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Session I: Access to Justice for Children in Africa

Chair: Prof. Jaap Doek, Professor of Law, Vrije University, Amsterdam

Dr. Nkatha Murungi, Head, Children and the Law Programme, ACPF

Spotlighting the invisible, justice for children in Africa

Evidence of gross violation of child rights and wellbeing in the context of access to justice for children in Africa. ACPF started in 2011 based on a fundamental believe that the violation on children across the continent call on us to revisit the way we do to enhance access to justice. In 2011 conference in Kampala and during this conference key findings and deliberation emerged, namely:

1. The African continent does not have a specialised mechanism for dealing with children or justice system adapted to the need of children.
2. We do not have sufficient information on the use of informal justice mechanism, yet we acknowledge that this system exists and is in use across the continent.
3. Challenges experienced by vulnerable groups of children, especially children experiencing additional barriers that are intrinsic to a volition that the child has or the environment that the children finds himself makes it more difficult for them to access justice.

Following the conference in Kampala, Guidelines on Action for Children in the Justice System in Africa were adopted. It was time to take stock of the progress made to see if the interventions proposed are effective, hence the meeting in Addis.

She stressed that access to justice is an anchor for the other rights, through access to justice the children can access other rights. The consequences of the experiences of children in their interaction with the justice system can be lifelong. There are a lot of successful initiative in different countries but since we are not talking to each other across the continent we are not learning from other experience and sometime reinventing the wheel. The need to document progress, and to facilitate cross-country learning on what works to enhance justice for children.

The Conference is a tool to gather evidence with respect to access to justice for children.

The Study makes three key findings:

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

- Non-discrimination
- Adherence to the principle of the best interests of the child
- Child participation
- Protection of children’s dignity
- Observance of the rule of law; and
- Specialization of systems and institutions to fit the needs of children

Key issues in this regard:

- Lack of consistency and uniformity in ensuring that the laws are implemented
- Disparities from country to country
- Failure to establish specialized child justice systems
- Disregard for child justice standards, such as routine detention of children, particularly pre-trial detention Ex: Pre-trial detention the child is taken in the police station instead of seeking ways to release them
- Legal aid services are inadequate and mostly non-governmental initiatives
- Sustainability of the interventions is questionable because most of the effective initiatives are non-governmental led
- Continued over concentration on children in conflict with the law and much less on children in civil justice processes, child victims and witnesses

There have been positive developments as well:

- Increased domestication and implementation
- Increase in use of legal representation of Children in justice process but has not reached the level sought
- Adoption of diversion and alternative to judicial processes for child offenders
- Set up of one-stop centres (4 Centres in Malawi offering services for children victims of sexual and physical violence and insures their dignity is preserved)
- Effective collaborations between government, CSOs, and the partners.

We tend to focus our attention on formal justice in total ignorance of informal justice mechanism. In Africa between 70 to 90 % are using informal justice mechanism. Historically when the colonial system came and introduced formal justice mechanism they thought that the one which pre-existed would be phased out. But instead they have grown and evolved and will not go away. Rather than thinking that the informal system would disappear it is time to take actions to think how to make them viable option for access to justice for children.

Although we know that the informal legal mechanism exists, but we don’t know much about them nor the form in which they exist. Informal mechanisms of justice are not always necessary inherently against child rights. It is generally accepted that these systems exist alongside formal mechanisms – often the relationship is not regulated. There are no or limited safeguards for children using these mechanisms. The fact that the informal justice never died shows that they are attractive, they are accessible in the village, the children can just walk to them, they are in the local language, they have no cost at all, they don’t use incarceration.
Positives about informal justice:

- Accessibility – proximity, language and costs
- Minimal use of incarceration
- Focused on restoration and social cohesion
- Focused on the communal rather than the individual
- Speedy resolution
- Conciliatory and restorative

Challenges:

- Limitations to child participation
- Lack of codified normative basis making them too discretionary and hence susceptible to abuse (discretionary to the elders position)
- Poor record keeping
- Lack of legal representation in most cases
- Non-applicability of the rules of evidence
- Lack of enforcement

Therefore:

- More research is required
- There is need to invest in the positives
- Training and sensitization
- Integration of informal justice systems in rule of law programming
- Coordination with the formal justice system is necessary

Why be concerned?

- Justice systems seem to be blind to the specialized needs of certain children
- The needs of vulnerable groups are not prioritized
- Failure to address the needs of the vulnerable groups inevitably results in injustice for the affected children
- The needs are diverse and unique to each group
- To underscore the need for adequate resourcing of justice systems

Children with disabilities: Limited understanding of the needs of these children and hence incapacity that are intrinsic in the system to respond to those need.

- The authorities that are dealing with children do not know what to do if a child with disabilities showed up at the police station.
- If they show up in court, for instance collection of evidence, the rule of evidence does not adapt to those children. Child with intellectual disability have a harder time being taken seriously.
- Because our system is set on the general standard of the average child, the standards that we have in the formal justice system are not able to adapt, not set out to provide reasonable accommodation for children nor set out to provide support. Every court has a child friendly
bench, but the court does not have a sign language interpreter who is cognizant to facilitate access to justice for children.

- Lack of capacity amongst the authorities in dealing with children with disabilities
- Failure to provide reasonable accommodation and support measures to enable them access justice
- An overrepresentation of children with mental illness or behavioral disorders— which leads to higher of recidivism

**Girls:**

- Contextual vulnerability
- There are fewer girls in conflict with the law. The main challenge is numbers, they are so few girls engaging with justice system and because of that governments do not go out of there way to establish facilities for girls. There is a general trend of those girls being incarcerated with adults, because of that they are susceptible to further abuse and exploitation. The need of girls are not payed so much attention to in the justice system.
- Serious consequences and elevated risks of violation and abuse while in the justice system

**Children deprived of a family environment:**

Without guardianship most of them end up in detention. They are victimized for not having proper care but also because they cannot access justice. They include: Children in care institutions; unaccompanied foreign children, and children living on the streets. **Challenges for children deprived of a family environment:** Lack of guardianship; conflict with the law enforcement authorities; vulnerability to detention and deprivation of liberty; higher risk of recidivism and failure to address route causes; failure to properly distinguish children in need of care and protection from criminal behavior.

**Child victims of specialized crimes,** including child victims of trafficking, and child victims of cyber crime, including online sexual exploitation. **Challenges faced by Child victims of specialized crimes:** The risk of double or multiple victimization; non-specialization of the systems to cater for such needs; lack or failure of a systems approach to addressing the issues and therefore failure to create linkages between access to justice and other developmental, rehabilitative and restorative aspects of the affected child’s life.

**Children in special contexts such as children affected by armed conflict:** It is nearly impossible for them to access justice on an individual capacity because we often talk about access to justice or transitional justice is spoken about in a perspective of collective abuse. But what about the individual child who is experiencing abuses in a context where there is a prevailing conflict in a country where the institutions have collapsed? **Key issues, particularly in the context of conflict:** Collapse of systems and institutions; failure of accountability mechanisms; inability to enforce remedies, rendering justice ineffective; systemic nature of violations; retributive nature of justice in conflict societies that may not be conducive to the restorative goals of child justice.

**Displaced, refugee, and unaccompanied children:**

- Lack of parental care and guardianship
- Lack of vital documents such as birth registration / certificates that are required to access the justice systems in some cases
Key Challenges:

- Lack of specialized systems of justice to cater for children
- Under-resourcing of child justice hence limited access by all children
- Limited availability of legal aid and representation services for children in the justice system
- Limited knowledge and transfer of effective models of enhancing access to justice
- Limited linkages between the legal and the social services workforce
- Overdependence on interventions by non-state actors
- Inadequate support to particularly vulnerable groups of children to enable them access justice
- Inadequate information on informal mechanisms of justice to ensure protective measures for the children utilizing them

Key opportunity:

- Guidelines on Action for Children in the Justice System in Africa
- A system’s approach
- Innovation and documentation of effective and practical models. Cross-learning between African countries to accelerate scale up of effective approaches. Ex: In Burundi they changed the color the files of children to pink to raise awareness that it is a child’s file.
- Maximizing on positive indigenous solutions and mechanisms

Recommendations:

- Ensure that national laws on access to justice are consistent with international and regional standards on child justice
- Establish and adequately resource child justice systems, comprising of specialised officers and dedicated facilities in all parts of the country
- Ensure that child justice systems are cognisant of the specific needs of particularly vulnerable groups of children
- Recognise the existence of, and regulate the interaction of informal mechanisms of justice with children
- Implement the Guidelines on Action for Children in the Justice System in Africa at a national level
- Document good and practical models for enhancing access to justice for children in Africa; and
- Facilitate cross-country learning on effective models of facilitating and enhancing access to justice for children in Africa

Conclusion:

- We are making progress, but we are a far way off the targets
- Our context demands that we pay due attention to the existence, use and role of informal justice systems
- That we need to do a lot more to ensure that our justice systems are responsive to the needs of all children in Africa, particularly the most vulnerable
- That we need accountability at all levels to give effect to the norms and standards that we profess and have committed to
Mrs. Karabo Ozah, Deputy Director, Center for Child Law (CCL), University of Pretoria

What do the findings of the study mean for children’s access to justice in Africa?

Generally African countries have started to enact child specific legislation in order to comply with international and regional treaties- thus encouraging a child-rights approach to children’s matters. Treaty reporting mechanism are also encouraging the promotion and protection of children’s rights – that enables the law, policies and practices to be interrogated in order to ascertain access to justice for children.

Despite legislative provisions, in practice children’s rights are still generally compromised by issues of resources-related barriers

**Fundamental principles:**

*Participation, best interests, dignity and non-discrimination:*

- Although many African countries have recognised the right of children to be heard and to participate in matters that affect them, qualifications such as age and sufficient maturity should not lead to exclusion of children and a more enabling environment that encourages child-participation should be encouraged.
  - With regards to child participation there is are pending issues on how it is qualified in our laws and what it means in practice. The tendency is to exclude children, the focus is often put on his age and not on what the child is saying.
- Children’s rights are inter-related, therefore the fundamental principles should be applied in a comprehensive manner (which countries do appear to be doing) but there is still room for improvement in areas such as access to justice for children with disabilities, girl children, refugee and migrant children, children living on the streets.
  - For instance, for a migrant child the focus is on the fact that he does not have a document and we forget about the other rights and principles supposed to be applied. People dealing with children should have a holistic approach and keep in mind all their rights. We need to maximize the child protection.

*Rule of Law and child-adapted systems and institutions:*

- Legislative provisions recognise the need to have process and systems that protect and promote children’s rights. But there is a need to ensure that uniformity in the countries and that includes considering specialised magistrates and judges.
  - Lack of uniformity within the country, a child might be lucking that we are piloting a certain project, whereas other children are exposed to the system without those extra protection. Ex: One-stop center highlighted in the report in South Africa, they are just 2 or 3 of them, and nothing in the rest of the countries. It raises the problem of how children are treated differently within the same country and we should encourage our
government to do more. It is usually children in rural area or that are already marginalized that do not have access to those services.

- In Ethiopia there are specialised judges unlike in South Africa. There are issues of magistrates that does not want to be specialised in children rights. We need to encourage them to take children rights seriously area.

Protection of privacy and safety:

- The protection of the identity of child offenders is clear in most legislations, however child victims are not always guaranteed protection in so far as court proceedings and the publication of their details. There is a need to strengthen the provisions for the protection of the rights of child victims and witnesses.
- Although provision is made for court procedures that enable the protection of children, i.e the use of intermediaries and closed-circuit TVs- resource constraints jeopardise access to justice for children.
  - The report refers to two cases in South Africa illustrating the lack of protection for child victim and what happens in the court when the child testifies. Children are often victimised by the system. We need to see how our government can access those issues and not only bring the excuse of resources.

Training and multi-disciplinary approach:

- Its commendable that most countries prioritised these areas, however there is a need to emphasise continued training of professionals who work with children and to make resources available that will enable the implementation of a multi-disciplinary approach to ensure access to all children. Ex: some children in Johannesburg benefit from more services than others in rural areas. The solution that is proposed is the use of unformal justice system.

Deprivation of liberty:

- Countries have enacted legislation to ensure that deprivation of liberty is a matter of last resort for child offenders and that seem to have led to a reduction of such deprivation of liberty. However, pre-trial detention remains a big issue.
- Areas of concern remain the detention of migrant children and children in children’s homes/ child and youth care centres whose detention may be thought to be in their interest. There is a need to look into these facilities and to ensure that placing children in such facilities is also a measure of last resort. Migrants children are being detained just solely on the account of being migrants. Some children come out of those detention facilities in a very bad state.

Children and the police:

- The “relationship” between child offenders and the police appear to be covered in most countries- albeit that in practice police still violate children’s rights. An area that needs continued attention is the treatment of child victims by the police. Although the report highlights specialised units for child victims, it also notes the shortages of police in some countries- therefore there is a need for all members of the police to be “child-specialist” in order to ensure that child victims’ rights are not compromised.
There are improvements in terms of adoption of protocols in terms of how the children should be arrested. But how police deal with child victims or sexual affairs is still an issue.

She gave the example of Kenya where the police refused to begin prosecution of a child victim of sexual abuse.

The report mentions the specialist child unite, but if a child enters a police station in the middle of the night, he should not have to wait for the special unit to arrive. Rather everyone should be trained in child related matters.

**Access to courts and judicial process; legal representation:**

- The initiation of court process by children/those representing them is uncontested in most countries and this ties in most instances with the right of children to participate in matters that affect them.
- The study notes that the challenge appears to be the inability of countries to ensure legal representation due to resource constraints. Noting that in most instances legal representation is funded by NGOs, the report implores governments to take up this responsibility by funding in-house or outsourcing such service.
- The lack of resources appears to be a common issue that affects different elements of accessing justice. In so far as legal representation is concerned innovative solutions such as mandatory pro-bono roster for legal practitioners may be another way to supplement the over-burdened system. We need to be innovative and come up with a mechanism where you can have more people to be representative for children.

**Children and the informal justice systems:**

- It is important to acknowledge the existence of these systems in their differing permutations.
- Issue of concern that requires our attention is the need to infuse human rights in the systems in order to balance the positives i.e for instance child offenders do not get a criminal record with the negative i.e the use of corporal punishment as a sanction.
- The protection of child victims of sexual offences is a difficult issue that cannot be ignored- the Zambian research’s approach to defilement is a case in point.
- In South Africa the proposed Traditional Court’s Bill for now 11 years, proposes that the courts will “give advise” in relation to ukuthwala (child/bride abduction) without defining what “give advise” means.
  - A case went to court In South Africa and the person was sentenced to jail for 22 years. During his trial he tried to use the customary law of Child-Bride-abduction tradition. The villagers opinion about this case, is that we are applying colonial laws and they all saw the rapist as a victim, not the 14 year old girl that was raped on her way to school and forced to marriage. We need to be mindful of these things. What is justice for this little girl, since she can never go back to her community. We need to be forceful on certain issues.
- Agree that we need intensive in-country research in this area- both customary and religious systems.
- We need to understand the practices and encourage a bottom-up approach that will enhance access to justice for all children.
Why a UN Global Study on Children Deprived of Liberty?

- **UN CRC:** Deprivation of Liberty of Children only as a measure of last resort, and in exceptional circumstances if absolutely necessary, only for the shortest period of time.
- In reality, far too many children are detained in prisons, pre-trial detention centres, police lock-ups, children's homes, orphanages or other closed institutions for refugee and migrant children, child soldiers or children accused of terrorism.
- Still, there is no reliable statistical data on the number of children deprived of liberty and we lack information on the reasons for their detention as well as on alternative measures for the purpose of de-institutionalization and reducing the number of children deprived of liberty.
  - The number of children behind bar is uncertain, about 1 million was given by UNICEF in the 1990 but not based on evidence. He is afraid that the number is much higher.
- Childhood is a formative time in everyone's life. Putting children behind bars and depriving them of their right to personal liberty leaves a deep mark – in their lives and in society.

**Main Objectives of the Global Study:**

- To assess the magnitude of this phenomenon, including the number of children deprived of liberty (disaggregated by age and gender), as well as the reasons invoked, the root-causes, type and length of deprivation of liberty and places of detention
- To document good practices and experiences and to capture the views and experiences of children to inform the Global Study's recommendations
- To raise awareness and promote a change in stigmatizing attitudes and behaviour towards children at risk of arrest or detention as well as children who are deprived of liberty
- To provide recommendations for law, policy and practice to safeguard the rights of children concerned, prevent their detention and significantly reduce the number of children deprived of liberty through effective non-custodial alternatives guided by the best interests of the child

**Key Focus Areas:**

1. Children deprived of liberty in institutions
2. Children deprived of liberty on national security grounds
3. Children deprived of liberty within the administration of justice
4. Children deprived of liberty for migration-related reasons
5. Children living in places of detention with their parents
6. Children deprived of liberty in the context of armed conflict

The Children deprived of liberty includes a wide scope of situation including being detained for your own protection. However, do children have access to justice as a remedy to fight against it.
Regional framework:

- According to Article 17(2)c of the *African Charter on the Rights and Welfare of the Child* the State parties should ensure that every child allegedly infringing the penal law should be presumed innocent; be informed; and afforded legal or any other assistance; shall have the matter determined as speedily as possible.
- According to the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, African Union 2003*, children should be entitled to all the fair trial applicable to adults and to some additional special protection. States must ensure that law enforcement and judicial officials are adequately trained to deal sensitively and professionally with children.
- According to the *The Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa (2004)*, governments are encouraged to adopt measures and allocate funding sufficient to ensure an effective and transparent method of delivering legal aid to the poor and vulnerable, especially women and children.

Access to Justice for Children in 2016:

Common problems and challenges:

- Lack of the direct enforcement of the Committee on the Rights of the Child (CRC)
- Gaps between law and practice
- Lack of children's courts/adequate training of judges
- Lack of specialized juvenile court facilities and procedures with adequate human, technical and financial resources
- Lack of legal aid
- Lack of independent, child-sensitive and accessible system for receiving and dealing with complaints

**Africa's Agenda for children 2040:**

*By 2020 States:*

- Should have introduced a system for expediting investigations and prioritising cases where the defendant or any victim or witness is a child;
• Should have programmes in place to ensure that judicial personnel, law enforcement agents and other professionals involved in the criminal justice system are sensitised to provide child-friendly services
• Should have enhanced the capacity of law enforcement agencies to ensure accountability to children
• Should have reviewed sentencing procedures in order that a non-custodial sentence is always considered when parents or primary caregivers of children are being sentenced
• Should have established a clear child protection policy in closed institutions that is known to all staff, with step-by-step procedures on how allegations and disclosures of violence are to be handled

By 2040:
• All justice proceedings concerning children avoid undue delay and postponement of proceedings is kept to a minimum
• The criminal justice system responds to the needs of child victims and witnesses of crime before, during and after trial

Promising practices:
• ACERWC is the only regional mechanism that specifically addresses violations of children’s rights (see for instance decision in the Talibés children case)
• In South Africa and Kenya NGOs are allowed to bring cases in the public interest against violations of the Bill of Rights or Children’s Act. (CRIN, 2016)
• In Kenya, matters before children’s courts must be finalised within three months of the child’s plea or dismissed entirely.
• According to the Mozambique legislation, all children are guaranteed access to the court system.
• If, due to lack of financial resources, and structural reasons, there is no system of child justice courts, States are obliged at least to ensure that the judiciary receive appropriate expertise in children’s rights. This solution was adopted by Algeria (CRC/C/DZA/CO/3-4, 2013) or Togo and Swaziland (CRIN, 2016).
• Due to limited financial resources and infrastructure, some African countries established mobile courts for children (e.g. Sierra Leone, Democratic Republic of Congo)
• Malawi’s legislation emphasizes that the proceedings in child justice courts shall be informal, technical language is avoided, court personnel and legal representatives do not wear robes or professional uniforms, and courts take regular breaks. (CRIN, 2012)
• In South Africa, there is an automatic review in certain cases regarding children (see for instance case number: A390/2011)

Answers to questions for this Section
• Prof. Nowak fully agreed with the representative of Senegal with regards to the countries in the European union dealing with migration related detention, that neglects access to justice principle for African
• With regards to the best way to intervene for children living in the streets Prof. Novak mentioned that there are many ways to reintegrate them into society if they have no parents.
Including with foster families, or smaller groups of children taken care off and given access to education without being deprived of liberty. The worst way is to put them into large institutions and are deprived of liberty. The institutions don’t necessarily mean that they are deprived of liberty, it all depends of the type and philosophy of the institution.

- According to Dr. Murungi it is possible to integrate training on child rights to law enforcement agencies and police officials. For instance, Namibia was able to put in place such a type of program, that is currently being implemented. We need to do more efforts to document those good practices, so we can share, learn and reproduce them in other African countries.
- Mrs. Ozah stressed the importance of continuity in term of training.
- Regarding the children in prison with their mother Mrs. Ozah mentioned that the African Charter has provisions about minimizing the imprisonment of mother or primary care givers. There is a general comment on that issue with relation to minimizing the mothers actually going to prison, thus avoiding children going there for a long period and often integrating the values of the prison cultural. It is therefore important to balance the interest of the child by allowing them to stay with their mother when there are very small and then putting them with family.
- Regarding the existence of the informal justice mechanism Dr. Murungi mentioned that it is not about the failure of the formal justice system that is operating fully. The informal system exists in parallel. The common point in African countries is the plural legal system that will always coexist. What matters is how the informal system can be regulated and linked to the formal mechanism.
- Regarding the protection and standards applicable within the informal justice mechanism, Dr. Murungi mentioned that only in Ethiopia there are about 80 communities and the same amount of justice mechanism (Local court or gathering). Each traditional justice mechanism seems to have a system of its own with judicators, laws, standards applied and remedies. The danger that we sit in in Africa is ignoring this mechanism or not knowing what there are. That leads to not interacting with them and not knowing Child rights are respected. However, we are not saying that they are the best option for dealing with children.
- Dr. Murungi defined the term informal justice with a very broad sense, that encompass the religion the traditional, the semi-formal. Ex: kids that are representative of the government and deliver justice based on the laws of a particular community. There are countries where going to the religious court is a choice. We need to be aware of those cases to be able to regulated children rights.
- Mrs. Ozah mentioned that there should be bottom up approach, to see how the court is run, ask if they allow corporal punishment for example.
- Regarding the absence of implementation, for instance of the guidelines and recommendations taken during the Kampala conference. The States are not aware and how can we have regional mechanism to accompany the States in implementing those guidelines.
- Novak concluded in saying that most children in Africa are unaware of the happening of this Continental conference and stressed that they should be made aware of it and the importance of child participation. We should try to speak to children and involve them in the global studies and the various forms of deprivation of liberty.
Legal pluralism can be defined as distinct or separate legal systems co-existing within one political system. While said co-existence may be either on a horizontal level (systems applying equally) or on a vertical level (one system being subordinate to the other).

Pluralist legal systems are quite common in the world. Pluralism is often seen in:

- Formal (mostly inherited from colonial rule, conquest, occupation, etc.) & Informal (traditional, customary) systems. In the United States of America for example, Indian Law exists alongside the Common Law
- There are many different combinations in the pluralistic legal framework

Examples of several types of legal pluralism:

- Civil Law & Common Law (Botswana, Namibia, Syechelles)
- Civil Law & Customary Law (Burkina Faso, Burundi, Guinea Bissau)
- Civil Law & Muslim Law (Algeria, Comoros, Egypt)
- Common Law & Muslim Law (Sudan)
- Common Law & Customary Law (Ghana, Malawi, Uganda)
- Common Law, Muslim Law & Customary Law (The Gambia, Kenya, Nigeria)
- Civil Law, Muslim Law & Customary Law (Djibouti, Eritrea)
- Civil Law, Common Law & Customary Law (Cameroon, Lesotho, Zimbabwe)
- Muslim Law, Common Law, Civil Law & Customary Law (Somalia)

Contemporary Legal Pluralism:

- Globalisation and the advancement of international legal relations has brought new dimensions to legal pluralism.
- Domestic legal systems are being influenced by international law – now seen as part of the national legal system.
- International law applies in domestic law within the spheres of:
  - Monism – direct application of international treaty law
Dualism – specific incorporation of international law into domestic law by a legislative process

Fitzmaurice Compromise – No relationship between the two systems of law (i.e. international & domestic. Differences are settled by clear rules on conflict of laws)

Other emerging instances of application of international such as Community Law (EU, ECOWAS, EAC, etc.)

There are both positive and negative effects of mixed legal systems:
- Positive impact: Choice of law and choice of forum
- Negative impact: Forum shopping; subjugation of individual rights (e.g. rights of persons subject to religious and customary law); unfavourable customary law (Saakyi Maame v Dede Paulina, 2004, Supreme Court of Ghana Decision)

Legal Pluralism – a necessary evil?
- Exists and operates in a number of countries
- Prevalent within the African context
- Influences the functioning of the legal system
- While fraught with challenges it provides useful opportunities
- Benefits of Legal Pluralism in Africa should be explored in-depth

Prof. Benyam Mezmur, Member, ACERWC; Member, UNCRC

Reflections from the UNCRC and the ACERWC.

Background and context:
- How, in their engagement with states, have the ACERWC and CRC Committee encountered and addressed the challenges that legal pluralism poses to children’s access to justice?
- Questions of mandate- and first things FIRST
- Legal pluralism and the Charter/Convention
  - Legal pluralism as a result of social/religious/political pluralism…
  - A lot of examples how these are accommodated by the treaties
  - "more conducive environment"
  - Near universal ratification = consensus?
- Access to justice through individual complaints

Issues:
• Reservations
• Issues in family law, criminal law, etc… examples…
• Balance between access and respect for rights
• Conflict between formal and informal law
• Limitations of institutional frameworks
• The role of religious/traditional leaders

Addressing challenges:
• Role of “personal choice”/ “justice as a relative concept”
• Engagement
• Managing “mandate creep”/ “bias”
• “More conducive environment” provisions
• Politicization of issues

Concluding remarks:
• The role of cardinal principles
• The limits of good practices [“baby with bath water”?]
• Challenge of striking balance/power of persuasion
• Research, data, advocacy… “visibility bias”
• Looking back to look ahead.

Ms. Kristen Hope-Burchill, Justice Advisor, Terre Des Homme
Customary Law & Juvenile Justice: An international perspective.

Low rates of children coming into contact with formal system in developing countries. Estimated 70 and 90 per cent of all disputes in developing countries solved through informal or customary mechanisms (Danida)

In line with:
• UN guidance on Justice for children (2008)
• ECOSOC Guidelines Basic Principles Use of Restorative Justice in Criminal matters (2000/14)
• Guidance from SRSG VAC
• Links with work on community-based protection (Wessels)

Pros: quick, inexpensive, shift from blame and punishment to restoration and repair, complementary with formal mechanisms, more readily available in times of crisis (war, natural disaster) when formal system may be weaker
**Cons:** concerns about due process, accountability, consent, partiality, corruption; rule of law; communities as contested spaces,

**Dilemmas from a rights perspective:**

- Community harmony prioritised over individual well-being?
- Reinforces power relations?
- Assumption: Engaging with Customary justice system will be met with hostility from formal system, will compromise rule of law, will condone harmful practices.

**Terre des Hommes: Research-oriented actions: Phased approach:**

Research question: To what extent can programming include formal justice actors and informal, customary, and alternative dispute resolution mechanisms and processes within a rights-based and restorative approach to justice for children?

- Phase 1: Situation analysis. Build knowledge and understanding of the mechanisms and processes that deal with children in conflict with the law outside of formal judicial structures
- Phase 2: Pilot activities and institutional learning. Begin engaging with IJS alongside formal justice systems
- Phase 3: mainstreaming in Juvenile justice. Explore possibilities of a holistic approach to juvenile justice sector reform programmes

**Results of Phase 1:**

Mapping of customary actors and relationships

- Varying degrees of cooperation; willingness to collaborate
- Definitions of ‘child’
- Descriptions of customary dispute resolution
- Processes and outcomes
- Factors impacting on decision-making
- Perceptions of justice actors and system users (adults and children)
- What were ambitions for change?

**Action-oriented research:**

*Pillar 1: Quantitative data collection*

- Develop better understanding of children’s treatment in customary justice
- Collect quantitative information and analyse using a rights-based and restorative lens

*Pillar 2: Sensitisation for Customary Justice System actors*

- In Egypt: On Egyptian Child Law; Restorative justice principles; Child protection; Basic JJ principles; Effective communication with children
- In Burkina Faso: Burkina Faso Child Protection Act and Code of Criminal Proceedings, focus on penal mediation

*Pillar 3: Coordination*
• Bringing actors from the formal and informal systems together to discuss strengths and weaknesses for children,
• Determine common action plans about reforms or changes they would like to work on together
• Egypt: CJS support of probation officers in social inquiry reports => Better sentences issued by judges.
• Burkina Faso. Establishment of multi-sectoral steering committees (Justice, Security, Social Action). Prosecutors have mandated one case of juveniles to be solved by a trained chief

Pillar 4: Participation

• Empower system users to participate in reforming the justice system
• Egypt: Structured child-participation methodology: PSS training; group work; public campaigns

Between September 2013 – January 2018:

2566 cases of children in CJS collected and analyzed, through 50 variables:

• IJS actor: profession; affiliation to official structures, etc.
• Child: socio-demographic information; role in the dispute, antecedents, etc.
• Case: type of crime; actors who intervened; outcomes, etc.
• Analytical questions re RJJ: voluntariness, safety, community vs. Individual well-being etc.
• Child’s involvement: exposure to harm, legal advice, participation

Session III: Access to justice for children in the context of armed conflict

Chair: Dr. Remember Miamingi, Child Protection Adviser, Peace and Security Department of the African Union

Dr. Remember Miamingi, Child Protection Adviser, Peace and Security Department of the African Union

The role and approach of the AU Peace and Security Council to enhancing access to justice for children in the context of armed conflict.

The mandate of the peace and security council:

Article 22 of the African Charter on the Rights and Welfare of the Child:

1…respect and ensure respect for…

2….all necessary measures … no child shall take a direct part in hostilities…

3…all feasible measures … protection and care affected by armed conflicts children in situations of internal armed conflicts, tension and strife.
Article 11 (3) of The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa: protect asylum seeking women, refugees, returnees and internally displaced persons, against all forms of violence, rape and other forms of sexual exploitation, and to ensure that such acts are considered war crimes, genocide and/or crimes against humanity and that their perpetrators are brought to justice before a competent criminal jurisdiction.

Article 3 (f) of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union: “protect human rights and fundamental freedoms, respect for the sanctity of human life and international humanitarian law, as part of efforts for preventing conflicts.

“2017 has been a devastating year for children trapped in conflicts. They came under attack in spaces where they should be safe—in homes, schools and hospitals and on playgrounds. Children were deliberately targeted in many conflicts: They were used as human shields, killed, maimed, abducted and recruited to fight. Millions of children also bore the brunt of diseases brought on by crushing wars.” UNICEF, 2017

Mr. Anthony Njoroge, Senior Programme Manager, Child Protection, Save the Children International, Eastern and Southern Africa Regional Office

Challenges and opportunities for children in access to justice in the context of armed conflict.

Discussing Accountability Mechanisms for Children in situations of armed conflict:

- More than 350 million children are living in areas affected by conflict, a more than 75% increase since the early 1990. Nearly half of these children are living in areas affected by high-intensity conflict
- Since 2010 there has been a 300% increase in the number of UN-verified cases of killing and maiming of children
- There’s been a more than 1500% increase in incidents of denial of humanitarian assistance for children living in conflict

The problem:

- Heinous attacks are committed against children on a daily basis
- The number of Violations are increasing- by 75% since early 1990s
- Children are more at risk in conflict now than at any time in the last 20 years
- Despite improved international legal and normative standards to protect children, that increasingly brutal tactics are being utilized
- The psychological impact of toxic stress on children living in conflict zones is profound and can lead to a vicious cycle of conflict
- The nature of modern conflict is changing, and it is changing in a way that often protects soldiers more than civilians
- Increase in non-state armed groups. Sharp increase reported in the number of non-state armed groups operating in conflicts over the last two decades
- Lack of monitoring. Huge gaps that exist on disaggregated child-specific data in conflict, as well as wider data on sexual violence and civilian casualties
- Crisis of compliance. Failure to hold warring parties to account for violations of the laws and norms created to protect civilians in conflict.

**Issues to consider:**

What components of Child Protection Accountability Mechanism in armed conflict are currently in place?

- What are the violations that girls and boys are exposed to; this should go beyond the 6 grave violations?
- Has the State ratified relevant international treaties? In practice, do national armed forces comply with relevant laws and norms, including international humanitarian law, human rights law, child protection standards, and relevant provisions in national law?
- How much evidence is there that members of the military and other state security actors have the mandate to follow up on accountability i.e. have their institutions awarded individuals with specific roles that include responsibility for holding perpetrators to account?
- Are local and national authorities willing and/or able to fulfil relevant obligations under national and/or international laws in matters of accountability for violations against children including abuse, neglect, exploitation and violence?
- Are other actors (e.g. national armed forces, human right organisations including national human rights institutions, international bodies, local communities) fulfilling their respective roles and responsibilities when it comes to holding perpetrators of violations against children to account?
- Are perpetrators of violations against children identifiable and accessible? This should also look at the cases of child perpetrators
- Do any parties to conflict obstruct or facilitate investigation, prosecution and sentencing of perpetrators?

**Child Safeguarding:**

- How do preventive and disciplinary processes protect the identity of the person (victims and other witnesses) reporting the allegations or concerns?
- Is the reporting and investigation process entirely child-centred? This approach ensures that the child’s needs and the rules of evidence and fair process required in any investigation and prosecution are satisfied

**Recommendations:**

*Prevent children being put at risk*

- The most effective way to protect children from the horrors of war is to prevent war
- Investments need to be made in peacekeeping, conflict-prevention initiatives, and training for military forces on how to keep children safe in conflict
Uphold international laws and standards

- All states and actors should abide by their commitments under international laws, and should endorse the Safe Schools Declaration, the Paris Commitments and Paris Principles.
- States and armed groups must commit to avoiding the use of explosive weapons in populated areas

Holding violators to account

- Stronger monitoring and reporting mechanisms to properly track civilian harm and child casualties
- Stronger justice systems that address violations of children’s rights in conflict.

Rebuilding shattered lives:

- Ensure funding is available to rebuild children’s lives wrecked by conflict, and investing in programmes that help children get their lives back
- Children also need to be provided with the right mental health support, and local mental health workers must be trained to support these children

Mr. Ayalew Getachew, International Researcher, ACERWC Secretariat

Highlights from the ACERWC’s Study on Children Affected by Armed Conflict.

The objectives of the continental study are:

- Assess the impact of armed conflict on children in the areas of education, health, nutrition/food security and child protection
- Assess whether African countries have mechanisms in place to respond to the challenges of especially vulnerable children, including girls and separated children, during conflict situations
- Assess the role of children as victims and witnesses to gross violations, including killings, maiming’s and sexual abuse

Countries in active conflict:

South Sudan

- Sexual violence is widespread exacerbated by impunity
- Reports indicate that there are over 10,000 registered separated children with no access to justice and other services
- The Ministry of Defence has put in place a directorate for children- the SPLA Child Protection Unit- facilitates among others access to justice
Central African Republic

- In 2014, 146 children killed and 289 injured
- According to UN statistics between 2013 and 2016, sexual violence by militia groups, the police and peacekeeping forces accounted for 108 cases
- Statistics are vastly underreported due to restricted reporting ability and lack of access
- Little or no action have been taken against identified alleged perpetrators- The collapse of the judicial system has led to widespread impunity for large-scale commission of grave violations against children
- In April 2015 the National Transitional Council adopted a law to establish a special criminal court to investigate and prosecute war crimes and crimes against humanity- however, the law does not provide particular mechanism to facilitate access to justice for children and no mechanism for protecting children

Nigeria

- Targeting of schools by armed groups, abduction of school girls, use of children as suicide bombers
- Education authorities reported that at least 338 schools were destroyed and at least 194 teachers killed between 2012 and 2014
- Sexual violence among displaced people has been reported in an IDP camp in Maiduguri
- Some parents resorted to marrying off their young daughters to protect them from marriage to insurgents
- There were also reports of parents pushing their children to engage in sexual activities for money to help the family

Somalia

- Children targeted for radicalization through violent videos and messages
- Rape is so rampant that it is being referred to as ‘normal’.
- Reported perpetrators over the years have included Al-Shabaab, peacekeepers and national forces
- The UN Office for the Coordination of Humanitarian Affairs reported 800 rape cases in the first half of 2013. At least one third of the victims were children
- In February 2013, the Ministry of Justice and international bodies called for the reform of the justice system. A human rights ‘road map’ for the period 2013 to 2015 has been formally endorsed. It would lay the foundation for improving the protection and promotion of human rights in Somalia. However, it was characterised as a failed attempt as it couldn’t protect children from sexual violence

Countries in fragile post-conflict situations or a major humanitarian crisis:

Republic Democratic of Congo

- Persistent armed conflict has precluded children’s access to justice and basic social services
- Widespread rape and other forms of sexual violence, including bodily mutilation. Peacekeepers have been accused of rapes
• Special police brigades for child protection are in place in at least four provinces. Other mechanisms include the National System of Children’s Courts, which hold hearings, deliver judgments, train social workers, provide legal assistance to children and assist with family reunifications.

Kenya
• Radicalization of children to fight across boarders in Somalia and to carryout terrorist attacks in Kenya
• To protect children, the police have standing orders to identify children as the most vulnerable in emergencies
• The National Police Service has established children and gender desks and child protection units in some police stations.

Liberia
• Twelve years after the end of the civil war, children and women continue to face a significant threat of sexual violence; there are frequent reports of rapes of children.
• According to data from the Ministry of Gender, Children and Social Protection, there were 1,392 incidents of sexual and gender-based violence nationwide in 2014.
• Reported shortage of magistrates with formal legal training, lack of literacy skills in the police, lack of lawyers outside the capital city, and lack of transport for social workers.

Mali
• In 2014 the United Nations recorded 90 cases of alleged sexual violence in the regions of Gao and Timbuktu.
• National Directorate of Social Development put in place a community referral system for child victims of violence, exploitation, abuse and neglect.

Burundi
• Children living on the street are particularly affected, and they have been reported as having become caught up in demonstrations.
• Children have been detained by law enforcement agencies.
• As many as eight children were killed during demonstrations in July 2015, many of them as a result of police shootings.

Major Findings in conflict countries:
• Access to Justice and Social protection structures are very weak, even non-operational in some instances, due to lack of funds and absence of personnel.
• The destruction of schools is prominent in all the study countries, but especially in Libya, Nigeria and South Sudan.
• Recruitment of children by armed forces and armed groups has become a common practice, especially in Central African Republic, Democratic Republic of the Congo, South Sudan and Sudan.
• Sexual and gender-based violence has become a weapon of war. It is common in all the study countries, especially DRC, Somalia and South Sudan.
• Hospitals have been destroyed in CAR, Libya and Somalia and Nigeria
• Many States have essentially abandoned the child protection terrain to NGOs.
• A fragmented approach leading to spotty coverage, lack of coordination and inconsistency of services.
• Lack of awareness of various services; and victims’ reluctance to make use of services due to threats from perpetrators, fear, and stigma.
• The study concludes that along with perpetrators, States are accountable for violations committed during conflicts and crisis situations due to their failure to protect children and to bring perpetrators to account. It is crucial for States to end the impunity through effective prosecution of perpetrators.

The following recommendations were made to the states:

• Adopt a rights-based approach (focusing on States obligations) for addressing violations of child rights in situations of armed conflict- this demands accountability.
• Vehemently condemn sexual and gender-based violence in conflict situations and ensure the prosecution of perpetrators, no matter who they are. Governments must also pledge their commitment to end impunity, uphold the human dignity of children and insist on realization of children’s rights to security and to freedom from sexual abuse.
• Children should be educated on how to report sexual and gender-based violence incidents in a timely manner and how to resist intimidation and other practices that encourage victims’ silence, which encourages impunity and the perpetuation of this crime.
• Establish effective special juvenile justice procedures for child perpetrators/victims in conformity with regional and international standards.
• Establish a reparation programme including adequate compensation for victims and survivors of conflict. Reparations should not wait for judicial processes since it is not in dispute that violations occurred. This should be informed by consultations to meet the dire needs of the beneficiaries.

Session IV: Vulnerability and access to justice for children
Chair: Mr. Theophane Nikyema, Board Member, IBCR; Executive Director, ACPF (2014-2018)

Dr. Shimelis Tsegaye, Head, Child Development and Protection Programme, ACPF

Conceptual challenges underlying a universal understanding of vulnerability in Africa and how it relates to children’s access to justice.
Do we really need Universals understanding of vulnerability?

There isn’t a universally understanding of vulnerability. It varies within countries and communities while understanding of this concept for governments and CSO’s are different. Should the concept be universalised blanket interventions will be sought.

Vulnerability concept was first use in the medical field when childhood pandemic left many children orphaned and deprived of parental care. When vulnerability is addressed the root causes of it must be tackled.

Models of vulnerability:

In this first model of vulnerability the individual is seen as deficient. The positive aspect of the Personal Deficit Model is that it allows individualised targeted responses.

Understanding Vulnerability:

- Is about being at greater/disproportionate risk of getting exposed to external risks, shocks, and stress
- Is a condition that increases the likelihood of an individual to be denied access to a particular social, economic, political or juridical process
- Arises when political, social, and economic structures deny people the environment within which their capacities can flourish and manifest
- Involves marginalization where people are rendered invisible, voiceless in decisions that affect their lives
- Is about having no or limited capacity to cope with stress and shock and to recover and adapt
- Broadly has its root causes in poverty, poor governance, discrimination, inequality, lack of social justice and intolerance. In other words, if society addresses the social issues, country more likely to have fewer people in a vulnerable situation.
- Multi-layered and context-specific
- Child vulnerability nearly always multiple & complex working in a downward spiral
- Vulnerability as a universal human condition
- Result of imperfections of societal institutions
- Vulnerable children are rights-holders and with resilience, rather than poor victims or passive recipients
- Risks of categorization/objectification of children in current Child Protection programming
- Vulnerability often addressed as an afterthought
Vulnerability of children:

Vulnerability refers to a condition, characteristic or factor that puts children at greater risk of:

- Being victims of crimes
- Being incriminated easily/coming into contact with the justice system easily and/or frequently
- Facing barriers to accessing justice
- Being victimized, abused, traumatized and maltreated once in the system
- Being stigmatized and seen with suspicion after leaving the system
- Is about particular groups of children whose voices are not heard and have limited or no choices in the context of justice
- Is about particular groups of children who lack access to special protection in the face of abuse and exploitation within the justice system

Barriers to accessing justice:

![Barriers to accessing justice chart]

Particularly vulnerable children:

*Children living in urban slums*

- Being held guilty by association/overall criminal culture in the community
- Access to drugs, alcohol and firearms

*Children living under poverty*

- Symbiotic relationship b/n poverty and access to justice
- Material deprivation and illiteracy limiting access to a highly monetized justice system [user fees/lawyers’ fees] and a highly ritualized court system
- Lack of trust and fear of power structures and of re-victimization

*Children with disabilities*

- Lacking physical access to the court house. e.g. Children with wheelchairs.
- Lack of disability-friendly transport to go to and attend court sessions
- Communication challenges/ lack of sign language interpretation facilities/lack of visual signage
- Intellectual capacity challenges/risks of being incriminated easily/risks of getting deceived to commit crimes
Children deprived of parental care (child-headed households; children living on the street; orphaned children)

- Risks of being incriminated easily
- Being held guilty by association/overall criminal culture in the community
- Drug and alcohol abuse
- Easy access to firearms
- Girls being exposed to sexual abuse in prison/ fear of being re-traumatized by the system
- Inability to legally represent themselves in the case of Child Headed Households
- Children living on the street often accused of vagrancy and begging

Children on the move and trafficked children

- Lack of identity documents and birth certificates and the tendency to avoid law enforcement in the host country
- Being identified with particular warring groups [especially in conflict-related displacements]
- Risks of persecution for reasons of race, religion, nationality, membership of a particular warring faction or social group, or political opinion
- Unfamiliarity of host country laws/incompatibilities in types of “unacceptable” behaviour in the source and host countries
- Language barriers

Conclusions:

- Child vulnerability is context-specific and should be seen as such in both policy making and programming-avoid top-down 'universal' packaging of interventions
- Child vulnerability is multi-faceted- always involving an interrelated and indivisible set of risks, hence requiring more systemic and multidisciplinary responses
- Address vulnerability by and through design- universal design- hence adopt a more preventative orientation
- Address broader societal structural factors/systemic imperfections
- Take the voices of vulnerable children into account in policy formulation and programming
- Have the right mindset: see vulnerable children as rights holders, not as passive victims and as capable and resilient individuals, not as deficient individuals

“Never forget that justice is what love looks like in public.”
— Cornel West

Mr. Noah Sang’anyi, Director, Children’s Services, Government of Kenya

Governments’ conceptualisation of children’s vulnerability and the impact on programming.
- Vulnerability” is elusive & adopts context specific meanings.
- Its application in child protection relates to challenges against accepted standards of child wellbeing.
- It may lead to physical, emotional and psychological exploitation
- Multiple vulnerability is possible among children.
- Physical, economic, social and political factors determine level of vulnerability & poverty is its one major contributor.
- Vulnerability may lead to exposures contributing to lack of access to public services and programs.
- Vulnerable population encounter discriminatory treatment & exploitation.
- Fragile stage of development of children make them vulnerable
- UNCRC provides that children need special protection before & after birth
- This shifts the attention to the mother and all care giver.

When justice is accessed by vulnerable child:
- They are able to obtain legal information, advice and assistance
- Access courts, tribunals and alternative dispute resolution mechanisms
- Obtain non-legal advocacy and support; and
- There is participation of children in law reform processes.

Common barriers in accessing justice...
- The common barriers to access to justice presents gaps which when identified aid government programing for service delivery to children and the vulnerable categories.
- Such barriers may include:
  - Poverty, lack of basic education, illiteracy, disability & lack of identity documents
  - Costs of court fees, lawyer fees, and form fees among others which may be too high for vulnerable categories
  - Transportation costs, food and living expenses, and accommodation during a trial
  - Potential for loss of income/livelihood when involved in a trial
  - When legislation ignore the special needs of certain categories
  - Intimidating court processes and language
  - Fear and the lack of trust in formal institutions
  - Physical access to formal justice systems where courts and authorities are far away from people

Government programming towards access to justice:

Programming for interventions towards children’s access to justice is informed by potential barriers. The interventions are context specific and are intended to fix the gaps. To address the above barriers, government programing towards children access to justice includes:

- A framework for free legal aid
- Emphasis on social protection to eradicate poverty
- Stronger judicial service system administration
- Comprehensive judicial service training programs
• Advocacy for improved legal literacy and access to information
• Inclusion of civil society organizations in efforts to enhance children’s access to justice
• Improved physical accessibility to judicial offices & other public institutions
• Improving judicial infrastructure
• Improving access to judicial information
• Improved data sharing within the judicial sector e.g. judicial information system
• Emphasizing the role of ombudsman
• Promoting community interventions; and
• Emphasizing alternative dispute resolutions (ADR).

→ In Kenya children tribunal are being built, while the constitution opened space for children.

Session V: Access to justice for children with disabilities in Africa

Chair: Ms. Yetnebersh Negussie, Senior Inclusion Advisor, Light for the World

Ms. Rumbidzai Dube, Senior Programme Officer, Children and Law Programme, ACPF.

Access to justice for children with disabilities in Africa

The models of understand disabilities:

Essentialism model: The individual having a disability is seen as an object rather than a subject with rights. This approach blames the victim for their natural state rather than understanding their specific condition and help them to adapt to an environment that is not created with them in mind.

Constructivism model (preferred model): Tries to understand how the context looks like, and how does it enable the person with disability to achieve the same form of existence as any other person. It recognizes that the factors around person with disability exist as barriers rather than the person with disability being a problem or victim. Looking at the context and the way it is framed and formed, how it presents challenges and adapting that context to them is a more progressive way.

The law & children with disabilities:

Just like all other children, children with disabilities interact with the justice systems in various capacities:

• Criminal justice proceedings: As victims of crime; as defendants accused of committing crimes; as witnesses – bearing witnesses to crimes.
• Civil judicial proceedings: As subjects of care, in the welfare system, or victims of abandonment, parental neglect, abuse, the decisions have huge impact on the lives of these children e.g. where and with whom they should live.
• Administrative proceedings: As actors where decisions impact aspects of their lives such as education; for instance the law decides the kind of learning support these children receive and whether they are educated in a mainstream or segregated educational environment (notwithstanding each child’s right to an inclusive education).

The legal framework:
Adoption of the UN CRPD in 2006 to address the insufficient protections of the rights of persons with disabilities in preceding international instruments

Prohibition of discrimination on the basis of disability in the CRC and the ACRWC

Article 23 of the CRC and 13 of the ACRWC have specific provisions on children with disabilities (States to take measure of protection, availing resources & assistance)

UN CRC General Comment No. 9, 10 and 12 (Elaborates what states responsibilities are)

Articles 12, 25, 37, 39 and 40 of CRC (Without specific reference to CWD)

Access to justice under Article 8 of the Universal Declaration of Human Rights ("UDHR") must be: Available to everyone; provides an effective remedy; carried out by a competent national tribunal; and protects fundamental human rights.

The African Charter on the Rights and Welfare of the Child provides for key elements of access to justice: Non-Discrimination (Art. 3). Consultation, participation and due consideration to views in all judicial or administrative proceedings (Art. 4). Protection of fundamental rights (Art. 5). Special treatment preserving the child’s dignity and worth and reinforcing their rights and fundamental freedoms.

CRPD Art. 13 – state parties have a responsibility to: Ensure effective access to justice for PWDs; on an equal basis with others; through provision of procedural and age-appropriate accommodations; to make age appropriate and disability specific accommodations.

CRPD Article 7 – take measures to ensure enjoyment of all the rights of children with disabilities on an equal basis with other children. Specific recognition in this article of the right of the child with disabilities to express their views

Key principles:

- Reasonable accommodation: Failure to provide constitutes discrimination (it means that states have provided accommodation equal to all the other children)
- Flexibility : Systems must accommodate the individual
- Accessibility : The system must be accessible physically, procedurally and content-wise
- Respect for difference: Disability should not be criminalized. Children with disabilities should not be penalised for their disability.

Why is disability an issue?

- Enhances the vulnerability of children in the realisation of their rights and welfare generally and access to justice in particular.
- The impairments underlying disability inevitably present barriers in the interaction of the affected children with existing mechanisms of justice.
- Additional barriers also emerge from social understanding of the impairment in question.

Barriers:

- **Structural barriers** : Arising from how the different systems relate to each other (e.g. who takes responsibility for supporting children with disabilities through these systems)
- **Procedural barriers** : Arising from the complexity of legal systems or the rigidity of many formal court processes.
- **Attitudinal barriers** : Where justice professionals have negative assumptions about the capacity of children with disabilities or society prejudices their capacities and abilities.
- E.g.: Lack of physical access to courts; lack of disability-friendly transport to attend court sessions; communication challenges in the system (lack of sign language interpretation facilities), lack of visual signage; intellectual capacity challenges which increases risk of incrimination or co-potentiation into criminal activities.
How does vulnerability manifest? As children in African contexts, their minority status:

- Infantilises them and negates their agency
- Makes them fully reliant on adult direction and supervision for support without which they have no access to aspects of the formal justice systems
- Silences them (they are not given space to express themselves); in the informal systems, they are not seen or heard as guardians completely speak on their behalf.
- Their disability makes them vulnerable to many forms of violence yet simultaneously rendering them invisible in spaces that offer solutions to their unique challenges
- Children with intellectual disabilities are especially targeted by sexual predators who presume they can’t comprehend the harm done to them, and if they do they will not report it.
- Sexual predators also target children with physical disabilities, easier to overpower.
- All children with disabilities are vulnerable to abuse, maltreatment and neglect hence requiring legal interventions than most children.

Children as witness: They are subjected to stereotypes and prejudices which exclude them from processes, limiting their right to participate. As witnesses the weight accorded to their evidence is low:

- They are generally not considered as credible or competent witnesses.
- Children with psychosocial disabilities may be discredited due to their mental health history.
- Children with intellectual disabilities may be questioned on their ability to tell the truth.
- Children with hearing or visual impairments are considered unreliable witnesses because they cannot recount what was literally seen or heard or their complaints are not taken seriously when they report to the Authorities.
- Evidence is lost when children with disabilities are not given the space and time to give their testimony at their own comfortable pace e.g. a child who stammers, or speaks slowly may not be treated with the patience they require by a rushed court/judge.

Children as offenders:

- *Determination of criminal capacity*: Systems apply chronological age in determining criminal responsibility which does not factor the nuances of children with intellectual or developmental disabilities.
- *Communication*: at the point of first contact with the justice system - information on the reason for deprivation of liberty: The issue of language or mode of conveying the message is not always disability sensitive.

Children as victims:

Current legal framework on access to justice for child victims emphasises the need for the victim or someone acting on their behalf to trigger the justice mechanism. Children With Disability are least likely to benefit from this because of isolation, over dependency on the caregiver, social stigma.

- Reasonable accommodation: Most African countries do not have the necessary facilities nor taken the measures to improved access to the justice system for children with disabilities. Simple issues such as physical accessibility of police stations and courts remain an issue.
- Communication: Several communication barriers remain unaddressed e.g. the absence of sign language or interpretation in the court systems.
- Access to information: Some children with disabilities lack access to legal information on legal rights, legal aid and procedures. Information is not packaged in accessible formats e.g. having constitutions, laws, pamphlets in Braille, plain language or alternative formats.
Consequences:
Owing to the many barriers presented to them, children with disabilities are: Marginalised; made invisible; ignored and not heard; treated as a shame on their families; viewed as a burden; labelled as “idiots”, “retarded” or even “witches” which have been sent to punish families; frequently abandoned and often likely to be deprived of liberty as a result of the disability.

Solutions:

*Develop and implement accessibility standards:*
  - Undertake and implement accessibility audits of courts
  - Set up mental health courts to give specialised service to children with mental disabilities.
  - Review and adapt judicial rules.
  - Improve physical accessibility of police stations and courts.
  - Provide information to the public about justice systems and processes in accessible formats (including easy-read and pictorial formats).
  - Improve ICT penetration as modern information communication technology systems and assistive devices ease access.
  - Promulgate mandatory provisions to establish procedural accommodations to judicial processes for persons with disabilities.

*Introduce flexible and sensitive approaches for individual communications needs of each child e.g:*
  - Create child-friendly interview rooms.
  - Create child friendly recording facilities.
  - Introduce video-conferencing instead of physical presence in court.
  - Remove communication barriers such as lack of sign language or interpretation.
  - Introduce and maintain sign language, augmentative and alternative communication (including interpreters trained in communicating with children with disabilities) as a permanent feature in the courts.

*Assessments and reasonable accommodations:*
  - Conduct research to understand the experience of children with disabilities from their own perspective
  - Guarantee mental health services for children with mental disabilities in the justice system and monitor their progression.
  - Improve access to legal information on legal rights, legal aid and procedures by making the information available in Braille, plain language or alternative formats that are relevant to these children.
  
  → Recognising that a purely welfare – based approach to justice without any reference to the child’s wishes or feelings – rights based is insufficient. It is not charity rather a states obligation for putting in place mechanism.
  
  → Train justice professionals as untrained officials can compound the barriers to justice for children with disabilities.
Ms. Zita Hansungule, Senior Project Coordinator, Center for Child Law (CCL), University of Pretoria

Legislative measures to improve access to justice for children with behavioural disorders: The case of South Africa.

Case study: Children being sent from pillar to post:

A child called A was 14 when his case was brought to a high court. A had been placed in more than one child and youth care center and psychiatric facility due to his father’s inability to care for him. His has been diagnosed with conduct disorder, ADHT and dysthymic disorder. He was referred to a psychiatric hospital because he was acting out and child and youth care center could not manage his behaviour. After being stabilized with medication he was sent back to the center. In 2009 a charge of malicious damage of property was laid against him. He was transferred to a secured care facility that houses child offenders pending a criminal justice offense that kept him sedated for most of his stay. He was then referred to a psychiatric hospital and 2010 his behavior was described of being erratic and uncontrollable and he remained in a psychiatric hospital for the rest of his life.

What is access to justice for persons with disabilities?

CRPD: “the provision of procedural and age-appropriate accommodation in order to facilitate their effective role and direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.”

Foundation for Human Rights: “[T]he ability of people to seek and obtain a remedy through formal or informal institutions of justice, and conformity with human rights standards.”

Academic writing, Trevor Farrow – access to justice is: “about accessing equality, understanding, education, food, housing, security etc … Good laws, rules, judges, educators, lawyers, and courtrooms are all important. However, these are not ends in themselves, but rather steps along the path to justice and access to it.”

Access to justice is more than just effective access legal processes it also is about effective access to: Assistance, services and programmes. That allow all, including children with behavioural difficulties to lead lives that promote their basic rights and development.

Access to Justice for children with behavioural difficulties:

It means not to be treated in a harsh punitive manner by criminal justice system because constantly in contact with police officers that do not understand why they are committing crimes. Access support and services that address their developmental and therapeutic needs. To reduce the likelihood of continued conflict with the law.

Why do they come into conflict with the law? Because behavioural difficulties manifest themselves in many ways:

- Display violent behaviour or retaliation towards others;
- Be physically abusive towards others;
- Express no regard or care for other people or other people’s property;
- Be indifference towards other people’s feelings / no apathy etc
How do behavioural difficulties arise:

- Children experiencing adjustment disorders;
- Anxiety disorders;
- Oppositional defiant disorders;
- Conduct disorders;
- Combination of above and others

Reasons for children experiencing this not clearly determinable: Combination of factors could play a role – biological, environmental and psychological.

Legal challenges:

- Reality on the ground – responses to children with behavioural difficulties do not align with human rights approach affirming equality, dignity & best interests.
- Failure of duty bearers to keep promises in international and national laws.
- Curator ad item appointed to investigate A’s circumstances: “I encountered a flawed system and staff in the system, frustrated by serious defects in the system who do not know where to turn in dealing with children with [behavioural difficulties] … it is the system that must be addressed urgently and comprehensively.”
- System needs to aligned in legal obligations already set out in the legislative framework. How?

Legislative measures or better implementation?

- South African legislative framework is a progressive framework designed to give effect to the rights of children in international law & the Constitution.
- The Child Justice Act – deals specifically with children entering in contact with the law. The act pushes to direct children away from criminal justice system as much possible. Care and protection system means that if they understand that committing the crime is wrong, they have the potential to be rehabilitated and reintegrated.
- The Children’s Act – care and protection system aimed at giving effect to constitutional rights of children to social services; right to family care; or appropriate alternative care. If they commit a crime and do not understand what they did, it sets up programs for care and protection.

Strengthening implementation:

- Policy development – inter-sectoral policy involving social services providers; education department; health department.
- Providing families with necessary support – prevention and early intervention.
- Developing specialised foster care.
- Child and Youth Care Centres / Care Facilities – with expertise to address developmental needs of children with behavioural difficulties in a holistic integrated manner.
- Evidence – if provided with correct therapeutic care children with behavioural difficulties make progress.

A South African High Court, in a moment of frustration, recognised the need to align practice with the law: “I have to pause here, perhaps in a moment of exasperation to ask: what message do we send the children when we tell them that they are to be removed from their parents because they deserve better care, and then wholly neglect to provide that care? We betray them, and we teach them that neither the law nor State institutions can be trusted to protect them. In the process we are in danger of relegating them to a class of outcasts, and in the final analysis we hypocritically renge on the constitutional promise of protection.” Centre for Child Law v MEC for Education 2008 (1) SA 223 (TPD)
Mr. Kitso Phiri, Legal Advisor, Southern Africa Federation of the Disabled (SAFOD)

DPO strategies to improve children’s access to justice in Southern Africa. Specific challenges that children with disability experience in seeking justice.

About SAFOD:
SAFOD is a disability focused network. It is headquartered in Botswana, near the SADC Secretariat. It was formed in 1986 by disabled people for disabled people as a federation of non-governmental organization disability organizations in the SADC Region. 10 countries affiliated to SAFOD through National Federation of Disabled People Organizations.

Coordinates activities of Organizations of PWD in Southern Africa. SAFOD programs and activities are implemented through its national affiliates. SAFOD core mandate has been mainly to strengthen the capacity of its national affiliates so they are able to effectively advocate for the rights of persons with disability in line with the UN Convention on Rights of Persons with Disability.

Definitions:

Access to Justice: Access to justice can means different things. e.g., the fairness which litigants are treated, justness of results delivered, the speed which cases are processed; and the responsiveness of the system to those who use it. Generally access to justice refers to the equity with which those from differing backgrounds are able to gain from the justice delivery system.

Advocacy For Those Who Cannot Afford It: Starting from the 1960s, access to justice focussed on practicing law for poor people. The goal was to provide legal representation to impoverished individuals who could not otherwise afford legal advice. This context of access to justice forms the foundation for today's legal aid and poverty law clinics.

Reforming the justice system: The need to advocate for people who cannot afford lawyers and the inadequacies and limitations of the legal aid system.

Equality of outcomes:

- This approach looks beyond equality of opportunities for under privileged or underrepresented litigants, instead it aims to achieve equality of outcomes by addressing the barriers faced by those trying to access the judicial system.
- Access to justice is the ability of people from disadvantaged groups to prevent and overcome human poverty by seeking and obtaining a remedy, through the justice system, for the grievances in accordance with the human rights principles and standards.

Disability: A physical or mental condition that limits a person’s movements, senses, or activities.
Section 52 of the Children’s Act Botswana states that “the parent , other relatives or guardian or such other person as the situation demands shall give, to the child with disabilities, such parental care, special assistance or care as will

- Ensure dignity of the child
- Promote the child’s self-esteem and self-reliance
- Enable the child to actively participate in social, cultural and religious educational activities subject to the child’s mental and physical capabilities.

Contextualisation:

- Botswana as case study – microcosmic representation of generally applicable laws in Southern Africa and landscape for access to justice
- Section 3 read with 18(1) of the Constitution of Botswana provides that any person who alleges that a right under the Act has been infringed or threatened can issue an application to the court for a remedy. The constitution provides for any person whose rights under the constitution has been or is likely to be violated to make an application for redress to the high court.
- Order 7 of the High Court Rules of Botswana, generally considers children as persons under disability. Meaning they can only initiate or defend proceedings through a guardian ad litem, who must act through a lawyer. A guardian ad litem for a child is appointed by the court, or through the filing of the court of a written consent by the proposed guardian ad litem confirming their agreement to act as the child’s guardian ad litem, and their knowledge or belief that the individual they seek to represent is a person under disability, and the grounds for such knowledge or belief.

Interventions by DPOs:

- Identification of disability based cases of discrimination through research. It is under its program (SAIPL) – Southern Africa Program on Inclusive Policies, Legislation and Justice, that SAFOD has embarked on a quest to develop a network of legal practitioners who can take on pro bono strategic litigation cases in the region in concert with DPOs on broader disability issues.
- Raise awareness about disability rights and national policies. The establishment of the Regional Advocacy Platform on the campaign for the SADC Disability Protocol. The draft was shared with stakeholders in 2017 at the Disability Roundtable Conference in Johannesburg.
- Lobby SADC members states to ratify the UN CRPD with Disability.
- Capacity building of national affiliates through trainings and workshops on how to monitor and evaluate Governments compliance with UNRPD.
- Enhancing the visibility of SAFOD and its affiliates for purposes of getting recognition at as a sector representative of DPOs.
- Establishing partnerships and collaborative efforts

Challenges Encountered by DPOs:

- Institutional & Technical Capacity in addressing issues with legal implications.
- Lack of funding, with some countries not receiving attention from development partners due their economic status.
- Political commitment on disability issues lacking
Judicial officers, law enforcement agencies not trained on disability rights. Lack of paralegal at community level. Except Zambia most society are reluctant to paralegal because of the fear of competition.

- No institutionalized forums specifically for children e.g Children’s court
- Lack of recognition by key regional institutions, e.g SADC
- Indifference of stakeholders on disability related issues

Strategies in Mitigating Challenges:

- Networking and Partnerships
- Collaboration with institutions of higher learning e.g university law clinics
- Capacity strengthening of national affiliates.
- Construction of a one stop centre

Way forward:

- DPOs require financial support to continue their work.
- Technical capacity in DPOs
- SAFOD should extend its reach to the remaining 5 SADC countries to be truly a regional organization. They are advocating for capacity building and training on access to justice.

Ms. Yetnebersh Negussie’s closing remarks for the Session.

A recent development is the AU protocol on Persons with Disabilities adopted in January 2018 and translation into to AU languages to be completed by end of May. Said Protocol is intended to give some leverage for access to justice for persons with disabilities. She also considers that although it is derived from the UN CRPD it is more advanced to it, namely because it has specific provisions on older people with disabilities as well with youth with disabilities. She invited the member states present to ratify it, since it can not enter into force unless 15-member states of AU ratify it.

The disable person organisers movement is a self representative movement. One of the challenges in Disabled People’s Organisations (DPO) is that to be member you have to become 18 year old. Legally speaking people with disabilities are omitted, only family members are included in DPO. Most DPO focus on matters affecting those beyond 18, such as livelihood, vocational skills training, employment…A challenge is to introduce youth to DPO.

The deprivation of rights with disabilities is imbedded in the justice system. She had the privilege to travel to Kenya to do a research on sexual violence. One of the challenge is that children with disabilities are considered unfit to participate in the justice system.

15% of people leave with disabilities in the word and 17% in Ethiopia. We deal with this issue not only because we feel pity but because it is their rights. Unless we start as earlier as possible, it becomes very artificial to start inclusion. Schools are the natural places to start inclusion. We still have special schools the CRDP is clear on its general comment, art. 24 prioritize inclusive education. There are some groups in Africa saying that this general comment does nor represent Africa, however African countries never had institutions before, but stayed with their families. Institutionalisations was never part of the African culture.
Session VI: Vagrancy laws and their Impact on children’s access to justice

Chair: Mr. Bright Theu, Head of Department, Practical Legal Skills, Chancellor College, University of Malawi

Mr. Bright Theu, Head of Department, Practical Legal Skills, Chancellor College, University of Malawi

Trends on the African continent with regard to legislating vagrancy.

Vagrant/vagrancy– its meaning (Oxford English Dictionary):

A vagrant is a person (child or adult) who:

- has no settled home or regular place of abode: and so wanders from place to place
- has no regular work or known means for earning a living
- Lives by begging or other means (e.g. collecting wasted food)

Vagrancy is therefore a state of being deprived, impoverished, destitute, and homeless- Status not an Act.

A vagrant child is…:

Under 18…who is in a state of impoverishment, need, destitution in that the child has no settled home; no means, support or provision for livelihood, and thus; wanders around for survival.

Normally they will depend on their parents, but vagrant child is more vulnerable of an adult vagrant. The term vagrant is by itself very reprehensible.

Incidence of vagrancy: society’s response:

Arguably traceable to England and Europe generally (no literature about it in Africa):

- Vagrancy was profiled as an image of a human being whose state is unacceptable based on the notions of a descent model human being. They were not desirable in society.
- With attendant vulnerabilities: society (those with social-economic prowess) pounced on the incidence to derive advantage: legislate against vagrancy – criminalize various aspects of vagrancy – with no genuine intention to ameliorate the plight of those caught up vagrancy – class issue.
- England: From Statute of Labourers, 1349 (during feudalism) giving alms an offence, escalated over time to curtail movement of potential Labourers, increase penalties (Vagabond and Beggars Act – detained and cast out of town), ear cut off, whipped until bloody, branding with a hot iron; curtailing criminal activities to Vagrancy Act 1824 – to punish idle and disorderly persons – (W. Chambliss (1960).
- Trend reverberated across Europe – during industrialization (France, Portugal etc.)

State of vagrancy laws – relics - Africa (PALU):
Vagrancy an offence in 22 countries:

- Algeria, Angola, Burkina Faso, Cameroun, Chad, Comoros, Republic of Congo, Cote d'Ivoire, Ethiopia, Eritrea, Gabon, Guinea, Madagascar, Mauritania, Mali, Morocco, Niger, Rwanda, Sahrawi Arab Democratic Republic, Senegal, South Sudan and Togo.

8 countries: offence to be suspected person and reputed thief without means of subsistence and failure to give a good account of oneself:


3 countries – offence to be idle and disorderly, loitering, no means of subsistence, cannot give a good account of oneself.

- Mauritius, Namibia and Sierra Leone

Vagrancy laws by region:

**North Africa**

- Of the 7(?) (Algeria, Egypt, Libya, Mauritania, Morocco, (Sahrawi Arab Democratic Republic?), Tunisia, only 2 do not appear to have vagrancy provisions in their Penal/Criminal Codes: Egypt and Libya
  - Algeria: children (persons under 18) they are not arrested but may only be subject to protection and re-education (new addition)

**West African**

- Of the 15 (Benin, Burkina Faso, Cabo Verde, Cote d'Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, Togo) – probably only 4/5 do not have vagrancy provisions (Benin, Ghana, Cabo Verde, Guinea Bissau, Liberia).

**Central Africa**

- Of the 9, (Cameroun, CAR, Chad, Congo DRC, Congo Republic of, Equatorial Guinea, Gabon, Sao Tome & Principe) only 3 do not have (ST&P, Equatorial Guinea, CAR)

**East Africa**

- Of the (15?) (Burundi, Comoros, Djibouti, Eritrea, Ethiopia, Kenya, Madagascar, Mauritius, Rwanda, Seychelles, Somalia and Somaliland, South Sudan, Sudan, Tanzania, Uganda) only 4 do not have (Kenya –repealed 2015, Djibouti, Somalia/Somaliland, Sudan)

**Southern Africa:**

Angola, SA, Malawi, Mozambique, Botswana, Lesotho, Kingdom of eSwatini, Namibia, Zimbabwe, Zambia, (none in Zimbabwe Criminal Law of 2004, Kingdom of eSwatini, SA, Mozambique (2015), Lesotho)

In Africa vagrancy laws remain prevalent:

Two major types:

- No place of abode, no known means of subsistence, failure to give a good account of oneself
Idle and disorderly person, loitering

Impact of Vagrancy Laws on Children:
Mostly children living on the streets - due to destitution out of many factors, abandonment, loss of parents or guardians, domestic abuse, abject poverty, etc.

- Exposes children to the vagaries of criminal justice system: typical response is by police action
- Rounded up and arrested: at night, during visits by dignitaries, as response to reported rampant crime
- Trailing children in the formal criminal justice system exposes them to violations of multiple rights
- Some treated as adults, detained together with adults, some assaulted, deprived of food, incarcerated for period etc.

Some positive developments/approaches:
- Judicial annulment – litigation. Malawi: Gwanda v The State, Constitutional Case No 5 of 2015,
  - Arrested in the wee hours of the morning carrying plastic bags for sale at the market, charged with rogue and vagabond, (s.184(1)(c) defined as being found in a public place at a time and in circumstances as to lead to the conclusion that such person is there for illegal or disorderly purpose.
  - Challenged the offence as unconstitutional for violation of multiple rights and principles (legality, certainty), annulled by the High Court (decision of 10 January 2017),
  - s.184(1)(c) PC survived: every suspected person or reputed thief, with no visible means of subsistence and cannot give a good account of himself
  - Lost opportunity - though unfathomable that this could be a valid law under the Constn.
- Laws providing for child friendly justice systems: separate court system/procedures (child Courts), diversion from formal criminal justice system.

Conclusion:
- There is often little controversy in reaching consensus on principles concerning the protection of children, despite the cultural diversity and the attendant relativism, but there is so much apathy when it comes to implementing the standards we adopt:
  - What is missing??
  - What is preventing us from taking that ultimate step towards the ideals we set for what we bequeath to the future for humanity’s continued existence: Children, our choice?? The parents choose to give life to them.
Background:

- The 2003 Ouagadougou Declaration and Plan of Action on Accelerating Prison and Penal Reform in Africa called upon African countries to decriminalise some minor offences to reduce overcrowding in prisons;
- ACJR Criminal justice audits conducted between 2013 and 2015 in Kenya, Malawi, Mozambique and Zambia showed that a significant number of persons were in remand facilities for extensive periods of time for petty offences such as loitering, being idle and disorderly, being a ‘rogue and ‘vagabond,' nuisance, touting and minor municipal contraventions.

Problem Statement:

- Laws, municipal by-laws and notions of social order that have their roots in the colonial era. Ex: In Mozambique the Penal code was kept since 1886 and the new one only in 2015;
- Many of these petty offences, esp. vagrancy offences, were enforced by colonial powers to control African populations and protect their economic interests in the African colonies;
- Laws remain intact in African jurisdictions even after the abolishment of colonial powers;
- Laws are in overly broad, vague or ambiguous language. e.g.: Good conduct not defined;
- People around the world who live in poverty and who are perceived to have less power are particularly targeted;
- Homeless people, street children, sex workers, street vendors and people with disabilities, ethnic minorities and refugees/asylum seekers targeted.

How are vagrancy laws applied in Africa?

- Officials use discretion to apply them to arrest anyone they suspect with no real evidence;
- No legal requirements of having reasonable suspicion and without officials having to assess all the elements of the crime;
- Extortion/bribes is commonly practiced as a way of avoiding arrest;
- People do not know their rights (especially children), legal/illegal arrest;
- Children are affected, particularly street children, homeless and trafficked children;
- Preventing crime?
- Criminalisation of the socio – economic challenges of poor and marginalised people.
What are the consequences on this application on children's access to justice?

She stressed that broader definition was given of access to justice but her presentation only pertains to the criminal justice. But a broader definition would include civil justice ad informal justice.

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<th>Arrest</th>
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<td>Arbitrary/illegal arrest</td>
<td>Lack legal representation</td>
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<td>Excessive force or violence by the police</td>
<td>Judicial system not properly equipped</td>
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<td>Problematic conditions of detention in police custody</td>
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<td>People don’t know their rights</td>
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<th>Pre-trial detention</th>
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<td>Unaffordable bails</td>
<td>Fine or imprisonment or both</td>
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<td>Legal representation</td>
<td>No separation of prisoners</td>
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<td>Duration outside legal periods</td>
<td>Problematic conditions of detention in prisons</td>
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<td>No separation of prisoners</td>
<td>Overcrowding</td>
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<td>Socio-economic impact (direct and indirect)</td>
<td>Education</td>
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Some examples:

- Rounding up street in the 2010 Soccer World Cup in South Africa.
- In DRC, Human Rights Watch reports that roundups of street children are likely to occur when crimes happen in areas where such children are known to congregate, the victims of the crime are politically connected.
- A 2012 research report documents that there were more than 150 children in conflict with the law in South Sudan’s prisons and that few services were available to them.
- In Kenya, there have been many incidents of street children being arrested and detained for loitering and other vagrancy offences ‘Vagrancy’ is a criminal offence under Kenyan law. Female street children reported being sexually propositioned or raped by police in order to avoid arrest or to be released from custody.
- Street children in Uganda also face abuse and arbitrary arrest. Police and officials threaten them at night and beat them with batons, whips or wires to extort bribes or as a punishment for ‘Vagrancy’.
- In Malawi in March 2012 more than 30 children were arrested in Kasungu, Malawi, for ‘loitering around town without proper reasons’, and in June 2013 Malawian police arrested 47 people aged 14 to 40 years for loitering in Balaka town in an effort ‘to curb criminal activities’.
- Research in Egypt clearly indicates targeted arrest campaigns against children by the police.

Implications for governments:

- These laws enforcement must be assessed against key human rights treaties such as the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights (AChHPR) and international treaties on children rights such as African Charter on the Rights and Welfare of the Child (AChRWC).
arbitrary arrest and subsequent detention of children in appalling conditions are tantamount to exploitation, and amount to cruel, inhuman and degrading treatment

Prosecuting the child on the basis of his or her ‘homelessness’ is in violation of the non-discrimination clause in the AChRWC

Increasing cost of detention.

Mozambique 15$ per person per day. They are 20 000 prisoners (2000 are children) 300 000$ a day.

Increasing corruption

A 2002 report by Transparency International found that on average each Kenyan had been forced to bribe the police four and a half times a month, paying them on average US$16 per month, and 95 per cent of interactions with the police resulted in a bribe

Weakening relations justice system/community

no trust on police

Increasing lynching cases

The Campaign:

In 2014, OSF HRI and organisations working in the field of criminal justice and human rights identified the need to form a campaign to advocate for the decriminalisation and declassification of petty offences on the Continent - to address the issues discussed in this presentation.

The Campaign has focused extensively on advocacy, research and (where possible) litigation and established its own Campaign identity, website, social network platforms and campaign material.

Initially the Campaign had seven partner organisations. To date there are 12 partner organisations.

What has the Campaign done and achieved?

Research has been conducted by Campaign partners in their respective countries on the existence and enforcement of petty offences.

The Campaign released a research report ‘Punished for Being Poor’ – the report explores arguments against and evidence for decriminalisation and declassification of petty offences. This is also used as an advocacy tool.

Campaign members have actively been involved in lobbying the African Commission (ACHPR) and all other strategic regional organisations /platforms to raise awareness and push the agenda of the Campaign. (i.e. conducting presentations, hosting side-events/discussions)

Some regional/domestic developments:


Kenya’s Chief Justice gazetted the formation of a national Steering Committee to review the criminal justice system and specifically petty offences.

Mozambique has abolished such offences in 2015, with the introduction of the new Penal Code

In Malawi, a court case challenging the constitutionality of the vagrancy offence of ‘being a rogue and vagabond’ succeeded. The court declared the offence unconstitutional. (Gwanda v. S)
Practical experiences of children living on the streets in accessing justice.

Challenges for children living on the streets:

- No parental care and protection
- No Identity Card: excluded from all services — medical services, education; persona non grata; with no proof of age, children on the streets are often treated as adults when they are still children.
- No safe/nutritious food (forced to scavenge and exposes to food poison)
- No access to facilities to maintain their personal hygiene (for girls sanitary)
- No access to medical care
- No access to education or training
- Need for money: Labour exploitation; sexual exploitation; criminal activity (just to survive not because they are criminal. Because they are small they are asked by adults to climb windows and fences)
- Abuse
- They experience: Discrimination; personal isolation; low self-esteem
- Children's best interests ignored
- More likely to take up behaviors that are antisocial (Use drugs, sniffing clue, cigarettes)

What children say:

- ‘We want to be free from any addiction and abuses’
- ‘We want to get the opportunity to learn as a citizen’
- ‘As community members, we need equal respect and job opportunities rather than being ignored and stigmatized’
- ‘We want you to give attention for our safety and listen to our voice’
- ‘There is a reason why we are on the streets. When you give us love and care we will be better people. When you dislike us and avoid us, we get upset, feel lost and hate the world.’

Access to Justice:

Three-fold impact on access to justice:

- Limited protection from the law or justice system when abused (labour, sexual abuse). They are afraid to report to the police because no one will believe them.
- Actively pursued by the law enforcers because of their petty criminal behaviour and sometimes just because they are on the streets. Often kids are abused by those who are supposed to be protecting me. It is often to a lack of awareness and skills. They are child protection policies but that are poorly implemented.
- Chronic lack of funding for Remand Homes and services to rehabilitate children
Case Study from Uganda:

Children on the streets in Uganda are ‘withdrawn’. “The Naguru Remand Home and the national rehabilitation centre house substantial numbers of street children. However national guidelines state that children from the streets should not be housed in remand homes but instead should receive care and protection services through, for example, drop-in centres. Staff in these institutions acknowledged that street children should not be there but recognised that police round-ups of street children continue to take place on a regular basis, and the police have nowhere else to take these children.”

- Staff at remand homes are under-resourced to reunify children with their families
- Community social workers are over-stretched and under-resourced
- Children from the street are criminalised and denied justice despite policies to protect them

“Remand homes are often excluded from interventions supporting children in other child care institutions, largely run by NGOs. As government institutions, remand homes tend to have more limited access to capacity building and other resources.”

In 2018 Uganda changed its policy. Children are collected from the streets but still problems.

Ways Forward:

- Change in attitude to children on the street
- Active implementation of policies already in place
- Closer collaboration between all stakeholders

Session VII: Technology and children’s access to justice in Africa: opportunities and challenges

Chair: Mr. Henry Kabwe, Executive Director, Media Network on Child Rights and Development (MNCRD), Zambia

Ms. Sabine Katharina Witting, University of Leiden, the Netherlands

Challenges and emerging issues in the context of technology and access to justice for children in Africa.

Information Communication Technologies (ICT) Coverage in Africa

- Unique mobile subscribers (GSMA): 46% in 2015 (11% annual growth over past 5 years)
- Radio reaches broadest audience (UNESCO 2017)

How can we leverage technology to break the barriers to access to justice for children in Africa?
Addressing lack of awareness and cultural barriers:
- Lack of awareness: where can we go to seek help? Cultural barriers as it might be common to access the formal system. Successful intervention: Uitani Radio: radio production by children for children. Children produce and determine the content (Ex: Violence, GBV)
- Aired in English and vernacular languages
- Breaking the silence
- Peer to peer support especially to teenagers

Addressing inaccessible services:
- Telephonic and SMS counselling for children (LifeLine/ChildLine). The children can remain unanimous and still seek assistance. Children can talk to a trained social worker and provide them counselling. If the child feels he or she requires face to face counselling or seek more services from a state social service or the police LifeLine/ChildLine will facilitate and refer the child to the respective service provider.
- Reporting portal for online child sexual abuse material (IWF). If the general public falls on child pornography and would like to have the perpetrators brought to justice. The reporting portal allows to report website that will be analysed by the Internet watch foundation in the UK, if illegal, they will collaborate with Interpol and national law enforcements to rescue the child and take the content down. This portal is in 5 African countries Namibia, Tanzania, Mozambique, Uganda, Mauritius and will be established in 15 countries before 2020.
- Digital participation in legislative reform. They informed by SMS of any regional consultation, to make sure that everyone is aware and raise their voice. If they couldn’t attend in person they can do it by sending SMS to Mister of Education in Namibia.

Addressing inefficient service provision:
- Electronic case management systems. The electronic case management systems allows to have only one entry point for data to go in and can retrieve the data as a service provider. Easier to track cases electronically: which document are still outstanding? where is the bottleneck? At the end of the day the delivery of justice can be accelerated.
- ‘Virtual’ court rooms (Use of video to avoid multiple interviews, use of video to avoid confrontation with alleged perpetrator, use of video to bridge distances). Ex: In Online child sexual abuse cases, usually the perpetrator and victim are in different countries. If you want to take the perpetrator to court you should take the witness to the perpetrator, or the perpetrator to the witness, which is not feasible in many cases. Famous case of Simon Harris abusing children in Kenya, was trialled in the UK while there was a virtual court room set up in Kenya, so the children could testify.

Challenges:
- Initial costs and maintenance especially for electronic case management systems running in the long term.
- Digital divide: youth cannot access the technology for various reasons, wealth, geographical factor, education and gender.
- Limited ICT infrastructure, in term of hardware’s. Do the police, judicial officers, social workers have computers. But also in term of human capacities, are all the staff supposed to navigate are digitally literate.
• Technological generation gap. Most people in decision making power did not grow up with technology, either they are not digitally literate themselves or have a general mistrust for technology, that can stop innovation.
• ‘Tech-hostile’ criminal procedures. The complainant must give evidence in the presence of the accused, so when we use a video record it infringes that right.
• Lack of data protection regulations. It is the downside of it, because we need to make sure the data is protected.

Lessons learnt:
• Accountability: Who is in charge of the maintenance and can budget.
• Broker new partnerships. ICT and universities or regulatory authority because they provide ICT services in the first place.
• Initiate local innovations
• Leverage corporate social responsibility of ICT industry
• South-South sharing. There are a lot of initiative, but we need to know about them.

Ms. Beatrice Gacengo, Programme Specialist, Online Child Sexual Exploitation, ECPAT International

Online child sexual exploitation and legal redress for children.

ECPAT is a global network fighting against sexual exploitation of Children. What forms does online child sexual exploitation (OCSE) take and how best can affected children obtain redress through the legal systems?

ICT is not the problem but offenders use technology to:
• Access potential victims
• Access like minded offending peers;
• Access and produce content (sexual abuse material);
• Access advice and tools: (form offender communities that exchange tradecraft and upskill offenders)

Factors contributing to growth of online child sexual exploitation include:
• Sense of anonymity – (darknet, crypto currencies, cloud computing);
• Ability to create and distribute content at very low cost.

Definitions:
• Child Sexual Abuse Materials (CSAM): Refers to materials depicting acts of sexual abuse and/or focusing on the genitalia of the child’. Alternative term for Child Pornography.
• Live online child sexual abuse: This is the live streaming of child sexual abuse for viewing by a remote audience. Some people are ordering child abuse material and paying money, once the session is over it is untraceable.
Online grooming for sexual purposes: It refers to the process of an adult building a relationship with a child through the use of the Internet / other digital technologies to facilitate either online or offline sexual contact with a child.

Sexting: Refers to the process by which someone intentionally shares sexually explicit messages, images or self-generated sexualised images of themselves. These images are taken by some other and shared within offender community.

Sextortion of children: Refers to the blackmailing of a child with the help of self-generated images of that child in order to extort sexual favours, money, or other benefits from her/him under the threat of sharing the material beyond the consent of the depicted child.

Trends:
- Most CSAM is exchanged, bought, and sold online. Increase for younger children
- CSAM have increased year on year because of the increase in use of cell phone and quality of the pictures of their camera
- Increased interest in pre-verbal children-unable to self-report their abuse. (WeProtect Global Threats report)
- Nature of CSAM evolving- once predominantly commercial- now no longer the case (INHOPES data-2014)
- Practice on the rise- becoming increasing affordable and leaves few traces (US department of Justice-Jan 2018).
- Represents a dual abuse of the child
- Persons watching remotely are the persons who have ordered the sexual abuse
- Abuse sometimes facilitated by child's family member e.g. in the Philippines.
- Sometimes motivated by poverty & lack of understanding on impact
- Particular risk-countries with internet widespread use of the English language & relative poverty
- Dynamics of threat changing with time.
- Previously was slow-time grooming
- Now, time between initial contact and offending outcome becoming extremely short
- Offenders focus on quickly gaining leverage rather than establishing a trusting relationship."
  Source CEOP
- Easy to self generate explicit images due to proliferation of mobile camera-enabled devices
- Images or videos are often shared with peers
- Children can also be groomed to share images with adult strangers online
- Images that they've shared can be used to manipulate them through sextortion
- Content can also be moved from original location (without child's consent) and uploaded elsewhere
- Sexual extortion is considered a feature of online solicitation of children
- There appears to be an increase of the use of this type of blackmailing (Virtual Global Taskforce)

Victim impact and re-victimisation: Both online and offline victims of sexual exploitation and abuse suffer trauma. An added layer for OCSE : difficult to identify and rescue, never ending victimization, little access to justice.
‘I live in constant fear that someone will see my pictures and recognise me and that I will be humiliated all over again…I am powerless to stop it…it’s like I am being abused over and over and over again’  
*Paroline v. United States, Victim Impact Statement*

**Barriers to access to justice for SEC Victims – both offline and online:**

OCSE – transcends geographical borders. It’s a global threat that requires a global response. If we try to tackle it on a national level we will only have partial success.

<table>
<thead>
<tr>
<th>Barriers</th>
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<td>Reluctance to report;</td>
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<td>Police inaction;</td>
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<td>Criminalisation of victims;</td>
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<td>Hardships Related to Recounting Abuse:</td>
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<td>Lack of Support from Family or Other Advocates;</td>
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<td>Threats to Safety</td>
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<td>Gaps in Communication;</td>
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<td>Unmet Needs for Specialized Care and Counselling:</td>
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<td>Child’s Best Interests Not a Primary Consideration:</td>
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<td>Failure to Secure Convictions and Legal Remedies:</td>
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**Challenges:**

- Few of the existing international frameworks/ conventions on SEC are explicit about online abuse
- International cooperation to bring offenders to justice complex due to:
  - Different terminologies used to refer to types of abuse;
  - Differences in what constitutes abuse;
  - Lack of reciprocal agreements or little coordination or regulation between countries

**Lack of access to justice for victims of OCSE can also stem from:**

- Limited capacity of law enforcement to investigate digital crime (UNODC 2015). It's a new practice that is evolving very fast and our knowledge is lacking behind. When it comes to the tool that they need, they are also lacking behind.
- Weak national laws in relation to OCSE. Some trends happening to children are not being criminalized.
- Difficulties in identifying the victims
- Limited reporting
- Issue of compensation very complex for victims of Child Sexual Abuse Materials e.g.: the perpetrator may be arrested but the material is still out there and the children revictimized. How does the criminal justice system deals with it.

**What can be done to improve access to justice:**

The we-protect model national response (MNR):

- The Model is focused on helping countries to build their response to OCSE (including access to justice for victims).
- This Model will:
  - Enable a country to assess its current response and identify gaps
Prioritize national efforts to fill gaps
Enhance international understanding and cooperation

MNR recommends:

- **Comprehensive legislation** on online and offline sexual abuse that is effective to investigate offenders and ensure protection of victims;
- **Dedicated law enforcement**: trained officers; proactive and reactive investigations; victim focused; International cooperation
- **Judiciary and Prosecutors**: trained; victims focused.
- **Access to Image Databases**: national database; link to Interpol data base
- **Reporting**:
  - mechanisms for victim reporting and support;
  - Mechanisms for reporting online content linked to law enforcement and internet service providers;
  - Statutory protections that would allow industry (e.g. ISPs) to fully and effectively report to law enforcement;
- **Takedown procedures**: industry to contribute through local removal and blocking of online child sexual exploitation content;
- **Education programmes**: for young people; parents; teachers; faith representatives. They are knowledge gaps between adults and children, studies have showed that the people supposed to be protecting children, are behind in term of knowledge. The children need to be empowered in term of their own protection.
- **Compensation, remedies, complaint procedures**: provision of effective remedy and reparations for victims- includes services to aid the recovery of victims.

Ms. Ali Tiloh Bassasso, Programme Officer, Counter Trafficking and Child Protection, ECOWAS

ECOWAS’ legal approach to addressing child sex trafficking and online child prostitution.

**Question clé**: Comment la Région Ouest africaine utilise-t-elle la loi pour faciliter l'accès à la justice des enfants victimes d'exploitation sexuelle et de prostitution en ligne conformément à la libre circulation des personnes et de l'utilisation croissante des technologies dans la Région?

**Introduction**: La protection des droits des enfants au sein de l’Espace Ouest Africain est à la fois une question importante et critique pour la réalisation des objectifs de sécurité humaine et de développement de l’Afrique de l'Ouest. Elle est nécessaire pour l'atteinte des ODD concernant les enfants : l'obj. 1 sur l'éradication de la pauvreté, l'obj. 2 relatif à la vie, la bonne santé et le bien-être pour tous les âges, l'obj. 4 sur l'éducation inclusive et équitable et l'apprentissage tout au long de la vie pour tous, l'obj. 5 sur l'égalité des sexes et l'autonomisation des femmes et des filles; obj. 8.7 qui concerne la lutte contre la traite de êtres humains, l'esclavage, le travail forcé et le travail des enfants et obj. 16.4 sur la violence contre les enfants, entre autres.
Contexte:
- Le trafic à des fins d’exploitation sexuelle d’enfants et la prostitution infantile en ligne sont des formes de violence contre les enfants et semblent être récurrents ces dix dernières années.
- Toutefois les statistiques sont peu disponibles sur la situation en Afrique de l’Ouest vu son caractère peu visible et surtout la capacité à combattre la cybercriminalité.
- L’exploitation en ligne des enfants est également à percevoir sous l’angle de l’évolution de la technologie, en termes d’ampleur et de densité (utilisation des téléphones portables, l’accès à l’internet, réseaux sociaux Ex : Facebook, twitter; la cybercriminalité etc.)
- Certaines études menées sur la question des violences, Abus et Exploitations des Enfants révèlent des violences d’ordre physiques, psychologiques, sexuelles, et de formes de pornographie, prostitution infantile, etc.
- Dans le contexte de la libre circulation des personnes et des biens, les enfants peuvent être davantage vulnérables si les mesures de protection ne sont pas adéquates
- Les nouvelles technologies servent parfois de moyens aux trafiquants et leurs complices pour le recrutement des enfants à des fins d’exploitation sexuelles, abus sexuels, de trafic d’organe, pornographie mettant en scène des enfants

Quelques instruments de la CEDEAO :
- L’accord de coopération en matière de police criminelle entre les États de l’Afrique Centrale
- Convention d’extradition entre les États de l’Afrique de l’Ouest adoptée de 1994
- Politique de la CEDEAO l’enfant et son plan stratégique
- Politique Régionale de protection et d’assistance aux victimes de la traite des personnes en Afrique de l’Ouest adoptée à Accra en Avril 2009
- Plan d’action de lutte contre la traite des personnes en particulier des femmes et des enfants
- Le traité de la CEDEAO de 1993 et son protocole relatif à la libre circulation des Biens et des Personnes
- Directives pour la protection de l’enfant
- Directives régionales sur la protection, l’appui et l’assistance aux témoins
- Procédures de prise en charge et standards de la CEDEAO pour la protection et la réintégration des enfants vulnérables concernés par la mobilité
- Cadre stratégique de la CEDEAO pour le renforcement des systèmes de protection de l’enfance pour prévenir et répondre aux violences, abus et exploitation des enfants en Afrique de l’Ouest

Les stratégies :

La prévention
- Information, l’Éducation et la communication des premiers responsables que sont les parents, les prestataires de services des enfants, et aussi et surtout les enfants sur les conséquences éventuelles et les bonnes pratiques à adopter
- Promotion des projets sociaux afin de réduire la vulnérabilité des populations
- Adoption des lois et prise en compte de la question de l’exploitation en ligne dans les politiques et stratégies de développement
• Mise en place des lignes d’appel gratuite en faveur des enfants
• Promotion de l’enregistrement des naissances

**La protection**

• Renforcement des capacités sur la politique régionale d’assistance aux victimes, standards de procédures de prise en charge
• Formation et renforcement de capacités des agents chargés de l’application de loi, et des travailleurs sociaux
• Formation sur l’écoute des enfants dans la procédure judiciaire, témoignage enregistré des enfants, etc)
• Projet de réinsertion socio-économique

**La poursuite**

• Il est important que les auteurs de ces pratiques soient poursuivis et jugés selon les lois en vigueur. Pour cela, il est important que les pays adoptent et appliquent les lois sur les violences à l’égard des enfants et prennent des dispositions pour les éradiquer sous toutes leurs formes
• Vu le caractère transnational de la question, il est judicieux que les États établissent des accord bilatéraux ou multilatéraux d’assistance
• Il est nécessaire de former des réseaux de travail, d’échanges, avec les acteurs impliqués dans la protection des enfants
• Il est important que les États membres utilisent le mécanisme de collaboration existant (Interpol, I 24/7, WAPCO west Africa police chef)
• La Commission de la CEDEAO dans sa mission de coordination et de supervision au niveau régional, organise des activités de suivi de mise en œuvre des instruments juridiques à travers des revues annuelles sur des questions de traite des personnes, et de protection de l’enfant sur la base des rapports synthèses issues des États membres. Ces rapports présentent des efforts accomplis par les États en matière de lois, de politiques, stratégies, prévention, protection et de poursuites judiciaires des délits et crimes, de même que les défis qui se posent. Mais aucunes mesures contraignantes.
• Ces revues periodiques servent aussi d’opportunités d’échanges sur les bonnes pratiques et aussi de renforcement de capacités sur diverses thématiques de protection de groupes vulnérables dont les enfants

**Les défis**

• Les systèmes d’alerte et de repérage en cas d’enlèvement, de disparition d’enfant (exemple de Amber alerte dans les pays développés)
• Collaboration entre les acteurs et la police
• L’évidence du crime dans la poursuite judiciaire

**Les perspectives**

• Cadre de protection de l’enfant visant à la bonne coordination des secteurs concernés par la protection des groupes vulnérables dont les femmes, les enfants, les déplaces, les refugies, les migrants, etc.
• Appuyer le renforcement de capacités des agences et points focaux chargés de l’application de la loi (Family Support Unit en Sierra Leone, DOVSU, Domestic violence UNIT au Ghana, NAATIP en Gambie, NAPTIP au Nigeria, les unités de POLICE dans les autres pays.)

Conclusion
Les NTIC dans leur évolution engendrent des impacts négatifs sur les enfants. Toutefois, ces technologies peuvent servir aussi de canaux en termes d’information pour les enfants sur leurs droits et devoirs, sur leur accès à la justice en cas de violation de leurs droits. Il appartient aux parties prenantes de la protection des enfants surtout aux gouvernants de mieux orienter les stratégies qui contribuent à réduire les risques qui compromettent la vie des enfants.

Answer to questions for this Session
• Regarding the facilitation of the coordination and mutual assistance between countries, especially when they do not have any diplomatic ties, Ms. Witting recommends to have a look at the Budapest convention. It enables to allow automatically the member states to collaborate with all other member states and increase mutual assistance.
• Ms. Witting mentioned that a database is being created by Interpol, to combat the sexual exploitation of children.
• Ms. Ali Tiloh : Beaucoup de pays de la sous-région ont ratifié des textes, politiques et stratégies. Le problème est la mise en œuvre de ces stratégies, mais aussi le financement et l’absence de volonté politique.
• Ms. Ali Tiloh : LA CEDEAO apporte son appui technique au niveau des formations et mise en place de points focaux auprès des pays membres pour développer des accords bilatéraux ou multilatéraux. L’objectif est de créer un réseau solide pour régler le problème de manière holistique.
• Ms. Gacengo: A good practice developed by internet service provider Microsoft that’s developed photo DNA to help law enforcement to identify child sexual abuse material. Service used by Internet Watch Foundation when an image is circulating within their network they are able to identify it.

Session VIII: Practical and successful models of facilitating access to justice for children
Chair: Benoit Van Keirsbilck, Director, Defence for Children International-Belgium (DCI-B)

Honourable Justice Teresia Matheka, Judiciary, Kenya

What aspects of the Special Task force on Children’s Matters under the National Council for the Administration of Justice have proved useful for improving children’s access to justice?
The National Council for the Administration of Justice:

- The National Council on the Administration of Justice set up under the Judicial Service Act
- A high-level policymaking, implementation and oversight coordinating mechanism composed of State and Non-State Actors from the Justice Sector, chaired by the Hon. The Chief Justice of the Republic of Kenya
- Its mandate: to ensure a coordinated, efficient, effective and consultative approach in the administration of justice and reform of the justice system.
- It performs its functions through various mechanisms, Working Groups and Task Forces
- The Taskforce on Children Matters is one of them

The Task Force- Why, Who, How, What?

The Mandate: To address emerging challenges facing children in the justice sector through 16 TORs. The TORs recognize that the challenges can be addressed through a three pronged approach.

- A review and report on the status of children in the system through a survey of the child justice sector, no. of children in the system, the existing infrastructure, institutions, available data and data collection and sharing
- Legislative and policy reform
- Co-ordination and sensitisation of the child justice sector, creation of awareness, training within and without the justice sector to respond to the needs of the child.
- Sustained pursuit of all the above through M&E

The work of the Task Force:

- First Task was to break down the vast work in the 16 TORs into actionable activities and deliverables – TF Workplan
- 16 TORs collapsed into 3 working committees each with its work plan: Legislative and policy Reform, Survey, Data collection, Welfare and Infrastructure and Coordination and Sensitization.
- Monitoring & Evaluation.
- The TF does not have a lifetime.
- Regular meetings of the whole TF
- Working retreats of the Committees
- Circuit visits
- Children Court Users Committee and Court User Committees
- Trainings
- Stakeholder engagements

Towards improved access to justice for the Kenyan Child:

- The Bill of rights in the CA since 2001, and the Constitution since 2010
- The transformation of the Judiciary under new Constitution and specifically the call under Art 159;
- Article 48 of the Constitution of Kenya 2010 guarantees every person's right to Access to Justice-it is a whole range of things
• Article 27 right to life, life begins at conception—rights from the point of conception, Article 256, defines a child (0-18) years. Article 20, application of bill of rights to All persons.
• Article 53: broad rights, specified in the Children Act, duty bearers, constitutionalized the paramountcy of BIC. ‘A child’s best interests are of paramount importance in every matter concerning the child’. Despite all these children still facing serious challenges.

Legislation, Policy and Guidelines 11 of the 16 TORs:

• Examination the operative policy and legal regimes, emerging case law, identify challenges, make appropriate recommendations.
• Prepare draft rules of procedure for (i) enforcement of fundamental rights of children (ii) Children with special needs.
• Develop Guidelines for (i) Child Protection Units (ii) children with special needs. They have participated in the review of the Children’s Act and bringing forward the issue of Children that have been left out, those with vulnerability (Child radicalized, petty crimes, case law about intersex children).
• Development Court practice Directions on all Children cases (ii) a form for presenting the P&C cases in court
• Develop the Diversion Regulations.
• Develop policies on (i) re-integration of children accompanying imprisoned mothers (ii) separated cells for children together with Guidelines/minimum standards of infrastructure of children Facilities
• Propose mechanism for the establishment of Child Police Unit in the National Police Service.
• Regarding children in institutions to reduce the number of children in institutions and developing standards to make sure that when they are in an institution that they are treated properly.
• Not all magistrates are able to apply children rights, so they asked volunteers to make sure that those dealing with children matters do not only have the training but also the passion.

Survey, infrastructure, welfare and data collection (7 of the 16, with special needs cutting across):

• Review and report on the status of children in the Administration of justice
• Assess, review, report and recommend on the service standards of each of the child justice sector institutions
• Conduct a SITAN of the existing infrastructure, equipment in the CJS develop guidelines for the monitoring, supervision and inspections for holding facilities.
• Propose mechanisms for the establishment of Child Police Unit in the National Police Service.
• Minimum standards of infrastructure of children Facilities, separated cells for children with special needs

Coordination and Sensitization, M&E:

• Review and report on the status of children in the Administration of justice from the other committees
• Develop a coordinated sensitization and awareness strategy.
• Improve co-ordination of the Juvenile Justice Actors at the National and County level.

Access to Justice (Haki)?

• What is justice for a child? What does access to justice mean to any child? the space to express their voice, to participate, be heard, to exercise their rights, and when there is violation, (dhulma) to challenge that violation and hold those responsible, to account.
• To a child it can be- whether the person is properly trained? How was child transported to court? spent the night? had a meal? on her periods? How long will be the wait at the law courts? In the police cells? Special needs?
• How do we provide a visible, available, accessible, affordable, child responsive justice system for the child? From the community, through the system and back to the community? Children are not small people.

Status of the child?

• No of children ‘being processed’ by the system, daily, monthly,
• Through circuit visits- by the TF- Institutions, infrastructure
• Lessons learnt from this:
  o Large backlog of cases-across the country (Remand) 6 months and above
  o Launched the ‘national service week on children matters’ to clear case backlog.
  o Children held in institutions beyond their childhood, challenges in what orders to issue
  o Knowledge, skill, attitude gaps among child justice actors
• Psycho social support gaps
• Data sharing gaps
• Legal aid gaps

DONE!

• Back log of cases in the courts- Launch of the national service week-clearance. They created an awareness campaign to reduce the pending cases related to children.
• Pre-service week visits, Activation and launch of CCUCs
• Legal aid, Witness protection
• Rescue and reintegration
• Practice directions on service weeks Tools developed on the go to collect data
• Hotspots of back log identified
• Mini-service weeks conducted
• Protection care forms
• Children Court Practice directions
• Re opening of child protection units at Police stations
• Activation of Plea bargain and development and use of forms
• Adopted Through Care guidelines
Milimani Law Courts pre-service week visit Service flyer:

- 20 visits to children institutions Remand and Rehabilitation Centers Child protection units: appropriate recommendations to the Director of Children Services
- Identification problematic institutions-one where the management had completely lost its purpose
- Children overstaying in the system, pregnant girl, 5 years waiting for case
- Land for one institution had been grabbed
- Children courts doing their own children court specific budgets
- Lunch for children going to court
- Adopted existing Through Care Guidelines to be applied by all JJAs
- Reviewed Chapter 46 of the police service standing orders to include on child protection units
- Review of the Children Act- there is a comprehensive proposed Children Bill
- Meetings with PS to address these issues and action taken
- Meetings with children and taking their views
- Eg. Judicial Officers need to look up from taking notes!
- Engagement with county governments- to look into county legislation on children
- Trainings for JJAs
- County government engagement in the Juvenile Justice system- institutions, rescue
- Engagement with the Kadhis
- Data collection tool developed
- Identification and focus of emerging issues children and elections, Children in emergencies
- E.g. absence of public drug rehab centers for children
Mrs. Genet Shume, Coordinator, Child Justice Protect Office (CJPO), Federal Supreme Court, Ethiopia

The Children’s Legal Protection Centre (CLPC) in Ethiopia.

CLPC (Children’s Legal Protection Center):
- Came into existence as a model program of ACPF in Ethiopia, 2005-2010
- Objective – to enhance the implementation of the rights of children particularly the right to access justice
- Hosted by the Federal Supreme Court of Ethiopia since 2012- to date with the objective of sustaining and scaling up the services
  - 2012-2017 – technical support and direct financial management by ACPF
  - Jan. 2018 – to date, project under the court’s direct financial management
  - Structural Integration into government program underway since 2017 - First draft study report presented & on completion

CLPC Launching -2012:
- MOU signed among 37 GOs & NGOs for legal and psychosocial needs of children in contact with the justice system
- Multi-stakeholder approach for the multifaceted needs of children in contact with the justice system

Advocacy & Public Awareness:
- Undertook Research and Assessments
- Evidence based Policy dialogue with policy makers
- Follow up on implementation of recommendations of studies & assessments
- Media, publication

CLPC’s Impacts:
- Improved realization of the rights of children via better accessibility of courts/justice s/m
- Contributed to influencing policy directions as a result of policy dialogue– legal and psychosocial services for children has been incorporated in recent policy & strategy documents
- Better interpretation of “the best interest of the child” principle via Comprehensive Approach
- Achieved efficient & cost effective approach via voluntarism– service, victim fund, platform for graduating students
- Contributed to produce pool of child rights expert lawyers and professionals
- Contributed to Standardization of Services – Developed working manuals/guidelines & conducted continuous capacity building trainings
• Enhanced the meaningful participation of children – complaint by children, their perspectives heard, as media audience
• Replicated the good practices of the CLPC to other 3 federating states of Ethiopia - Oromia, Amhara & SNNP regions
• A Referral network was put in place between social services, police, court, psychosocial. Coordination is done by the CLPC for the Child’s best interest.

Beneficiaries of the legal aid service:

• 55 million people in Ethiopia 50% of children.
• Since 2013: 25,329 through 5 centers benefited from the service
• Paternity DNA test and mediation, children in conflict with the law are represented in court, mediation for the best interest of the child to maintain family together, facilitate psychosocial services and economic services (medication, education, food, temporary shelter…) and capacity building (more than 2000 persons: judges, paralegals, social workers regarding child rights, legal framework…)

The CLPC – Moving Forward:

1. Fully integrate the child justice program within federal courts' formal structure & scale up at national level
2. Enhanced data management system
3. Certify Experts working on Child Justice for better child justice administration
4. Advocate for increased number of multidisciplinary professionals relevant for communication with children in the justice system
5. Promote CLPC’s replication at national level as well as to other African countries

Mr. Abdul Manaff Kemokai, Executive Director, Defence for Children Sierra Leone; President, DCI Movement.

Socio-Legal Defence Centres in Africa.

SLDC (Socio legal defence center):

• It is a sort of «help desk office», «low-threshold» center….
• An arrangement that can support children access justice
• When we refer to SLDC with think of structures establish within communities where people can come and access services. But is not necessary the case. The focus is not on physical structure but functions and the people who perform the functions to provide justice for children. Those functions can be performed at different places.
• Context specific:
  o E.g.: in Palestine a group of lawyers defend children at Israeli military courts, and children in schools that report violence to socio-legal centers in Palestine.
In Liberia there are social workers deployed at communities and police stations and address cases to lawyers that give them advise or go to court on their behalf. In Ghana the model is built on probational officer.

In the Netherland it’s more a help desk.

- We are working towards a common approach: «SLDC model» to guarantee access to justice for children
- There is a justice system, but its not reliable. Why? A weak social structure, a weak rule of law, a lack of knowledge (among both children and professionals – unaware of the possible forms of redress), corruption, discrimination and powerlessness
- All too often there is no redress, at a personal level (e.g. compensation; re-integration with apposite services) or effective accountability (e.g. bringing the perpetrator to court)
  → Not only they address cases at national level but also cross borders, and intercontinental for human trafficking across the Mediterranean Sea for instance.

Centralized & coordinated approach:

- Human Rights based: Normatively based on international standards and operationally directed to promoting and protecting human rights
- Multidisciplinary: Lawyer, social worker, psychologist, educator and general referral system - Specifically trained in children’s rights
- Child-centered: Empowering children as effective human rights holders (seg. Guiding Principles) & adapted to children
- Putting rights into practice through a child-focused, participatory, multidisciplinary / holistic approach….
- Parents are involved as far as possible, also following the UNCRC (art.3, art.5) re. responsibilities to protect & educate

They are 3 services offered by the SLDC:

Providing children access to justice…

- Individual level > (civil or criminal) case advocacy (child or adult initiation) – legal advise / representation or mediation / counselling;
- Collective level > social advocacy, can by policy or systematic: «child-friendly» society, providing a system of national laws and services that uphold HRs

Case advocacy:

- Child victims or offenders seek socio-legal assistance
- DCI lawyers, paralegals, social workers and staff assist children to access justice and seek remedies
- Cases are referred to relevant institutions (from the formal and informal systems) & children are granted their human right to effectively access justice
Case studies in Bolivia: Martin is 14 and living alone with granny and not attending school, he sexually harasses a 6 year old boy. Martin’s mother reports it to the Family & Youth Center and the case is referred to Public Prosecution Service, however they cannot represent both offender and victim, so Martin is referred to Pro Bono Lawyers, which decline as the offender is underage. Martin is left with no legal aid. Eventually the Public Prosecution refers him to DCI-Bolivia, who represent him in court where he pleads guilty. DCI secure the handing down of a non-custodial sentence (rehabilitation/educational programs) and now Martin is back in school and his home situation has improved.

Collective advocacy:

- Lack of / regressive laws, policies & practices
- Awareness-raising activities; lobbying; reporting;
- System of national laws, policies & practices that uphold the rights of the child. Inform the government and general public through awareness raising activities; contribute to the JJ conversation; which eventually can be integrated in UN reporting. They work to have government change their institutions to have them child friendly.

Sierra Leone model:

Case management: using the law and child friendly traditional practices in collaboration with other institutions to enhance justice and integration of the child and document within government’s case mgt system:

- Legal advice and representation- paralegals, social workers and lawyers work together
- Support probation officers to submit background information of the child to the magistrate/judge
- Mediation
- Family tracing
- Referrals and negotiations with service providers
- Documentation within govt established PRIMERO

Key Achievements:

- Establishment of the National Legal Aid Board in 2012- the models of DCI and TIMAP for Justice (institutional memory). DCI where to first to give free legal aid to children. They advocate that the government take over because not sustainable for NGO.
- Passage of the Sexual Offences Act in 2012. Before that there was an act for the prevention of cruelty to children, inherited from the colonial system but that had many gaps. DCI pioneered Passage of the Sexual Offences Act and used their own data to influence the new bill.
- Review of the Criminal Procedure Act.
- Establishment of case management system at the Ministry of Social Welfare Gender and in Children's Affairs in 2014. UNICEF supported this project to establish a case management system within the Ministry where they have deployed their staff. During Ebola outbreak DCI data system was used.
Baseline for the Child Justice Strategy 2014-2015
Cross-border trafficking cases
Over 1000 cases yearly

Lessons:

- Show casing- proving that it works
- Making it relevant to the user(s).
- High turnover (output)
- Role of the family/parents
- Traditional orientation of the people. Before the world was divided into countries, the communities were divided by clan and had their informal justice system.
- Case by case approach

Challenges:

- Wrong perception and wrong response to NGO/UN interventions
- Change of institutional/political leadership
- Lack of accountability
- Law, culture and politics
- The principle of universality

Conclusion:

- Implementation in peace mill is taking place in Africa
- Progress with individuals rather than instructions. Trained police forces, judiciaries in children's rights.
- Emphasis must now be on institutionalization of the good practices by the governments.

Mr. Theophane Niyema, Board Member, IBCR; Executive Director, ACPF (2014-2018)

Strengthening the capacity of child protection actors for an effective access to justice for children: the case of Burkina Faso

Who are we?

Founded in 1994, the International Bureau for Children’s Rights – the "Bureau" or "IBCR" – is a non-governmental organisation based in Montreal. The Convention on the Rights of the Child and its three optional protocols are at the heart of the mission and values of the Bureau.

The Bureau is a centre of technical expertise and, through its interventions, strengthens and builds the capacity of those who work directly with children, including social workers, representatives of...
security and defence forces, members of the judiciary, civil society groups, formal and informal organisations of the private sector and decision-makers in Canada and abroad.

**Our three fields of activity:**

**Children and Justice**

- Protecting child victims and witnesses of crime as well as children in conflict with the law to ensure that their best interests are taken into account.
- Strengthening capacities and structures in accordance with applicable standards in order to promote the application of justice adapted to children.

**Exploitation and Violence Against Children**

- Preventing all forms of exploitation, violence, abuse and neglect of children by working with governments, public institutions, the formal and informal private sector and communities.
- Ensuring that children are better protected, listened to and respected.

**Children in Emergency Situations**

- Working to strengthen capacities of personnel in emergency situations caused by crises, armed conflicts or natural disasters.
- Targeting the effective implementation of national, regional and international laws and standards in terms of technical and live skills.

**Our technical expertise ...**

*ICBR's provides technical expertise in the following in Canada, Latin America, Africa and Asia:*

- **Capacity building:** Focused on technical support to specialised training institutions (judiciary schools, police and military academies, social work schools, etc.) to promote the integration of permanent, mandatory and evaluated courses on children’s rights in professional training curricula. Sustainability being sought.
- **Applied research:** Assessments, comparative analyses, mapping exercises and country profiles with a view to sharing best practices from governments and civil society organisations in the areas of promoting and protecting children’s rights. It forms the basis for dialogue among decision makers in the countries in question. Ex: Government of Burkina Faso and of Tunisia sharing experiences.
- **Advocacy and Institutional Support:** We provide technical assistance and promote constructive, ongoing dialogue with competent authorities to ensure that local partners are able to effect the necessary changes to better protect children’s rights. This support comes in the form of assistance with legislative reform, the adoption of standard operating procedures, and the development of internal policies, instructions and budgets.
- **Tools, Reference Manuals and Standards:** ICBR helps develop standards related to children’s rights by developing various tools and reference guides on best practices in promoting and upholding children’s rights.
• Training Leadership: IBCR leads various train-the-trainer sessions and practical courses every year. These courses lead to certification and are aimed at individuals who work in the field of children’s rights.

Burkina Faso: the context …

• Insecurity: terrorist attacks in the capital and in the north
• Protection of children: strong legislative framework, but no effective implementation
• Persisting challenges: e.g. FGM, child marriage, exploitation, trafficking
• Child friendly justice since 2004: but specialized courts only in 9 out of 24 provinces
• Lack of training in children's rights
• In access to justice Most of the victims still do not have information or are afraid of going to court. Most cases are not brought to court
• Prison overcrowding (180 -> 300%)
• Reform of justice sector: uncertainty regarding the suppression of juvenile court judges
• Need to reinforce the collaboration and partnership between different actors/stakeholders (government, IO, NGO, civil society, parents and children themselves)
• Need to reinforce data collection system on child protection

Project Objectives …

Project duration is 2015-2020 and ambitions to strengthen child-sensitive juvenile justice as a prerequisite for effective access to justice. More specifically project aims to:

• Provide children with access to social, security and legal services that are more respectful of their rights and supportive of their active participation in their own lives
• Equip police, gendarmes, justice personnel and social workers with appropriate tools and enhanced skills for better child protection
• Improve the quality of interactions between children and stakeholders by establishing local mechanisms for coordination, guidance and care
• Build the capacities of training structures for police, gendarmes, justice personnel and social workers so they can effectively transfer knowledge and skills on child rights
• Ensure that the security, judicial and social environments surrounding girls and boys in Burkina Faso become more respectful of child protection and participation issues
• Better equip and train security forces, justice personnel and social workers in Burkina Faso in protecting children, while taking into account their gender-based situation

→ The originality of this project is that its based on a protocol between Burkina Faso and the Canadian government. It is a request from Burkina Faso to strengthen their capacity for having an effective access to justice.

Our Approach:

• Working directly with the personnel of the ministry of justice: adoption of a mandatory course on children rights and best practices at the National School of Administration and the Judiciary
• Capacity building of all other stakeholders: training of social workers, police, gendarmes, all child protection actor who will interact with the judiciary. Courses have been adapted in the professional training institutions of the national police and gendarmerie.
• Strengthening a multisectoral approach and coordination of stakeholders: raising awareness of actors on the importance of working/collaborating among themselves. In addition we facilitate regular multisectoral meetings
• Advocacy for improvement in and reforms of the procedures and the laws: using a bottom-up approach with a focus on jurisprudence.

Achievements:

• Development of training modules specific to the actors and with their full appropriation : ENAM will train this year 150 personnel of the judiciary. Initially a 20-hour course, likely to move to 25 hours. Modules also developed and available for personnel of defence and security, as well as social workers. IBCR only provides technical expertise for their curricula.
• Development of specific Standard Operating Procedures for each actor: These focus on protection for children in contact with the law in general, and then specific chapter on children in conflict with the law, children at risk, victims, witnesses, family and administrative proceedings - + specific attention to girls, right to participate and be heard, assistance and long term approach.
• Regular interaction with the justice sector and multisectoral meetings: We use these forums to facilitate better collaborative work between the different sectors/departments of the government.

Challenges and opportunities…

• A 20 hour-course remain insufficient to effectively equip the judiciary staff. Ideally it is should be 35 hours
• Reform justice sector: a challenge and an opportunity for an effective access to justice for children in Burkina Faso
• Strong engagement of the governments of Burkina Faso and Canada
• The child is seen more and more as an actor who can and ought to participate
• Actors understand the need of improved collaboration in the best interests of the child
• Strong motivation and engagement of the justice sector actors in the promotion and protection of the rights of the child
• Though the project is relatively new, some of the following impacts have been noted. An evaluation in 2020 will be more indicative when the evaluation will be completed

Impacts so far:

• Improved procedures: Services provided by the judiciary are more in compliance with child protection and child participation principles
• Behavioural change: “At the end of the proceedings, I educate the parents on their role in protecting their child, in monitoring the implementation of the court decision and supporting their child for reintegration in the society (testimony of a judge).
• Organisational change: Project led to a proposal to establish a “Directorate of Child Justice” at the ministry in charge of justice.
• Influencing the justice reform: The project provides IBCR with an opportunity to influence the ongoing judiciary reform to ensure a more efficient and effective access to justice for children in Burkina Faso

Closing remarks of this Session

• M. Van Keirsbilck. DCI elaborated a Manual on what it means to be a lawyer for a child and it will be online soon.

Session IX: The Way Forward
Adoption of the Call to Action