study. Also, over 10 ombudsmen or public protectors are also provided for in African constitutions. In addition, children's 'parliaments' and children's ombudspersons and how they contribute in the promotion and protection of children's rights in Africa are areas on which there is a dearth of accessible information. A careful and nuanced study of strengths and weaknesses of different forms of oversight in respect of child law would be of benefit. Does a dedicated body such as a children's commission carry sufficient political and economic weight to mainstream children's legal rights, or is oversight better located in specific government departments? How helpful to the overall monitoring project have human rights commissions and similar bodies been? What co-ordinating structures are suitable and effective in ensuring inter-sectoral and multi-disciplinary service delivery to children? Answers to these questions might be dependent on particular socio-political contexts, but could nevertheless serve to highlight areas of strength and weakness.

## 9 Regional mechanisms and children's rights

The UN has recognised and promoted regional arrangements for the protection of human rights. At its 92nd plenary meeting in December 1992, the UN General Assembly reaffirmed that 'regional arrangements for the promotion and protection of human rights may make a major contribution to the effective enjoyment of human rights . . .'<sup>77</sup>

When considering the regional protection of human rights in Africa, the African Commission on Human and Peoples' Rights (African Commission)<sup>78</sup> comes to mind. However, the main regional body mandated to promote and protect children's rights in Africa is the African Committee of Experts on the Rights and Welfare of the Child (African Committee), the body to whom the African Children's Charter entrusts the functions of promotion and protection of its provisions.<sup>79</sup> The need to clarify the relationship of the African Committee with other AU organs, such as the African Commission, is also an important issue for the effective operation of the Committee and the optimal use of resources. Although the actual work of the African Committee is still in its

<sup>77</sup> Regional arrangements for the promotion and protection of human rights, UN General Assembly Resolution A/RES/47/125. The following year, in June 1993, the World Conference on Human Rights (held in Vienna) also reaffirmed the fundamental role that regional and sub-regional arrangements can play in promoting and protecting human rights.

<sup>78</sup> The African Charter came into force in 1986, creating the African Commission with the mandate of promoting and ensuring the protection of human and peoples' rights (see arts 30 & 45 of the Charter). Further see M Evans & R Murray *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2000* (2002).

<sup>79</sup> Art 32 African Children's Charter.

infancy,<sup>80</sup> with the necessary financial and technical support, it can prove itself to be a major tool for promoting and protecting children's rights in Africa.

The establishment of an NGO group for the African Children's Charter, similar to the NGO group for CRC, as a coalition of international, regional and national NGOs which works together to facilitate the implementation of the African Children's Charter, could be an idea to which some thought could be given, as well as a project to compile the jurisprudence that will come out from the work of the African Committee now that country reports are beginning to be received. Publication of the Committee meeting proceedings could play a role in information dissemination and in highlighting areas for further action and research.

In addition, the role of regional courts for the promotion and protection of children's rights is very significant. The practice of the European Court and the Inter-American Court testifies to this fact.<sup>81</sup> In Africa, the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol) entered into force on 25 January 2004.<sup>82</sup> African intergovernmental organisations may also submit cases to the African Court,<sup>83</sup> including the African Committee.<sup>84</sup> By undertaking comparative research from other regional courts, suggestions may be devised as to how to positively influence the jurisprudence of the African Court for the advancement of children's rights in Africa.

Apart from the AU, a research opportunity that could be explored is through the New Partnership for Africa's Development (NEPAD). Although the main concerns of NEPAD are economic issues,<sup>85</sup> the African Peer Review Mechanism (APRM) could possibly address issues of

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<sup>80</sup> For the work of the African Committee, see A Lloyd 'How to guarantee credence? Recommendations and proposals for the African Committee of Experts on the Rights and Welfare of the Child' (2004) 12 *International Journal of Children's Rights* 21 and B Mezmur 'The African Committee of Experts on the Rights and Welfare of the Child: An update' (2006) 6 *African Human Rights Law Journal* 549.

<sup>81</sup> See, eg, B Dohrn 'Something's happening here: Children and human rights jurisprudence in two international courts' (2004) 6 *Nevada Law Journal* 749 (2006 Special Issue on Legal Representation of Children).

<sup>82</sup> Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 10 June 1998 (entered into force 25 January 2004) <http://www.africa-union.org/innopac.up.ac.za:80/home/welcome.htm> (accessed 3 July 2005). Currently, the seat of the Court has already been decided and the judges elected.

<sup>83</sup> Art 5(1)(e) Protocol to the African Charter.

<sup>84</sup> While the question of the relationship between the Court and Commission has received some attention and suggestions, scant attention has been paid to the relationship between the Court and other relevant bodies, such as the African Committee. One question which arises is whether the Court has any role to play in cases that are submitted to the African Children's Charter Committee or whether cases alleging a breach of the Children's Charter may be brought directly to the Court under art 5(3) of the African Charter Protocol.

<sup>85</sup> African Peer Review Mechanism Base Document, AHG/235(XXXVII) Annex II.

human rights<sup>86</sup> under its 'democracy and political stability' focus.<sup>87</sup> Thus, as a child rights dimension is not entirely absent, the continued monitoring of developments at a regional level should focus on the extent to which children's rights fulfillment become a mainstream item for the regional development agenda.

## 10 Conclusion

That research on child rights-related issues is part of the implementation requirement of both CRC and the African Children's Charter is clear. For instance, in its General Comment No 5 on the 'General measures of implementation of the Convention on the Rights of the Child', the CRC Committee states that the '[c]ollection of sufficient and reliable data on children, disaggregated to enable identification of discrimination and/or disparities in the realisation of rights, is an essential part of implementation'<sup>88</sup> and thus 'states should collaborate with appropriate research institutes and aim to build up a complete picture of progress towards implementation, with qualitative as well as quantitative studies'.<sup>89</sup> In line with the child participation and best interests of the child principles, the involvement of children in research should be given the due attention it calls for.<sup>90</sup> This article represents an initial attempt to identify research themes and topics of special relevance to the furtherance of children's rights in the African context in order to sharpen and strengthen our capacity to promote good practice and promising solutions.

<sup>86</sup> The APRM is an instrument voluntarily acceded to by member states of the AU as an African self-monitoring mechanism. It is a mutually agreed instrument for self-monitoring by participating member states.

<sup>87</sup> The other three are Economic Governance and Management (EGM); Corporate Governance (CG) and Socio-Economic Development (SED). In relation to children affected by armed conflict, children's issues have been incorporated into peace negotiations and peace accords, hence the role of the Peace and Security Council of the AU could also be important.

<sup>88</sup> CRC Committee, General Comment No 5 'General measures of implementation of the Convention on the Rights of the Child' (2003) para 48.

<sup>89</sup> As above.

<sup>90</sup> In the context of juvenile justice, the CRC Committee has suggested that children should be involved in evaluation and research, 'in particular those who have been in contact with parts of the juvenile justice system'. See CRC Committee General Comment No 10 'Children's rights in juvenile justice' (2007) para 99.