

**ASSESSING THE IMPLEMENTATION OF THE CONVENTION ON THE RIGHTS OF  
THE CHILD IN LUSOPHONE AFRICA (ANGOLA AND MOZAMBIQUE)**

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November 2012

## DECLARATION

I declare that **Assessing the Implementation of the Convention on the Rights of the Child in Lusophone Africa (Angola and Mozambique)** is my work and that it has not been submitted for any degree or examination in any other University. All the sources used or quoted have been dully acknowledged.

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## **DEDICATION**

I dedicate this work to my family. Particularly, I dedicate this work to my loving parents and siblings. The work is also dedicated to all children and those who commit themselves to better the lives of this vulnerable group.



## ACKNOWLEDGEMENTS

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## ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ACPF	The African Child Policy Forum
ACRWC	African Charter on the Rights and Welfare of the Child
AIDS	Acquired Immunodeficiency Syndrome
CEDAW	Convention on Elimination of All forms of Discrimination against Women
CNAC	Conselho Nacional da Criança (Angola)
CNDC	Conselho Nacional dos Direitos da Criança (Mozambique)
CRC	United Nations Convention on the Rights of the Child
CRPD	Convention on the Right of Persons with Disability
ECHR	European Convention on Human Rights
FGM	Female Genital Mutilation
HIV	Human Immunodeficiency Virus
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
INAC	Instituto Nacional da Criança (Angola)
IMF	International Monetary Fund
MDG	Millennium Development Goal
MPLA	Movimento Popular de Libertação de Angola
NPA	National Plan of Action
OAS	Organisation of American States
OAU	Organisation of African Unity

OVC	Orphans and Vulnerable Children
PARP	Action Plan for Reduction of Poverty (Mozambique)
UN	United Nations
UNAIDS	Joint United Nations Program on Acquired Immune Deficiency Syndrome
UNESCO	UNITED Nations Educational, Scientific and Cultural Organisation
UNICEF	United Nations Children's Fund
WHO	World Health Organisation



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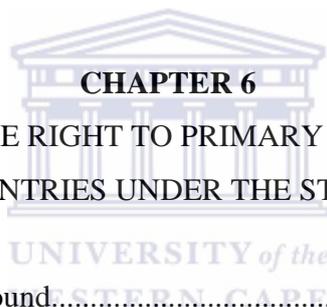
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# CHAPTER 1

## BACKGROUND AND INTRODUCTION

### 1.1 Background and introduction to the study

In 1989 the United Nations General Assembly adopted the United Nations Convention on the Rights of the Child (CRC),<sup>1</sup> providing the first-ever comprehensive international law standards for the promotion and protection of children's rights. Before the adoption of the CRC, children's rights were viewed as a quest for charity.<sup>2</sup> The CRC was ratified by 100 states within two years of its adoption,<sup>3</sup> and to date has been ratified by 193 states.<sup>4</sup> In the words of Doek, a former Chairperson of the Committee on the Rights of the Child (CRC Committee), which monitors compliance with the CRC, "[n]o other human rights treaty comes that close to universal

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<sup>1</sup> United Nation Convention on the Rights of the Child (CRC), adopted in 1989, and entered into force in 1990, UN Doc. A/RES/44/25 (1989) [hereinafter referred to as the CRC].

<sup>2</sup> Thoko Kaime, *The African Charter on the Rights and Welfare of the Child: A socio-legal perspective*, Pretoria University Law Press (2009), pp 14.

<sup>3</sup> Jaap Doek (2003) 'The U.N. Convention on the Rights of the Child: Some observations on the monitoring and the social context of its implementation', *University of Florida Journal of Law and Public Policy*, Vol. 14, No. 126, p 34.

<sup>4</sup> Three countries, namely, Somalia, South Sudan and the United States, remain to ratify the Convention. Although the CRC is the second youngest of the seven human rights treaties, it is the most successful one, taking less than ten months to enter into force. In 1990, Kenya, Namibia, Uganda and Zimbabwe were amongst the first African countries to ratify the CRC. Malawi ratified the Convention in 1991.

*ratification*” and “*the CRC is at the same time the human rights treaty with widest coverage*”.<sup>5</sup> This makes the Convention the world’s leading tool, and the most important instrument, for the advancement of children’s rights.<sup>6</sup> The Convention establishes basic standards accepted worldwide,<sup>7</sup> and, therefore, it serves as the foundation for domestic laws and policies focusing on children’s rights.<sup>8</sup>

Although the CRC has been ratified by many states, the greatest challenge, presently, is that of achieving its implementation.<sup>9</sup> This is confirmed by the prevalence of negative practices limiting the enjoyment of children’s rights. Such practices include female genital mutilation and early marriage, both of which impair the enjoyment of rights for the girl child, as well as child trafficking, which in recent years has become a problem affecting many children, especially in countries like Mozambique where cases are reported annually.<sup>10</sup> It is within this context that this study undertakes its examination of the CRC’s implementation in Angola and Mozambique.

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<sup>5</sup> Jaap Doek (2003) ‘The protection of children’s rights and the United Nations Convention on the Rights of the Child: Achievements and challenges’, *St Louis University Public Law Review*, Vol. 22, No. 235, p 17.

<sup>6</sup> See Cynthia Cohen (1993) ‘The developing jurisprudence on the rights of the child’, *Saint Thomas Law Review*, Vol. 6, No. 1, p 14.

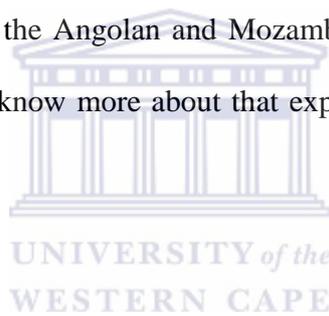
<sup>7</sup> See Nevena Sahovic, Jaap Doek, Jean Zermatten, ‘*The rights of the child in international law – Rights of the child in a nutshell and in context: All about children’s rights*’, Stampfli Publishers (2012), p 48.

<sup>8</sup> Most statutory norms within states are framed within the parameters of the CRC. See, for example, the Mozambican Children’s Act (Act No. 7/2008 of 9 July 2008).

<sup>9</sup> Robert Ledogar (1995) ‘*Realizing rights through national programmes of action for children*’ in James Himes (ed.) ‘*Implementing the Convention on the Rights of the Child: Resource mobilization in low-income countries*’, Kluwer Law International, p 55.

<sup>10</sup> See Chapter 4, section 4.6.3. See also generally Save the Children (2009) ‘*O tráfico interno e exploração de mulheres e crianças em Moçambique*’, Save the Children, pp 1-98. See also Jacqueline Gallinetti, Daskha Kassar

Three reasons underlie the decision to examine these countries in particular. The first, as it will be discussed in detail in Chapter 2, is that numerous aspects of their socio-economic and cultural make-up inhibit the advancement of children's rights.<sup>11</sup> There is, in other words, a pressing need to promote the implementation of the Convention in the two jurisdictions and thereby ensure that children enjoy their human rights. The second reason is that both countries ratified the CRC and committed themselves to its standards;<sup>12</sup> consequently, it is necessary to investigate how they are faring in terms of giving effect to those standards. The third is a personal one: the author is a Mozambican national who is interested in promoting children's rights generally. Moreover, given that the author speaks Portuguese, the official language of the two countries, it is hoped that this study will help to unveil the Angolan and Mozambican experience to an Anglophone scholarly community intrigued to know more about that experience but hindered by barriers of language.



The study places no emphasis on the implementation of the CRC in other Portuguese speaking countries in Africa (such as Cape Verde, São Tomé and Guinea Bissau). This was due to unavailable research materials and also because of a lack of the financial resources needed to travel to access these countries.

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*'Trafficking of children in Africa: an overview of research, international obligations and existing legal provisions'* in Julia Sloth-Nielsen (ed.) *'Children's rights in Africa: A legal perspective'*, Ashgate (2008), pp 239-240.

<sup>11</sup> See generally Chapter 2.

<sup>12</sup> Angola ratified the CRC in 1990 and Mozambique ratified it in 1994.

The starting-point of this study is that the CRC enjoins states to adopt all the necessary legislative, administrative and other measures to ensure implementation of the rights protected under the Convention.<sup>13</sup> In this regard, the study investigates the legislative and policy measures required to give effect the Convention, with effective implementation of the CRC being said to require “*visible cross-sectoral coordination to recognise and realize children’s rights across Government, between different levels of government and between government and civil society - including in particular children and young people themselves*”.<sup>14</sup> Furthermore, the study takes into account the fact that coordinating bodies tasked with children’s matters must be established, empowered, and supported from the highest possible levels of government to allow them to function at their full potential.<sup>15</sup> In addition, states parties to the Convention should ensure that governmental departments competent in the areas covered by the CRC have effective coordination of their activities. Lastly, the study acknowledges that self-monitoring and evaluation of progress in the process of implementation of children’s rights is regarded as essential for achieving the goals defined in the Convention.<sup>16</sup> All of these elements will be considered and substantively analysed in relation to the two selected countries.

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<sup>13</sup> See Article 4 of the CRC.

<sup>14</sup> See Para. 27 of Committee on the Right of the Child (CRC Committee) General Comment No. 5 on the General Measures of Implementation of the Convention on the Rights of the Child, UN Doc. CRC/GC/2003/5 (General Comment No. 5), discussed more substantively in Chapter 3.

<sup>15</sup> See Para. 15 of CRC Committee General Comment No. 9 on the Rights of Children with Disabilities, UN Doc. CRC/C/GC/9 (2006) (General Comment No. 9).

<sup>16</sup> See Para. 46 of General Comment No. 5.

## 1.2 Statement of the problem and aims of the study

Since the adoption of the CRC, the primary focus has been on achieving its universal ratification and on pressing governments to develop laws, policies and institutions to implement the rights protected under the Convention.<sup>17</sup> However, on a practical level less has been done to ensure that the new laws, policies and institutions meet the requirements of the Convention. Also, at least at the level of research, it has not been questioned sufficiently whether the administrative measures adopted are efficient enough to ensure adequate implementation of the principles and standards deriving from the Convention. However, some of the work in this regard has been done by the CRC Committee, which is tasked with reviewing state reports submitted under Article 44 of the CRC requiring states to explain what they have done to give effect the Convention.<sup>18</sup> At the regional level, the African Committee of Experts on the Right and Welfare of the Child (established under the African Charter on the Rights and Welfare of the Child)<sup>19</sup> also contributes significantly to assessing the implementation of children's rights by African governments.<sup>20</sup>

The questions that were raised above remain relevant in the context of Angola and Mozambique, which were late to enact legislation domesticating CRC standards and establish institutions

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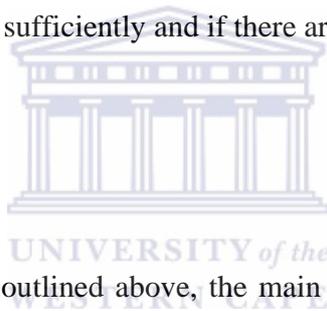
<sup>17</sup> Jonathan Todres (1998) 'Emerging limitations on the rights of the child: The United Nations Convention on the Rights of the Child and its early case law', *Columbia Human Rights Law Review*, Vol. 30, No. 159, pp 164-165.

<sup>18</sup> See Article 44 of the CRC.

<sup>19</sup> African Charter on the Rights and Welfare of the Child (African Children's Charter or ACRWC), adopted in 1990 and entered into force in 1999, OUA Doc. CAB/LEG/24.9/49 (1990).

<sup>20</sup> Julia Sloth-Nielsen, Benyam Mezmur (2009) 'Out of the starting blocks: The 12th and 13th sessions of the African Committee of Experts on the Rights and Welfare of the Child', *African Human Rights Law Journal*, Vol. 9, No. 1, pp 336-352.

giving effect to those standards. To be more precise, Mozambique only enacted a comprehensive law focusing on children's rights in late 2008, while Angola passed a similar statute only in the last quarter of 2012. In a similar vein, the institutions tasked with the coordination of children's rights in Angola and in Mozambique were established much later owing to the late enactment of the laws protecting children's rights. This leaves a wide gap for research to investigate whether the measures adopted by these countries are in line with the standards of the Convention. Thus, the main objective of this study is to determine if the laws, institutions and policies focusing on children's rights in these countries meet the standards of the CRC. The study also aims to investigate as well as assess if the measures for implementation of the Convention as adopted by these countries have been explored sufficiently and if there are ways of exploring them further.



### **1.3 Research question**

In accordance with the objectives outlined above, the main question that the study attempts to ask is this: Is the CRC being implemented effectively in Angola and Mozambique? Within this overarching question, a number of sub-questions are raised in the course of the study, including:

- 1) Have these countries adopted appropriate legislative and administrative measures required to give effect to the Convention?
- 2) What are some of the major challenges facing the measures Angola and Mozambique have adopted to implement the CRC?
- 3) Are there any lessons that these countries can share or that they can learn from elsewhere to fast-track the implementation of the Convention?

- 4) What further steps need to be taken to promote the implementation of the CRC and the realisation of children's rights in these two countries?

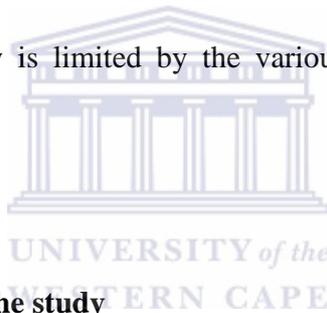
The answers to these sub-questions are provided in the various chapters of the study, and these will be built up to answer the main research question. In dealing with the first sub-question, the study will investigate if the measures for implementing the CRC adopted by Angola and Mozambique are in accordance with the standards of the Convention. In this regard, the rules governing the implementation of the CRC as defined by the CRC Committee and General Comments of other treaty bodies will provide substantive guidance. On the challenges relating to the measures for implementing the Convention as adopted by the countries under the study, the main task will be to unveil the gaps with the objective of proposing solutions to address them. Lastly, in relation to the lessons that Angola and Mozambique can share or learn from elsewhere, and in regard to future steps to be taken, the objective is to advance solutions to tackle the implementation gaps obstructing the realisation of children's rights in the two countries.

#### **1.4 Significance of the study**

It is submitted that in assessing the implementation of the CRC in Angola and in Mozambique, the study highlights gains for children's rights and identifies barriers obstructing the realisation of the objectives of the Convention. In relation to the gains, this study aims to promote actions by the Angolan and Mozambican governments towards the advancement of the objectives of the Convention, and therefore the realisation of children's rights. With regard to identifying challenges, the study exposes the barriers obstructing realisation of the rights under analysis; it

argues that they need to be addressed, and its concluding recommendations seek to benefit and inform the development of future strategies for achieving the objectives of the CRC. Consequently, bearing in mind that children are among the most vulnerable groups in society,<sup>21</sup> the study sets out to play a contributory role in promoting the establishment of rights-based systems that are more favourable to children.

In addition, the study contributes generally to the body of existing literature pertaining to the implementation of children's rights; it contributes to this discourse, more specifically, by providing ground-breaking information about the CRC's implementation in Angola and Mozambique. However, the study is limited by the various factors explained in the section below.



### **1.5 Scope and the limitations of the study**

A significant limitation on this study is the pronounced scarcity of available material focusing on the implementation of children's rights in Angola and Mozambique. It is submitted that only very few authors have devoted attention to this theme; their writings, moreover, have not given a detailed analysis of the subject, with most of these simply commenting on the laws focusing on children's rights without assessing them against the CRC.<sup>22</sup> As a result, the few materials that are

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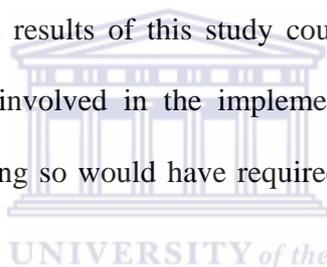
<sup>21</sup> See Cecilia Flores-Oebanda (2006) '*Addressing vulnerability and exploitation of child domestic workers: An open challenge to end a hidden shame*', UNICEF Innocenti Research Centre, p 2.

<sup>22</sup> There is little literature discussing the implementation of the Convention on the Rights of the Child within the context of Portuguese-speaking countries generally and in Angola and Mozambique specifically. It should be noted that most scholarly works focusing on the implementation of children's right in these jurisdictions approach the

available could make only a small contribution to the development of this study's main arguments; conversely, it was necessary to rely on other sources to be able to do so.

In addition, although attempts were made to ensure uniformity throughout the study, the discussions reveal certain imbalances. For example, in their coverage of particular themes, certain chapters may provide a preponderance of information about one country and relatively little about the other. This imbalance was usually because of a shortage of available information about one of the countries (and an adequate amount about the other).

Moreover, it is submitted that the results of this study could be strengthened by undertaking interviews with the departments involved in the implementation of children's rights in the countries examined. However, doing so would have required extensive regional travel, and for



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theme by commenting on the provisions of the child laws of these countries and do not attempt to engage with the details pertaining to the Convention. For example, Medina captured the principles underlying the Angolan juvenile justice system by commenting on the Angolan child laws in a book entitled *Lei do Julgado de Menores e Código de Processo do Julgado de Menores Anotados*. Recently, Mondlane published a commentary on the Mozambican Children's Act in a book entitled [*Lei de promoção e protecção dos direitos da criança anotada e comentada*]. In 1996 Sacramento and Pessoa explored the Mozambican legal framework for the protection of children's rights. However, the latter has become outdated pursuant to the enactment of a new children's statute in Mozambique in 2008. In addition, the other literature focusing on children's rights in the two countries does not bring a comparative perspective to the subject. Consequently, by looking at these countries comparatively this study provides novelty of perspective and closes some of the gaps in the extant literature. See generally Maria Medina, '*Lei do Julgado de Menores e Código de Processo de Julgado de Menores Anotados*', 2 Edição Revista e Actualizada, Coleção Faculdade de Direito da Universidade Agostinho Neto (2008). See also generally Carlos Mondlane, '*Lei de promoção e protecção dos direitos da criança anotada e comentada*', Ministério da Justiça e Centro de Formação Jurídica e Judiciária, (2011) pp 1-349. See further generally Filipe Sacramento, Ana Pessoa (1996) '*Implementation of the rights of the child in the Mozambican context*' in Michael Freeman (ed.) '*Children's rights: A comparative perspective*', Dartmouth Publishing Company, pp 145-164.

financial reasons this was not possible. There are also barriers to access of government information and officials.<sup>23</sup> For example, in some cases the author was made to provide many supporting documents before information could be made available. This was particularly true in the case of laws and policies, which under normal circumstances are freely available for public use. In view of these challenges, conducting interviews was not an option.

The scope of the study is limited to its objectives and therefore less emphasis is placed on matters that fall beyond them than on those that do. However, some examples are drawn from instruments other than the CRC, such as the African Children's Charter and the American Convention on Human Rights (ACHR),<sup>24</sup> in order to substantiate the arguments put forward. Reference is also made to other international treaties governing children's rights as part of the yardstick, which is used to assess the implementation of the CRC in the two countries under the study. This is motivated by the fact that other instruments regulating children's rights explored in the study complement the provisions of the CRC. In addition, given the wide array of issues included in the field of study focusing on the implementation of children's rights, not all aspects could be explored. In this regard the study limits its scope to the analysis of specific laws, policies, administrative measures and institutions pertaining to children's rights in the two

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<sup>23</sup> It should be noted that there was some reluctance of informers working on the field of children's rights in Angola and Mozambique to disclose information needed for analysis. This was mainly to avoid conflicts with government. As a result, some information used to develop the study was obtained from individuals and organisations (including international and national organisations) that asked to remain anonymous. This had the effect of limiting the depth of the inquiry as it was difficult to cross-examine the findings.

<sup>24</sup> American Convention on Human Rights or Pact of San José (ACHR) adopted in 1969 and entered into force in 1978.

countries concerned. The choice of the aspects discussed is mainly based on their significance in relation to the subject under analysis.

The first chapters of the study adopt a general approach by investigating the implementation of the CRC in relation to the laws, policies, administrative and institutional steps taken by Angola and Mozambique. However, Chapter 6 is more practical inasmuch as it considers the implementation of a specific right, namely the right to primary education protected in the Convention. In addition to the other reasons which I will explain later, this will be done to provide the reader with more details on the challenges facing the implementation of at least one right contained in the CRC.



## 1.6 Methodology

In order to achieve the objectives outlined in section 1.2 above, the study applies techniques of legal comparative research methodology that helps to establish similarities and differences<sup>25</sup> between the systems compared.<sup>26</sup> In this regard, primary attention was devoted to comparing and analysing the laws, the policies, the administrative measures, and the institutions tasked with the implementation of children's right in the countries examined. In addition, desk research methodology was used to collect supporting documents required to analyse the systems of these countries. Inter alia, textbooks, journal articles and United Nations Agencies (UN Agencies)

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<sup>25</sup> See Mary Hayden (2006) *Introduction to international education*, Sage Publications, pp 6-8.

<sup>26</sup> See Francois Venter (2000) *Constitutional comparison*, Kluwer Law International, p 19. See also Elize Kung (2006) *An international perspective on the fundamental human rights of educators*, Lambert Academic Publishing, p 7.

reports were used to support arguments. Online sources, including the websites of UN bodies such as the Office of the United Nations High Commissioner for Human Rights (OHCHR) and other international and regional organisations, were also prioritised.

All efforts were made to ensure the most accurate results and to maintain a neutral platform for academic debate. Thus, the findings of this study are open to further discussion related to the fulfilment of the study's objectives.

### 1.7 Clarification of concepts

For the purposes of this study, implementation is defined as the process whereby state parties to the CRC take action to ensure the realisation of all rights protected in the Convention for all children in their jurisdictions.<sup>27</sup> The word implementation as used in this study also means domestication to the extent that it translates the notion of inclusion of treaty standards, specifically CRC standards, into the domestic legal order of the two countries under analysis.

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<sup>27</sup> It should be noted that other words can be used interchangeably in the place of the word 'implementation', for example, 'giving effect to', 'application' and 'performance'. Implementation furthermore refers to the process by which international law treaties are translated into practice. See Para. 1 of General Comment No. 5. See also Philippe Gautier (2011) 'Article 1: Convention of 1969', in Oliver Corten, Pierre Klein (eds.) 'The Vienna Convention on the Law of Treaties: A commentary', Oxford University Press, Vol. 1, p 21, and Online Oxford Dictionary, available at <http://oxforddictionaries.com/definition/implement> (accessed 25 May 2012). See further Jutta Joachim, Bob Reinalda, Bertjan Verbeek (2004) 'International Organisations and policy implementation: Pieces of the puzzle' in Jutta Joachim, Bob Reinalda, Bertjan Verbeek (eds.) 'International Organisations and policy implementation: Pieces of the puzzle', Routledge, p 4.

The study employs four indicators (namely, legislation, policies, administrative and institutional measures)<sup>28</sup> to measure the implementation of the CRC in Angola and in Mozambique. Based on the findings, an attempt is made to classify these countries into one of three categories of implementation: (1) fully implementing, (2) not implementing at all, and (3) partially implementing.<sup>29</sup>

Either of the countries examined is deemed to have fully implemented the CRC if all four indicators assessed are present in their jurisdictions and if these meet the standards of the Convention. It should be noted that it is difficult to make an accurate assessment of full implementation of the CRC in the light of the existence of a treaty body (the Committee on the Rights of the Child) mandated to monitor the implementation of the Convention.<sup>30</sup> Only the Committee has full authority to express whether or not a state has implemented the CRC. Therefore, the views expressed here are open for review. In addition, given that implementation

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<sup>28</sup> It should be noted that in using these multiple indicators the study asserts the familiar proposition that the implementation of rights cannot be measured based on single indicator or index. See Edzia Carvalho (2008) 'Measuring children's rights: An alternative approach', *The International Journal of Children's Rights*, Vol. 3, No. 16, p 546.

<sup>29</sup> These notions are based on Viljoen and Louw's study, which attempted to classify state compliance with the decisions of the African Commission on Human and Peoples' Rights based on five broad categories including 'full compliance', 'noncompliance', 'partial compliance', sui generis cases of compliance or partial compliance after a change of government (also termed situational compliance) and 'unclear cases'. See Frans Viljoen, Lirette Louw (2007) 'State compliance with the recommendations of the African Commission on Human and Peoples Rights 1994-2004', *The American Journal of International Law*, Vol. 1, No. 1, p 6.

<sup>30</sup> Dovile Skujyte (2011) 'Right of African children under the African Charter on the Rights and Welfare of the Child: the addition to the universal protection of a child', unpublished LLM dissertation, University of Tilburg, p 44-48.

is a process, the findings reflected here cover only implementation of the CRC as studied until the end of the year 2012.

With regard to the second category, “not implementing at all” cases relate to situations where the relevant state party discussed in the study has not put in place any measures as provided in Article 4 of the CRC to implement the rights protected in the Convention. This category also includes situations where the state party concerned may have put in place certain measures described in Article 4 of the Convention, but where these are contradictory to the objects and the purposes of the Convention.

The last category, “partially implementing”, refers to cases where the state party concerned has adopted a number of measures outlined in Article 4 of the CRC but where other measures remain to be adopted. It also refers to cases where all measures under Article 4 of the Convention were adopted but are lacking in certain aspects deemed to be important to comply with the obligations under the Convention.

## **1.8 Outline of the study**

This study is divided into seven chapters.

Chapter 1 introduces the study. It provides background and explains the significance of the study. It also describes the objectives of the study and specifies the research questions and the methodologies applied. In addition, it is in this chapter that the scope and the limitations of the study are discussed.

Chapter 2 outlines the socio-political context within which children in Angola and Mozambique live. It looks in particular at the socio-economic and cultural factors affecting children, and argues that, because certain of these factors carry negative impacts, it is crucial that the CRC be adequately implemented in the two jurisdictions.

Chapter 3 underlines the value of the CRC and its implementation by examining the shortcomings of the instruments that predated the Convention. As such, the chapter begins by highlighting the flaws inherent to instruments such as the 1924<sup>31</sup> and 1959<sup>32</sup> Declarations of the Rights of the Child, believed to be amongst the first international documents on children's rights. The chapter then offers a synopsis of the CRC and investigates the duty to implement the rights enshrined in the Convention as prescribed in Article 4 and other provisions. Lastly, it discusses the framework for the implementation of the CRC, showing that this framework provides an opportunity for the advancement of children's rights in all jurisdictions, especially in Angola and Mozambique.

Chapter 4 examines the legislative and policy measures adopted by Angola and Mozambique to give effect the CRC. The chapter begins by looking at several of the instruments ratified by these countries that have the potential to advance implementation of the Convention. It then discusses the status of the Convention in those countries. Thereafter, the chapter examines their

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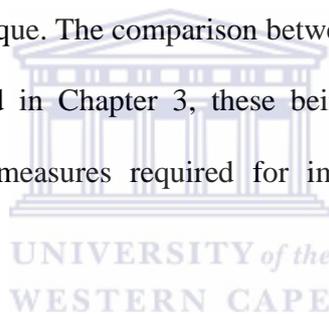
<sup>31</sup> Declaration of the Rights of the Child (1924 Declaration), adopted by the League of Nations in 1924, Leagues of Nations Official Journal, Supplement No. 23.

<sup>32</sup> Declaration of the Rights of the Child (1959 Declaration), adopted by the United Nations in 1959, UN. Doc. A/4354 (1959).

constitutions and laws in order to understand how they have advanced children's rights and to identify the persistent gaps. Policy measures are then discussed, with the same purpose in mind.

Chapter 5 builds on Chapter 4 by providing examples of the administrative and institutional measures adopted by Angola and Mozambique to implement the CRC. At this point, it should be noted that the assessment of the measures envisaging the implementation of the CRC in Angola and Mozambique is made against the framework for implementation discussed in Chapter 3.

Chapter 6 provides a case study focusing on the implementation on the right to primary education in Angola and Mozambique. The comparison between the two countries is, once again, based on the indicators discussed in Chapter 3, these being the laws, the policies, and the administrative, and institutional measures required for implementation of children's rights protected under the CRC.



Chapter 7 concludes the study with a summary of the key findings and a set of recommendations for improving the child-rights systems in Angola and Mozambique. The recommendations are framed generally and target the governments, institutions that work in the field of children's rights, and civil society organisations. The academic community and general public are also encouraged to participate.

## **1.9 Key words**

Children

Children's rights

Convention on the Rights of the Child

Countries under the study

Duties and obligations

Institution and mechanisms

Instruments

Implementation

Legislation

Policies



## CHAPTER 2

### PLACING CHILDREN WITHIN THE CONTEXT OF THE COUNTRIES UNDER THE STUDY

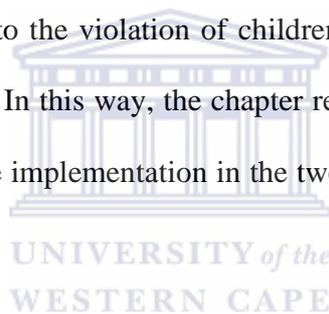
#### 2.1 Introduction

This chapter places children within the context of the two countries under analysis with the purpose of laying the foundation for the chapters that follow. To achieve this objective, the chapter explores a number of socio-economic factors in Angola and Mozambique that intersect with the interests of children.

Seven themes are discussed. Section 2.2 looks at the official language and other languages used in the two countries, and it is argued that language interacts with children's right to education. Section 2.3 explores the population demography of the countries. In arguing that Angola and Mozambique have a large population of children, the section underlines the need for them to protect children through legislation and policies consistent with the United Nations Convention on the Rights of the Child (CRC). Section 2.4 discusses cultural factors relevant to children's rights. It highlights certain cultural practices associated with the matrilineal and patrilineal customs inherent to Angolan and Mozambican communities. Section 2.5 takes matters a step further by investigating two specific practices in closer detail, namely, early marriage and initiation rites.

Section 2.6 focuses on religion and argues that there are areas where faith-based practices intersect with children's interests. It provides an overview of how the reluctance to use methods of contraception stigmatised by Christianity impacts on the lives of children by leaving many of them orphaned as a result of the spread of sexually transmitted diseases such as HIV. Some economic factors interfacing with children's rights are discussed in section 2.7. Three thematic issues are explored: poverty, the reliance on external aid and the involvement of children in the economic sector through child labour. Section 2.8 expands on the HIV/AIDS pandemic.

Lastly, the conclusion makes the claim that most, if not all, of the factors discussed in the chapter create circumstances predisposed to the violation of children's rights and that these factors are substantially covered by the CRC. In this way, the chapter reiterates the importance of the CRC and the need to ensure its adequate implementation in the two countries profiled, as discussed in chapters 4, 5, and 6.



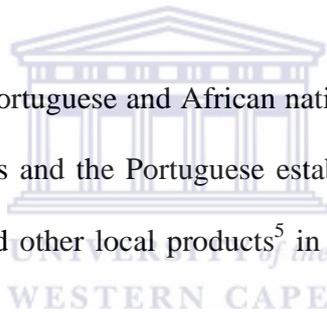
I submit that the areas covered in this chapter fall under the rubric of social, economic and cultural themes that are highly debated within the arena of children's rights. Admittedly, there are other relevant socio-economic, cultural, and political concerns which also attract substantial debate in the field of children's rights. These include, parenting and juvenile justice. Nevertheless, the latter areas are closely interrelated to the topics discussed in this chapter. For instance, in the case of juvenile justice, criminal activities amongst children may be directly linked to poverty, and parenting issues can be related to the matrilineal tradition and the patrilineal customs associated with many societies. But despite the interconnectedness of these topics, this thesis will, in the interest of manageability, focus solely on the areas identified above.

As mentioned, this chapter sets out to underscore how certain socio-economic and cultural elements intersect with the interests of children in the two countries and demonstrate in turn the need for adequate implementation of the CRC.

## **2.2 Official and other languages**

Angola and Mozambique are former Portuguese colonies.<sup>1</sup> The arrival of Portuguese settlers in the Congo Basin in the late fifteenth century gave rise to a Portuguese linguistic and cultural presence on the continent,<sup>2</sup> a presence which, especially in countries such as Angola and Mozambique, lasted more than 500 years.<sup>3</sup>

The first interaction between the Portuguese and African natives in these countries dates back to 1483. In the beginning, the natives and the Portuguese established commercial relations,<sup>4</sup> with the natives trading gold, beads and other local products<sup>5</sup> in exchange for firearms, whisky and



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<sup>1</sup> Perreira João (2009) *'The impact of democracy in Mozambique: Assessing political, social and economic developments since the dawn of democracy'*, research report for the Centre for Policy Studies, p 2.

<sup>2</sup> John Lipski, *'Portuguese language in Angola: Luso-creole missing link?'*, paper presented at the annual meeting of the AATSP, San Diego, 1995, p 1; copy on file with the author.

<sup>3</sup> The Portuguese were also present in São Tomé e Príncipe, Guinea Bissau and Cape Verde. See Lipski (note 2 above), p 1.

<sup>4</sup> It is believed that initially the Portuguese were involved in trading especially in the West African region, which is close to Angola where they traded in clothes and other similar products in exchange for African minerals. See John Vogt (1975) *'Notes on the Portuguese clothes trade in West Africa, 1480-1540'*, *The International Journal of African Historical Studies*, Vol. 8, No. 4, pp 623-651.

<sup>5</sup> Including diamonds in the case of Angola.

goods manufactured in Europe.<sup>6</sup> Between 1500 and 1550 other forms of trade developed. The Portuguese became increasingly interested in exploiting slave-labour on sugar-cane plantations in the Americas and Brazil.<sup>7</sup> Slaves were also needed to work on Portuguese coffee plantations in São Tomé and Príncipe.<sup>8</sup> The increased interest in slaves and local products led in 1891 to the effective colonial occupation of Angola and Mozambique.<sup>9</sup>

During the era of colonial occupation, Portuguese was the main language used for communication between the natives and Portuguese settlers. Natives also communicated in local Bantu languages (Kimbundu, Luchazi and Mbunda in Angola<sup>10</sup>, and Emákhwa, Nyanja-Sena and Tsonga in Mozambique<sup>11</sup>). Colonial dominance in the two countries ended in 1975 after the

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<sup>6</sup> Lipski (note 2 above), p 2.

<sup>7</sup> Information at [http://tdl.org/txlordspace/bitstream/handle/2249.3/663/05\\_slavery\\_colonies.htm?sequence=11](http://tdl.org/txlordspace/bitstream/handle/2249.3/663/05_slavery_colonies.htm?sequence=11), (accessed 19 October 2012).

<sup>8</sup> Anti-slavery International (2004) *The cocoa industry in West Africa: A history of exploitation*, Anti-slavery International, p 5.

<sup>9</sup> Portuguese settlers occupied Angola and Mozambique before 1881. However, in the early stages, occupation was not formally recognised by other European powers that had interests in the region. Formally, the 1884-85 Berlin Conference, which decided the partition of African states among European powers, advanced solutions to the lack of recognition of Portuguese occupation in Angola and Mozambique. It was on the basis of the Berlin agreement that Portugal, France, Germany and Britain later agreed to the Portuguese occupation of Angola and Mozambique. Furthermore, it is argued that the colonial occupation of these territories was facilitated by ambitious native chiefs who signed treaties of vassalage with the Portuguese settlers allowing the latter to control the territories in exchange for Portuguese products.

<sup>10</sup> Felix Banda (2009) 'Critical perspectives on language planning and policy in Africa: Accounting for the notion of multilingualism', *Stellenbosch Papers in Linguistics PLUS*, Vol. 38, p 8.

<sup>11</sup> Karl Gadelli, *Languages in Mozambique*, Africa and Asia, Goteborg working papers on Asian and African languages and literature (2001), No. 1, p 1.

Portuguese government was overthrown and independence restored.<sup>12</sup> Portuguese was adopted in both countries as the official language and continues to be a key language in usage there.<sup>13</sup>

Despite the official recognition given to Portuguese, many Bantu languages remain important for communication among the people, mainly because not everyone speaks Portuguese. Statistics show a huge prevalence in these countries of speakers of local languages. It is believed that approximately 155 000 Angolans speak Luchazi while 135 000 speak Mbunda.<sup>14</sup> The estimates for Mozambique are that about 41% of the population speak Emákhwa, 10% Nyanja-Sena, and another 19%, Tsonga.<sup>15</sup>

It is worrying that, amidst the many languages spoken in Angola and Mozambique, only Portuguese gained official recognition, a development which had the effect of marginalising the population who speak other languages. The situation is exacerbated by the fact that while children account for most of the population of these countries, Portuguese is used in classrooms, hospitals, police stations and for other social services which children need. Thus, accounting for the language context in the laws and policies of Angola and Mozambique is one of the important ways to achieve the aims of the CRC and to improve children's lives.

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<sup>12</sup> In 1974 a military coup led to the overthrow of the Portuguese colonial government in Portugal. This opened space for Portuguese colonies in Africa to claim their independence from the new government, which was much more willing than its predecessor to negotiate and concede to pressure from the colonial territories. See Mária Rezola (2008), 'The Portuguese transition to Democracy', *Portuguese Journal of Social Science*, Vol. 7, Issue 1, pp 6-8.

<sup>13</sup> See 1975 Constitution of Angola and 1975 Constitution of Mozambique.

<sup>14</sup> Banda (note 10 above), p 8.

<sup>15</sup> Gadell (note 11 above), p 1.

## 2.3 Population demography

As at 2011 Angola had a population estimate of 18 million people;<sup>16</sup> for Mozambique, the estimate in 2012 was about 23.5 million.<sup>17</sup> The population size of the two countries continues to grow. In 2011, Angola and Mozambique recorded a 39.3% birth rate for every 1 000 citizens of the population.<sup>18</sup> In 2012, the population growth rate for Angola<sup>19</sup> was calculated at 2.7%, as against 2.4% for Mozambique.<sup>20</sup> Approximately 43% of the Angolan population is aged between 0-14, and about 45.9% of the Mozambican population falls in the same age group.<sup>21</sup> No accurate information could be found on the total estimates of the population of these countries below the age of 18.<sup>22</sup>

However, children (defined as persons below 18 years)<sup>23</sup> form the majority of the populations, as it is estimated that they comprise more than half of the population of Angola and Mozambique. Notably, the specificities in the cultural and traditional, religious and economic contexts of the

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<sup>16</sup> Information available at <http://www.indexmundi.com/angola/population.html> (accessed 19 October 2012).

<sup>17</sup> Information available at <http://www.indexmundi.com/mozambique/population.html> (accessed 19 October 2012).

<sup>18</sup> For information on Angola see [http://www.indexmundi.com/angola/demographics\\_profile.html](http://www.indexmundi.com/angola/demographics_profile.html) (accessed 19 October 2012). For Mozambique, see [http://www.indexmundi.com/mozambique/demographics\\_profile.html](http://www.indexmundi.com/mozambique/demographics_profile.html) (accessed 19 October 2012).

<sup>19</sup> Information available at <http://www.indexmundi.com/g/g.aspx?c=ao&v=24> (accessed 19 October 2012).

<sup>20</sup> Information available at <http://www.indexmundi.com/g/g.aspx?v=24&c=mz&l=en> (accessed 19 October 2012).

<sup>21</sup> Information available at <http://www.indexmundi.com/angola/population.html> (accessed 19 October 2012).

<sup>22</sup> I highlighted elsewhere the challenges faced in trying to obtain reliable data in this regard. See Aquinaldo Mandate, *Implementing the Convention on the Rights of the Child in Angola and Mozambique: Opportunities and challenges*, p 4, paper presented at Children's Rights Conference held in Belfast, Northern Ireland, 1 and 2 June 2011; copy on file with the author.

<sup>23</sup> See Article 1 of the CRC.

countries play a significant role in determining the extent to which the CRC is implemented. This necessitates an investigation into these issues. For explanatory purposes, the sections that follow provide informational background on certain components of these elements.

## **2.4 Main lineage patterns**

Children find themselves caught up within a variety of cultural practices in communities in the countries under examination. The patrilineal custom and the matrilineal lineage are predominant in these communities. Matrilinearity determines that children belong to the family of the mother and that the father is a mere agent in the family. In matrilineal settings, the primary responsibility for the upbringing of children falls to the mother and her male relatives, starting with her brothers.<sup>24</sup> Thus, in matrilineal societies, children owe more obedience to their uncles than to their fathers.<sup>25</sup> This conforms with matrilineal norms attributing rights over a woman's reproductive abilities to her own clan or ethnic lineage.<sup>26</sup>

By contrast, the practices in patrilineal societies are based on opposite principles. For instance, in patrilineal lineage the primary responsibility for raising children rests with the father and his family.<sup>27</sup> This is due to patrilineal customary norms attributing rights over women's reproductive

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<sup>24</sup> Mkita Mathambo, Henry Victor (2002) 'Matriliney, patriliney and wealth flow variations in rural Malawi', *African Sociological Review*, Vol. 6, No. 2, p 73.

<sup>25</sup> As above.

<sup>26</sup> Carlos Arnaldo (2004) 'Ethnicity and marriage patterns in Mozambique', *African Population Studies*, Vol. 19, No. 1, p 145.

<sup>27</sup> Mathambo, Victor (note 24 above), p 74.

abilities to their male counterparts.<sup>28</sup> It simply means that in the case of the death of the male parent, the child is expected to be brought up by the family of the deceased. The same applies in cases of divorce when the responsibility to raise children fails on male parents and their families.

The Chokwe ethnic group in the eastern region of Angola is believed to be matrilineal, while the M'banlundu people in the central region of the country are patrilineal.<sup>29</sup> The matrilineal lineage is predominant in the northern region of Mozambique, with the central and southern regions bearing the patrilineal structure.<sup>30</sup>

It was observed that the patriarchal nature of the patrilineal lineage perpetuates unequal relations, a situation which contradicts the principle of non-discrimination enshrined in the CRC.<sup>31</sup> Such inequality derives from the belief within patrilineal custom that women are inferior to men and therefore cannot make binding transactions in their own right unless they are assisted by a man (the husband for married women, or the father or uncle or brother for unmarried woman).<sup>32</sup> Furthermore, in deeply rooted patrilineal societies women may be denied inheritance rights, which, by virtue of the lineage structure, are conferred instead on their male counterparts. It is

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<sup>28</sup> Arnaldo (note 26 above), p 145.

<sup>29</sup> James Olson (1996) *The people of Africa: An ethnohistorical dictionary*, Greenwood Publishing Group, p 130. See also Florencio Fernando (2009) *Un reino dos reyes: Diferentes legitimidades en Bailundo (Angola)*, *Revista CIDOBd'Afers Internacionals*, No. 87, pp 167-189.

<sup>30</sup> Arnaldo (note 26 above), p 145.

<sup>31</sup> Monica Tabengwa, *Harmonisation of national and international laws to protect children's rights: The Botswana case study*, p 5, research report for the Botswana child-law reform process; copy on file with the author.

<sup>32</sup> As above.

my contention that these arguments can also be use against discriminatory practices relating to matrilineal societies denying male parents the exercise of certain rights over their children.

Consequently, children may be advantaged or disadvantaged depending on the nature of the lineage system into which they are born. For example, girls born into patrilineal society may see their inheritance rights negated while boys may inherit the entire estate of the family. Likewise, boys turning adults in matrilineal societies may be denied the exercise of rights over children who they may father. It suffices to say that the prevalence of discriminatory practices in the lineage groups of the two countries compels them to adopt laws and policies to protect children who fall victim to customary rules. It is submitted that good laws and good policies will help these countries achieve the goals envisaged under the CRC.

## **2.5 Some key cultural practices affecting children in the countries under the study**

Customary norms, especially African customs, play a significant role in the manner that African communities organise themselves.<sup>33</sup> This is partly because these norms guide the way in which African societies arrange power relations in traditional settings, and partly because customary law regulates the day-to-day activities and relationships between people.<sup>34</sup> Thus, it cannot be overstated that these norms affect the lives of people in several ways, including for example, in the way that they determine the time of marriage and the conditions under which a person is

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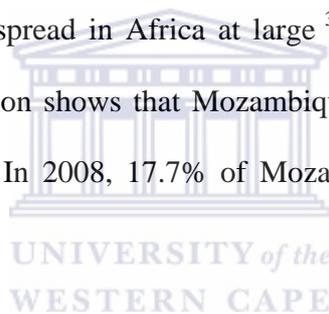
<sup>33</sup> Thoko Kaime *The African Charter on the Rights and Welfare of the Child: A socio-legal perspective*, Pretoria University Law Press (2009), p 32.

<sup>34</sup> Discussing the importance of customary norms, Kaime quotes a citation from Lindholm to the effect that every group in society has certain routines of practices that must be observed by everyone if they are to be accepted as members of that specific society. See Kaime (note 33 above), p 34.

considered an adult. In this way, it can be asserted that certain aspects of African customary norms intersect significantly with the interests of children. The next sections introduce early marriage and initiation rituals as customs practised in Angola and Mozambique, and highlight how they affect the interests of children and hence the implementation of the CRC. The emphasis is placed primarily on the negative role these practices can play in the lives of children and the justification that this provides for ensuring adequate implementation of the Convention.<sup>35</sup>

### 2.5.1 Early marriage

Early marriage, or child marriage, is often defined as the marriage of girls who are younger than 18 years.<sup>36</sup> This practice is widespread in Africa at large<sup>37</sup> and Angola and Mozambique in particular. The available information shows that Mozambique is among the countries with the highest prevalence in the region. In 2008, 17.7% of Mozambican girls below 15 years were



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<sup>35</sup> Rebecca Davis (2012) *Speaking up for the little ones: Enforcing children's rights*, Honors Project of Parkland College's, paper No. 43, p 14, available at <http://spark.parkland.edu/cgi/viewcontent.cgi?article=1046&context=ah&sei-redir=1&referer=http%3A%2F%2Fwww.google.co.za%2Furl%3Fsa%3Dt%26rct%3Dj%26q%3Denforcement%2Border%2Bchild%2Brights%26source%3Dweb%26cd%3D14%26ved%3D0CC0QFjADOAo%26url%3Dhttp%253A%252F%252Fspark.parkland.edu%252Fcgi%252Fviewcontent.cgi%253Farticle%253D1046%2526context%253Dah%26ei%3DWc1yUKDbKouGhQfWoGoBw%26usg%3DAFQjCNFhLkzXahsOCnQP1IwhVYEliSUew#search=%22enforcement%20order%20child%20rights%22> (accessed 8 October 2012).

<sup>36</sup> Rita Mutyaba (2011) 'Early marriage: A violation of girls fundamental human rights in Africa', *The International Journal of Children's Rights*, Vol. 19, No. 2, p 339.

<sup>37</sup> For example, as at 2005 UNICEF estimated that about 42% of women in Africa aged between 15 and 24 are married before completing 18 years. See United Nations Children's Fund (UNICEF), *Early marriage: A harmful traditional practice*, UNICEF (2005), p 4.

married or living in institutions akin to marriage. Some of these girls were married as early as 13 years of age.<sup>38</sup>

Angola is also challenged by this phenomenon. This came to light when the Committee on the Rights of the Child (CRC Committee) noted the prevalence of the practice during the second review of report under Article 44 of the CRC.<sup>39</sup> At the time, the Committee urged Angola to ensure effective implementation of the minimum age of 18 prescribed in the Family Code as a measure to deal with the problem.<sup>40</sup> While it can be admitted that since then there may have been improvements on the ground, considerable effort will be required to address cultural practices that embrace this custom.

The negative effects of early marriage on the lives of children, especially on the health of the girl child, are widely known. These include the fact that early marriage causes pervasive damage to the physiological and mental health of the girl child through complications during childbearing. In extreme cases, it can also lead to maternal mortality since the child is not physically mature enough to bear children.<sup>41</sup> Furthermore, early marriage can contribute to school drop-outs for

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<sup>38</sup> Instituto Nacional de Estatística, *Multiple Indicators Cluster Survey 2008*, Instituto Nacional de Estatística (2008), p 102-103, available at [http://www.childinfo.org/files/MICS3\\_Mozambique\\_FinalReport\\_2008.pdf](http://www.childinfo.org/files/MICS3_Mozambique_FinalReport_2008.pdf) (accessed 23 October 2012).

<sup>39</sup> See Paras. 26-27 of the CRC Committee concluding observations and recommendation on Angola state parties report submitted pursuant Article 44 of the CRC, UN Doc. CRC/C/AGO/CO/2-4 (2010).

<sup>40</sup> Information available at <http://www.crin.org/resources/infoDetail.asp?ID=21944> (accessed 15 October 2012).

<sup>41</sup> Roselyn Hanzi (2006) *Sexual abuse and exploitation of the girl child through cultural practices in Zimbabwe: A human rights perspective*, unpublished LLM dissertation, Centre for Human Rights of the University of Pretoria, pp 29-31.

girls, given that when married they are expected to play a more meaningful role in the family by preparing food, cleaning and undertaking other chores which reduce their available time for studying. Against this backdrop it becomes important to assess whether, and to what extent, Angola and Mozambique's current legislative framework makes provision for addressing the problem of early marriage.<sup>42</sup>

### 2.5.2 Initiation rituals

Initiation rituals are common to many African customs. Amongst the many examples of known initiation rituals<sup>43</sup> are male circumcision and female genital mutilation (FGM), or female genital cutting. Whereas male circumcision entails cutting off the foreskin of the penis,<sup>44</sup> FGM involves the removal of all or parts of the female genitalia.<sup>45</sup> The execution of these rituals is explained differently and they have diverse meanings depending on the environment where they occur. According to Ondiek, it is believed that FGM reduces female sexual desire and thus increases the

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<sup>42</sup> It should be noted that countries in the region, including South Africa, for example, are working to address early marriage, which makes it important for Angola and Mozambique to join this regional effort to eradicate the problem. See Section 12(2) of the South African Children's Act 38 of 2005. See also Lea Mwambene, Julia Sloth-Nielsen (2011) 'Benign accommodation? Ukuthwala, "forced marriage" and the South African Children's Act', *African Human Rights Law Journal*, Vol. 11, No. 1, p 17.

<sup>43</sup> This also includes female virginity testing, amongst many others. See generally Louise Vincent (2006) 'Virginity testing in South Africa: Re-traditioning the postcolony', *Culture, Health & Sexuality*, Vol. 8. No. 1, pp 17-30.

<sup>44</sup> Alicia Hurlburt (2011) '*The implications of male circumcision on HIV transmission*', Pell Scholars and Senior Thesis, Paper No. 72, p 7.

<sup>45</sup> Concellia Ondiek (2010) '*The persistence of female genital mutilation (FGM) and its impact on women's access to education and empowerment: A study of Kuria District, Nyanza Province of Kenya*', unpublished Doctor of Literature and Philosophy thesis, University of South Africa, p 45.

chances of keeping women virginal before marriage.<sup>46</sup> She also argues that FGM is sometimes seen as part and parcel of a cultural practice which leads women into adulthood, integrates them into society and affords them recognition by the community; similar justifications on cultural grounds are also made in the case of male circumcision.<sup>47</sup>

With regards to the meaning of circumcision (whether male or female), African customary laws have used initiation rites to demarcate the passage from childhood into adulthood.<sup>48</sup> Therefore, it can be argued that in terms of African customs, circumcision rituals are, in some societies, an indispensable means for empowering young children to become adults and participate actively in the affairs of their communities.

African customs in the countries under examination are strongly characterised by some of these traditional rituals. A 2007 study estimated the prevalence of male circumcision was at 80% among Angolans and 60% among Mozambicans.<sup>49</sup> While male circumcision is widespread, FGM is hardly practised in Mozambique, with a handful of these cases being reported only

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<sup>46</sup> As above, p 49.

<sup>47</sup> Julia Sloth-Nielsen (2012) 'A foreskin too far? Religious, "medical" and customary circumcision and the Children's Act 38 of 2005 in the context of HIV/Aids', *Law Democracy and Development*, Vol. 16, p 86.

<sup>48</sup> See Godfrey Odongo (2005) '*The domestication of International Law Standards on the Rights of the Child with specific reference to Juvenile Justice in the African Context*', unpublished LLD thesis, University of the Western Cape, p 151.

<sup>49</sup> World Health Organisation and Joint United Nations Programme on HIV/AIDS (2007) '*Male circumcision: Global trends and determinants of acceptance, safety and acceptability*', World Health Organisation and Joint United Nations Programme on HIV/AIDS, p 10.

sporadically.<sup>50</sup> However, it is observed that FGM in Mozambique is on the increase, partly because of the arrival of refugees from countries where it is prevalent.<sup>51</sup> In the Angolan context, the occurrence of FGM is not reported at all.

Male circumcision has been justified on the grounds that it is said to reduce the chances for spreading HIV.<sup>52</sup> However, for safety purposes, it should be carried out in medically recommended conditions to avoid trauma and other injuries to the patient. By contrast, FGM is widely understood as a violation of the rights of the girl child.<sup>53</sup> Some of the short-term effects of FGM include damage caused to the adjacent organs; death can also result from severe loss of blood.<sup>54</sup> In the long run, FGM leads to scarring, complications when giving birth, and infertility; it may also lead to a complete loss of sexual pleasure and to pain during intercourse.<sup>55</sup>

The risks associated with these traditional rituals make it vital that the latter be regulated. Even in circumstances where few cases of harm are reported, regulations are important to protect the

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<sup>50</sup> See for example AllAfrica news report on 'Mozambique female genital mutilation in the north', available at <http://allafrica.com/stories/200612080439.html> (accessed 26 October 2012).

<sup>51</sup> Information available at <http://english.cri.cn/6966/2012/02/20/3124s682210.htm> (accessed 26 October 2012).

<sup>52</sup> Rennie Stuart et al (2007) 'Male circumcision and HIV prevention: Ethical, medical and public health tradeoffs in low income countries', *Journal of Medical Ethics*, Vol. 33, No. 6, pp 357-361. See also Sloth-Nielsen (note 47 above), pp 83-85.

<sup>53</sup> Makundi (surname not available) (2009) '*Harmful cultural practices as violation of girls' human rights: Female genital mutilation in Tanzania and South Africa*', unpublished LLM dissertation, North West University, p 11. See also Lucinda Le Roux (2006) '*Harmful traditional practices, (male circumcision and virginity testing of girls) and the legal rights of children*', unpublished LLM dissertation, Faculty of Law, University of the Western Cape, p 17.

<sup>54</sup> Ondiek (note 45 above), p 51.

<sup>55</sup> As above.

victims, especially when they are children. In accounting for these practices, Angola and Mozambique would place themselves in a better position to cater for the situation of children and improve their lives in accordance to the principles of the CRC if they (the countries) adopted measures to combat harmful cultural practices.

## 2.6 Religion

Examining the interaction between children's rights and religion is not a taboo area, as has been established in a number of cases involving these matters. For example, Langlaude observes that “[T]he European Court on Human Rights has recently considered the relationship between custody and religion, the place of religion in school, and religious education.”<sup>56</sup> She further notes that domestic jurisdictions have considered “the right of school pupils to wear religious garb or religious symbols”.<sup>57</sup> The bulk of case law mentioned by Langlaude concerns the interface between religious practices and the rights of persons less than 18 years, and shows a clear link between religious practices or religious beliefs and children's rights.

The constitutions of Angola and Mozambique define these countries as secular states.<sup>58</sup> Secularity defines the separation between religion and the state.<sup>59</sup> It requires the state to be

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<sup>56</sup> Sylvie Langlaude (2008) ‘Children and religion under Article 14 of the UNCRC’, *International Journal of Children's Rights*, Vol. 16, No. 4, p 476.

<sup>57</sup> As above.

<sup>58</sup> See Article 10 of Constitution of 2010 Angola and Article 12 of 2004 Constitution of Mozambique.

<sup>59</sup> Martin William (2006) ‘Secular state, religious people – The American model’, The James A Baker III Institute for Public Policy, p 9, available at <http://bakerinstitute.org/publications/REL-pub-MartinSecularStateReligiousPeople-042006.pdf> (accessed 22 October 2012).

neutral and to ensure respect for the co-existence of a multiplicity and diverse religious groups. It is against such a constitutional background that many religions are practiced in the countries being profiled.

The available data indicates that Christianity is practiced by an estimated 53% and 46% of the population of Angola and Mozambique, respectively. Roughly 0.5% Angolan people profess Islam, and 17% of the population of Mozambique is Muslim.<sup>60</sup> The various practices amidst these religions impact differently on the rights of the child. For example, under the Christian faiths, Catholicism prohibits the use of contraceptives and other methods of family planning<sup>61</sup> on the grounds that they defile the procreative function of sexual intercourse.<sup>62</sup> The lack of use of contraception has the obvious consequence of increasing the population size of these countries and heightening the economic burden associated with raising children; it also increases the chances of spreading dangerous diseases like HIV/AIDS, syphilis, and gonorrhoea. It is submitted that some of these diseases claim the lives of parents while their children are young. In Mozambique, for instance, the number of children who are orphaned due to HIV stands at 1.4 million, with about 5 000 of them living in the streets.<sup>63</sup> The situation in Angola is no different. As at 2002, approximately 8 800 Angola children had lost one or both parents due to HIV/AIDS,

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<sup>60</sup> Information available on Operation World website at <http://www.operationworld.org/moza> (accessed 20 October 2012).

<sup>61</sup> Giuseppe Benagiano et al (2011) 'Condoms, HIV, and the Roman Catholic Church', *Reproductive Biomedicine Online*, Vol. 22, No. 7, p 701.

<sup>62</sup> Luc Bovens (2009) 'Can the Catholic Church agree to condom use by HIV-discordant couples?' *Journal of Medical Ethics*, Vol. 35, No. 12, p 717.

<sup>63</sup> Information available at <http://www.child-sponsorship.com/mozambique.html> (accessed 27 May 2011).

and about 8 000 of them were thought to be infected with the virus.<sup>64</sup> In 2009, Angola had an estimated 22 000 children living with HIV virus. There is no doubt that many of these children were conceived from parents who carried HIV/AIDS virus. As it will be shown later in the section dealing with HIV/AIDS, HIV prevalence remains high in these countries.

This picture shows that the two countries need good policies and laws in place to ensure that children enjoy their rights under the CRC and to provide solutions to the impact that religious practices may have on their lives.

### **2.7 Some economic factors interfacing with children's rights**

The economy of any country, including factors such as its level of poverty, reliance on external aid and available workforce, impacts on the realisation of children's rights. The next sections provide brief insight on how some of these economic variables affect this process in the case of Angola and Mozambique. The first two sections discuss poverty and reliance on external aid; the last section deals with children as a part of the workforce assisting the household economies of many families in these regions.

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<sup>64</sup> See Jenny Clover (2002) 'Angola's children bearing the greatest cost of war', *African Security Review*, Vol. 11, No. 3, p 24.

### 2.7.1 Poverty

Africa is one of the richest continents in the world<sup>65</sup> yet many of its countries are dogged by poverty,<sup>66</sup> a situation true of both Angola and Mozambique.<sup>67</sup>

Angola is widely known for its diamonds and oil reserves,<sup>68</sup> and the importance of this oil-rich economy cannot be overstated in a world market where fluctuations in the price of crude oil affects the price of basic commodities – such as food and medicine – which are needed by the population (children included). Moreover, recently it was found that beneath the Mozambican soil there is plentiful gas, coal and other natural resources waiting to be explored.<sup>69</sup>

Both countries are amongst Africa's fastest growing economies and show high growth-rates in gross domestic product (GDP). Between 2000 and 2008 Angola's GDP increased from 3 to 13.2%;<sup>70</sup> in the same period the Mozambican GDP rose from 1.5% to 6.8%.<sup>71</sup> The International



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<sup>65</sup> Tim Unwin (2008) 'On the richness of Africa', blog paper, p 3, available at <http://www.gg.rhul.ac.uk/ict4d/workingpapers/richness.pdf> (accessed 22 October 2012).

<sup>66</sup> Nana Poku (2002) 'Poverty, Debt and Africa's HIV/AIDS crisis', *International Affairs*, Vol. 78, No. 3, p 539.

<sup>67</sup> Mandlate (note 22 above), p 4.

<sup>68</sup> See generally Jakkie Cilliers, Cristian Dietrich (eds.), 'Angola's war: The role of oil and diamonds', Institute for Security Studies (2000), pp 1-370.

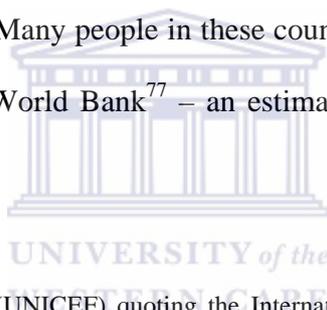
<sup>69</sup> Marcelo Mosse, Thomas Selemane (2008) 'The Extractive Industries Transparency Initiative (EITI) in Southern Africa: The Mozambican case', Southern Africa Resource Watch, pp 5, 9 and 13, available at [http://www.sarwatch.org/sarwadoocs/EITI\\_Mozambique\\_CReport.pdf](http://www.sarwatch.org/sarwadoocs/EITI_Mozambique_CReport.pdf) (accessed 22 October 2012).

<sup>70</sup> The African Child Policy Forum (2011) 'The African report on child wellbeing 2011: Budgeting for children', The African Child Policy Forum, p 158.

<sup>71</sup> As above.

Monetary Fund (IMF) foresees a growth rate for the Angolan economy in 2012 of 9.7% and an estimated 6.7% growth for Mozambique.<sup>72</sup> Although this reflects a slight drop in the overall growth of these countries' economies, their forecasted GDP figures remain above the continent's estimated average economic growth in 2012 of 5.3%.<sup>73</sup>

Yet despite these figures, the World Bank rates these countries as developing economies, meaning that they generate low income in comparison to developed countries.<sup>74</sup> In addition, the Angolan economy depends on donor funds (an issue which is addressed in the next section),<sup>75</sup> although this is to a lesser extent than the Mozambican economy, which is sustained mainly by small-scale farming and fishery.<sup>76</sup> Many people in these countries live below the USD 2 or USD 1.25 poverty line defined by the World Bank<sup>77</sup> – an estimated 40% in Angola<sup>78</sup> and about 12



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<sup>72</sup> See United Nations Children's Fund (UNICEF) quoting the International Monetary Fund (IMF), available at [http://www.unicef.org/esaro/5483\\_social\\_policy.html](http://www.unicef.org/esaro/5483_social_policy.html) (accessed 20 October 2012).

<sup>73</sup> See 'An analysis of issues shaping Africa's economic future', *Africa Pulse*, 2011, Vol. 3, p 3, available at [http://siteresources.worldbank.org/INTAFRICA/Resources/Africas-Pulse-brochure\\_Vol3.pdf](http://siteresources.worldbank.org/INTAFRICA/Resources/Africas-Pulse-brochure_Vol3.pdf) (accessed 2 November 2012).

<sup>74</sup> Information available at The World Bank website at <http://data.worldbank.org/about/country-classifications/country-and-lending-groups> (accessed 19 October 2012).

<sup>75</sup> See section 2.7.2.

<sup>76</sup> David Plank (1993) 'Aid, debt and the end of sovereignty: Mozambique and its donors', *The Journal of Modern African Studies*, Vol. 31, No. 3, pp 409 and 424.

<sup>77</sup> Francisco António (2009) 'A relatividade da pobreza absoluta e segurança social em Moçambique', Instituto de Estudos Sociais e Económicos (IESE), p 1.

<sup>78</sup> Information available on Children's Rights Portal at <http://childrensrightsportal.org/angola/> (accessed 20 October 2012).

million people, or 54.7%, in Mozambique.<sup>79</sup> The situation is aggravated by high levels of unemployment.<sup>80</sup>

Children are the hardest-hit by this phenomenon, with more than 57% of them in Mozambique being affected by poverty.<sup>81</sup> Chirwa posits that poverty-stricken children experience many problems, including hunger and lack of access to education. He further observes that these children are challenged by inadequate housing and lack of access to health.<sup>82</sup> This necessitates that the governments of countries affected by poverty, including Angola and Mozambique, take action to ensure adequate protection of the interests of such children. It will be shown later in Chapter 6, dealing with the implementation of the right to primary education, that both countries require sound measures to advance children's interests under the CRC.

### **2.7.2 Heavy reliance on external aid**

Despite their abundant natural resources, Angola and Mozambique are not free from reliance on external aid. They receive assistance in various forms, which includes transfers of money and skills, and, at times of natural catastrophe such as floods or droughts, humanitarian assistance given in the form of food, medicines and clothes.

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<sup>79</sup> National Directorate of Studies and Policy Analysis (2010) *Poverty and wellbeing in Mozambique: Third National Poverty Assessment*, Ministry of Planning and Development, p 25.

<sup>80</sup> Mandate (note 22 above), p 5.

<sup>81</sup> Information available on the website of the United Nations Children's Fund at <http://www.unicef.org/mozambique/overview.html> (accessed 19 October 2012).

<sup>82</sup> Danwood Chirwa (2009) *Child poverty and children's rights to access to food and basic nutrition in South Africa: A contextual, jurisprudential and policy analysis*, Socio-economic Rights Project of the Community Law Centre, University of the Western Cape, p 3.

As mentioned, Angola is less reliant on donor assistance than Mozambique.<sup>83</sup> Quoting figures by the IMF, Hanlon and Renzio observe that in 2004 foreign aid made up 48% of the budget of the Mozambican government.<sup>84</sup> As at 2009 more than 50% of the country's planned state budget was dependent on aid.

The importance of international co-operation, and especially donor aid, to these countries cannot be overemphasised in the light of the pervasive financial problems facing the world today. However, the over-reliance on external assistance and aid affects their governmental capacity to implement national programmes, including ones affecting children. The inability to implement such programmes becomes particularly visible when there is a restriction on the amount of aid given to the governments or when donor assistance is substantially reduced.<sup>85</sup> A noteworthy instance came in 2008 when Mozambique received USD 150 million less aid than in the past due to the global economic crisis;<sup>86</sup> at the time, the Mozambican metical dropped in value relative to the American dollar. As a result, numerous activities that were planned for the education sector were not implemented. An evaluation report on government progress showed that about 5% of

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<sup>83</sup> See section 2.7.1 above. See also Mandlate (note 22 above), p 6.

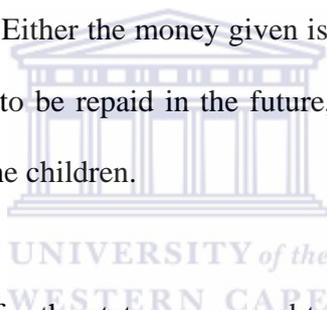
<sup>84</sup> Paulo Renzio, Joseph Hanlon (2007) '*Contested sovereignty in Mozambique: The dilemmas of aid dependency*', Managing Aid Dependency Project, 2007 GEG Working Paper, p 2, available at [http://www.globaleconomicgovernance.org/wp-content/uploads/Derenzio%20and%20Hanlon\\_Mozambique%20paper%20rev%20120107.pdf](http://www.globaleconomicgovernance.org/wp-content/uploads/Derenzio%20and%20Hanlon_Mozambique%20paper%20rev%20120107.pdf) (accessed 22 October 2012).

<sup>85</sup> See Mandlate (note 22 above), p 6.

<sup>86</sup> Information available on the website of the United Nations Children's Fund at <http://www.unicef.org/mozambique/overview.html> (accessed 27 May 2011).

the activities planned for 2008 were not achieved due to budget constraints.<sup>87</sup> These included schools which were not built and teachers who were not given the required training.<sup>88</sup> This situation impacted negatively on the lives of many children.

Admittedly, in the sphere of debt politics, aid comes with strings attached to it, and the implications thereof may not always be beneficial to the population. For instance, it has been observed that some of the aid granted to Angola is linked to the eagerness of donors to control the country's natural resources.<sup>89</sup> It suffices to say that some of the donor assistance given to these countries may have underlying objectives that are divorced from initiatives geared towards the realisation of children's rights. Either the money given is meant to be applied in areas which do not relate to children or it has to be repaid in the future, thereby constituting unsustainable debts which impairs the future of the children.



This makes it critically important for the states concerned to adopt clear policies on the type of assistance they need and to ensure that international co-operation helps them advance the rights of children without at the same time creating onerous future burdens for them. Moreover, donors need to be reminded about their duties stemming from the CRC. They must be reminded of the fact that international co-operation to ensure the realisation of children's rights is an obligation

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<sup>87</sup> Ministério de Plano e Desenvolvimento de Moçambique, '*Balanço do Plano Económico e Social de 2008*', Ministério de Plano e Desenvolvimento, p 126-7, available at [http://www.pap.org.mz/downloads/balanco\\_pes\\_2008\\_versao\\_ar.pdf](http://www.pap.org.mz/downloads/balanco_pes_2008_versao_ar.pdf), (accessed 27 May 2011).

<sup>88</sup> As above.

<sup>89</sup> William Reno (2000) '*The real (war) economy of Angola*' in Jakkie Cilliers, Cristian Dietrich (eds.), '*Angola's war: The role of oil and diamonds*', Institute for Security Studies, p 220.

under the Convention.<sup>90</sup> In this regard, the duty placed upon state parties to the Convention is clearly articulated in CRC Committee's General Comment No. 5<sup>91</sup> on the general measures of implementation of the Convention on the Rights of the Child (which are explained in detail in Chapter 3). The General Comment makes it clear that:<sup>92</sup>

[w]hen states ratify the Convention, they take upon themselves obligations not only to implement it within their jurisdiction, but also to contribute, through international cooperation, to the global implementation.

This shows that there is a cooperative duty<sup>93</sup> for all states to work together to fulfill children's rights, especially in countries like Angola and Mozambique which are affected by poverty and in great need of assistance to achieve the goals defined in the CRC.

### **2.7.3 Involvement of children in the economic sector (child labour)**

The involvement of children in economic activities through child labour<sup>94</sup> is widespread in Angola and Mozambique. This is due to factors such as the long-lasting political conflicts, which, alongside poverty and diseases like HIV/AIDS, forced numerous families to enlist their

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<sup>90</sup> See Article 4 of the CRC.

<sup>91</sup> See Para. 7 of CRC Committee General Comment No. 5 on the General Measures of implementation of the Convention on the Rights of the Child (General Comment No. 5), UN Doc. CRC/GC/2003/5.

<sup>92</sup> As above.

<sup>93</sup> See Para. 60 of General Comment No. 5.

<sup>94</sup> According to the International Labour Organisation (ILO), child labour refers to:

children prematurely leading adult lives, normally working long hours for low wages under conditions damaging to their health and to their physical and mental development, sometimes separated to their families, frequently deprived of meaningful educational training opportunities that could open up for them opportunities for a better future.

See ILO Convention on the Minimum Age for Admission for Employment (Convention 138), adopted in 1973 and entered into force in 1976. This instrument was ratified by Angola in 2001 and Mozambique in 2003.

children in activities aimed at generating income for survival.<sup>95</sup> Severe economic hardship is one of the chief reasons why child labour is so widespread in these countries.<sup>96</sup>

In 2002, close to 30% of Angolan children aged between 5-14 years were involved in child labour.<sup>97</sup> In the same period the situation in Mozambique was not markedly different. The 2008 Multiple Indicators Cluster Survey for Mozambique indicates that approximately 22% of children were directly involved in working activities<sup>98</sup> and that child labour was greatest among children between 12 and 14 years<sup>99</sup> as it was, too, among children in poor families; conversely, the prevalence of child labour declined in wealthier families.

Children have been involved mostly in support of domestic work (washing, cooking and caring for younger children) and in family businesses (selling basic commodities such as sugar, rice and cigarettes). Sometimes they are forced to carry heavy weights above their capacity or work with dangerous chemicals. It is also commonly the case that children who are involved in child labour tend to work for long hours under the sun and get paid very little for a living.<sup>100</sup> Furthermore,

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<sup>95</sup> Line Eldring, Sabata Nakanyane, Malehoko Tshoaedi, '*Child labour in the tobacco growing sector in Africa*', report for the IUF/ITGA/BAT Conference on the Elimination of Child Labour, Fafo Institute for Applied Social Sciences, Nairobi, 8-9 October 2000, p 9; copy on file with the author.

<sup>96</sup> For a discussion on poverty and economic hardship, see section 2.7.1 above.

<sup>97</sup> Instituto Nacional de Estatística, '*Resultado de Inquerito de Indicadores Multiplos (MICS 2) – 2001*', Instituto Nacional de Sstatística, p 13, available at <http://www.childinfo.org/files/angola.pdf> (accessed 23 October 2012).

<sup>98</sup> Instituto Nacional de Estatística (note 38 above), pp 102-103.

<sup>99</sup> As above.

<sup>100</sup> Information available at <http://www.reuters.com/article/2009/02/17/us-angola-childlabour-idUSTRE51G4NS20090217> (accessed 22 October 2012).

child labour usually sees children being involved in the informal economy: in the rural areas children work in small family farms, and, in urban settings, guarding cars or selling trinkets and food in the streets.<sup>101</sup> As it will be pointed out in Chapter 4's discussion of legislative and policy measures for implementing the CRC, the involvement of children in these sectors still remains unregulated.<sup>102</sup> Given that the present study is an assessment of the implementation of the CRC in Angola and Mozambique, it is important to uncover gaps of this kind and to offer recommendations for addressing the various problems which affect children's rights.

## **2.8 HIV/AIDS**

It was pointed out above that the spread of HIV/AIDS impairs the enjoyment of children's rights.<sup>103</sup> In 2009, a significant number of the world population aged 15 to 49 was infected with HIV.<sup>104</sup> In the same year, estimates were that 2% of the Angolan and 5% of the Mozambican population were infected.<sup>105</sup> Both countries also recorded infections in young children. Altogether, in 2009 about 174 000 of under-15 children in these countries were HIV-positive, 22 000 being in Angola and the remaining 130 000 in Mozambique.<sup>106</sup>

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<sup>101</sup> Eldring et al (note 95 above), p 48.

<sup>102</sup> See Chapter 4, section 4.5.2.

<sup>103</sup> See section 2.6 above.

<sup>104</sup> Information available on the website of the World Health Organisation (WHO) at <http://apps.who.int/gho/data/?vid=360#> (accessed 23 October 2012).

<sup>105</sup> As above.

<sup>106</sup> As above.

These countries are applying significant resources to the HIV/AIDS pandemic, and over time, considerable progress has been made as a result. For example, between 2006 and 2009 the HIV prevalence rate among the Mozambican population between 15 to 49 years decreased from 16.1<sup>107</sup> to 11.5%,<sup>108</sup> which shows that the countries have some level of commitment to curbing the problem. However, HIV/AIDS remains a huge problem and continues to have deleterious effects on their economies and social structure<sup>109</sup> inasmuch as it decimates the economically active population and deepens the vulnerability of young people and the elderly;<sup>110</sup> a further negative effect of HIV/AIDS is the growing number of orphans.<sup>111</sup>

Countries affected by poverty, including sub-Saharan-African countries like Angola and Mozambique, are badly affected by the HIV/AIDS pandemic.<sup>112</sup> The major constraint pertains to the tension between their limited resources and the need to invest in HIV/AIDS treatment, prevention and other areas. The situation is worsened when children are born infected and there

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<sup>107</sup> See Frans Viljoen, Precious Susan (2007) 'Introduction: Human Rights under threat in attempts to address HIV and AIDS', in Frans Viljoen and Precious Susan (eds.), *Human rights under threat: Four perspectives on HIV, Aids and the Law in Southern Africa*, Pretoria University Law Press, p 9.

<sup>108</sup> See UNAIDS, 'Report on the global AIDS epidemic: A UNAIDS 10<sup>th</sup> anniversary special edition', UNAIDS, 2006, p 506.

<sup>109</sup> Lizizila Panda (2007) 'Knowledge of Angolan women about the causes and effects of HIV/AIDS', unpublished Master of Arts dissertation, University of South Africa, p 34.

<sup>110</sup> Commission on HIV/AIDS and Economic Governance in Africa (2008) 'Africa: The socio-economic impact of HIV/AIDS', Commission on HIV/AIDS and Economic Governance in Africa, p 4.

<sup>111</sup> Case Anne et al (2004), 'Orphans in Africa: Parental death, poverty and school enrolment', *Demography*, Vol. 41, No. 3, p 483.

<sup>112</sup> See WHO, UNAIDS and UNICEF, 'Global HIV/AIDS response: Epidemic update and health sector progress towards Universal access', WHO, UNAIDS and UNICEF progress report 2011, p 23.

is limited access to antiretroviral treatment. For instance, in 2005 only 3.4% of Mozambican women who were pregnant had access to Prevention of Mother-Child Transmission Treatment (PMTCT) drugs, while others were left untreated.<sup>113</sup> In other cases children are faced with the challenge of leaving schools to look after sick parents infected with HIV/AIDS.<sup>114</sup> In view of this overall situation, the governments of the two countries need to strengthen their political commitment to enacting legislation and policies that address the problem of HIV and all evils associated with it, including stigmatisation, discrimination and other consequences.<sup>115</sup>

## 2.9 Conclusion

The preceding exposition shows that it is difficult to think of any aspect of the current socio-economic context of Angola and Mozambique that does not interface in some way with the interests of children. Evidence was provided to support the contention that children's rights intersect with a range of factors, from the countries' language policies through to the impact of HIV/AIDS. As highlighted in this chapter, the economic burdens caused by poverty, in addition to the prevalence of harmful cultural practices such as early marriage and female genital cutting, continue to undermine the interests of children. It is a worrying fact that children constitute the majority of the population of these countries and yet are amongst their most vulnerable groups.

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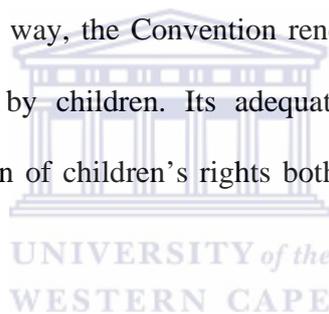
<sup>113</sup> AIDS and Human Rights Research Unit (2007) *'Human rights protected? Nine Southern African countries reports on HIV, AIDS and the Law'*, Pretoria University Press Law, p 134.

<sup>114</sup> The World Bank (2005) *'Mozambique poverty and social impact analysis: Primary school enrollment and retention – The impact of school fees'*, The World Bank, p 2.

<sup>115</sup> Patrick Eba (2007) *'Pandora's box: The criminalization of HIV transmission or exposure in SADC countries'*, in Frans Viljoen, Susan Precious (eds.) *'Human rights under threat: Four perspectives on HIV, Aids and the Law in Southern Africa'*, Pretoria University Law Press, p 40.

This makes it important to reflect on the situation of children in these countries and to devise solutions to improve their future.

This study submits that one way of improving the current situation of Angolan and Mozambican children is by ensuring that the countries adopt adequate legislative, policy and institutional measures to implement the CRC.<sup>116</sup> This is mainly due to the fact that the CRC covers many aspects pertaining to the socio-economic situation of children. As will be explored further in the next chapter,<sup>117</sup> the Convention places obligations on state parties to adopt legislative, administrative and *all other possible*<sup>118</sup> measures to implement children's civil, political rights and socio-economic rights. In this way, the Convention renders itself an indispensable tool for addressing the challenges faced by children. Its adequate implementation is, therefore, a precondition for the materialisation of children's rights both globally and in the two countries being profiled.



The next chapter introduces the United Nations Convention on the Rights of the Child and discusses the framework for its implementation. This will be followed by other chapters (namely, chapters 4, 5 and 6) which examine whether the legislative, policy, and institutional measures adopted by the countries under analysis meet CRC standards for the realisations of children's rights.

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<sup>116</sup> See Chapter 1, section 1.1.

<sup>117</sup> See generally Chapter 3 section 3.5.

<sup>118</sup> My emphasis added.

## CHAPTER 3

### THE

### CONVENTION ON THE RIGHT OF THE CHILD AND THE FRAMEWORK FOR ITS IMPLEMENTATION

#### 3.1 Introduction

Before the adoption of the United Nation Convention on the Rights of the Child (CRC) there were earlier international attempts to regulate children's rights,<sup>1</sup> including the 1924 Declaration of the Rights of the Child (1924 Declaration)<sup>2</sup> adopted under the League of Nations and the 1959 Declaration of the Rights of the Child (1959 Declaration)<sup>3</sup> prepared under the auspices of United Nations. Other earlier instruments included the International Labour Organisation (ILO) Minimum Age (Industry) Convention (ILO Minimum Age Convention 1919)<sup>4</sup> and the International Convention for the Suppression of Traffic in Women and Children.<sup>5</sup> While the ILO

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<sup>1</sup> Geraldine Van Bueren, *The international law on the rights of the child*, Martinus Nijhoff Publisher (1995), Vol. 35, pp 1-2.

<sup>2</sup> Declaration of the Rights of the Child (1924 Declaration), adopted by the League of Nations in 1924, Leagues of Nations Official Journal, Supplement No. 23.

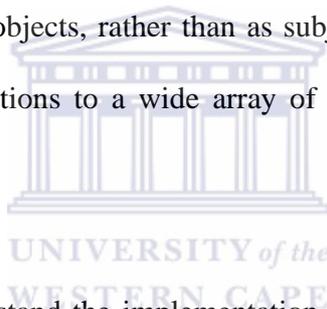
<sup>3</sup> Declaration of the Rights of the Child (1959 Declaration), adopted by the United Nations in 1959, UN. Doc. A/4354 (1959).

<sup>4</sup> International Labour Organisation (ILO) Minimum Age (Industry) Convention, adopted in 1919 and entered in force in 1921 (ILO Minimum Age Convention 1919).

<sup>5</sup> International Convention for the Suppression of Traffic in Women and Children, adopted in 1921. This instrument was later amended by the Protocol on the amendment of the 1921 International Convention for the Suppression of

Minimum Age Convention 1919 established the age for admission to industrial activities and helped to reduce number of children employed in the fast-developing industries, especially in Europe,<sup>6</sup> the Convention for the Suppression of Traffic in Women and Children compelled the High Contracting States to adopt measures to address the problem of trafficking in women and children.<sup>7</sup>

However, despite their considerable contribution, these instruments fell short of a comprehensive approach to the subject.<sup>8</sup> This was due to the fact that they were informed by conceptions of childhood prevailing at the time according to which children were understood as little human beings needing protection and as objects, rather than as subjects of the law.<sup>9</sup> As a result, these instruments failed to provide solutions to a wide array of problems affecting the interests of children.



This chapter asserts that, to understand the implementation of the CRC, it is necessary first to understand the instruments which predated it, especially those instruments relating directly to

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Traffic in Women and Children, adopted 1947 and entered into force in 1950 (Convention for the Suppression of Traffic in Women and Children as amended by the 1947 Protocol).

<sup>6</sup> See Gallinetti for a detailed discussion on the standards of this instrument, in Jacqueline Gallinetti (2007) *An assessment of the significance of the International Labour Organisation's Convention 182 in South Africa with specific reference to the instrumental use of children in the commission of offences as a worse form of child labour*, unpublished LLD thesis, University of the Western Cape, pp 50-70.

<sup>7</sup> See Articles 2, 3, and 6 of the Convention for the Suppression of Traffic in Women and Children as amended by the 1947 Protocol.

<sup>8</sup> Van Bueren (note 1 above), pp 1-3.

<sup>9</sup> As above.

children. In this regard, the chapter begins by exploring the 1924 and 1959 Declarations of the Rights of the Child, which are believed to be the first international instruments of their kind dealing with this subject.<sup>10</sup> The chapter then highlights the shortcomings of these instruments by arguing that they lacked the desired binding force ascribed to treaties like the CRC.<sup>11</sup> It is argued that this impaired the extent to which the two Declarations could be employed to promote and protect the interests of children.

Furthermore, the chapter provides a synopsis of the Convention and investigates the duty to implement the rights enshrined in the CRC as prescribed in Article 4 and other applicable provisions. Prior to the discussion of the framework for implementing the CRC, an analysis is provided of comparative standards on implementation of selected international instruments. The conclusion reiterates that state parties to the CRC, including the two countries under examination (Angola and Mozambique) are required to implement the rights enshrined in the Convention through appropriate legislative, administrative and all other measures.

### **3.2 Pioneer documents protecting children's rights**

The available information indicates that the first attempts to regulate children's rights predated the CRC. It is thought that they date back to the late nineteenth century and the period immediately after the First World War.<sup>12</sup> In this regard, in 1920 a non-governmental organisation

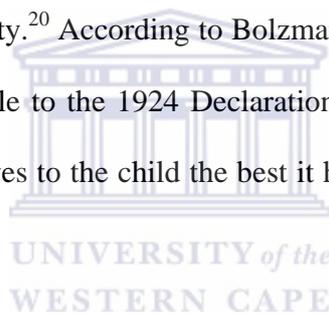
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<sup>10</sup> See Douglas Hodgson (2009) 'The rise and demise of children's international human rights', *Forum on Public Policy: A Journal of the Oxford Round Table*, pp 4-6.

<sup>11</sup> See section 3.3 below.

<sup>12</sup> Office of the United Nations High Commissioner for Human Rights (OHCHR) '*Legislative history of the Convention on the Rights of the Child*', United Nations (2007), Vol. 1, p 3.

called 'Save the Children International Union' was set up with the aim of addressing the dire situation of children brought about by the war.<sup>13</sup> In 1924, the aims of this organisation were adopted as a resolution which became known as the Declaration of the Rights of the Child or the Declaration of Geneva.<sup>14</sup> Kaime posits that the adoption of this instrument by the League of Nations was amongst the first attempts to make provisions for a catalogue of children's rights at the international level.<sup>15</sup> The instrument contained five principles reflecting the need to provide for the development of the child,<sup>16</sup> the need to feed the child who was hungry,<sup>17</sup> and the need to attend to children first during times of relief.<sup>18</sup> It also reflected the need to protect children against exploitation<sup>19</sup> and the need to raise children in the consciousness that their talents must be put towards the service of society.<sup>20</sup> According to Bolzman, the latter notion characterised the child as a resource.<sup>21</sup> The Preamble to the 1924 Declaration noted that men and women of all nations recognise that mankind owes to the child the best it has to give.<sup>22</sup> Notably, however, the



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<sup>13</sup> Lara Bolzman (2008) 'The advent of child rights in the international scene and the role of the Save the Children International Union 1920-45', *Refugee Survey Quarterly*, p 1.

<sup>14</sup> As above.

<sup>15</sup> Thoko Kaime, *The African Charter on the Rights and Welfare of the Child: A socio-legal perspective*, Pretoria University Law Press (2009), p 4.

<sup>16</sup> See Principle 1 of the 1924 Declaration.

<sup>17</sup> See Principle 2 of the 1924 Declaration.

<sup>18</sup> See Principle 3 of the 1924 Declaration.

<sup>19</sup> See Principle 4 of the 1924 Declaration.

<sup>20</sup> See Principle 5 of the 1924 Declaration.

<sup>21</sup> See Bolzman (note 13 above), p 32.

<sup>22</sup> See Preamble to the 1924 Declaration.

1924 Declaration was not binding, and its principles were formulated in terms of duties owed to children rather than as rights for them.<sup>23</sup>

Many years later the United Nations General Assembly adopted the Declaration of the Rights of the Child (1959), marking a step further towards the advancement of children's rights.<sup>24</sup> Differing from the 1924 Geneva Declaration, the text of the new instrument was slightly longer in that it had ten principles whereas the 1924 Declaration had five.

Another difference was that the 1924 Declaration had provisions framed as duties owed to the child while the 1959 Declaration embodied principles formulated as rights for children. Thus, it was possible to find in the 1959 Declaration principles capturing children's rights to name and nationality,<sup>25</sup> adequate nutrition and housing,<sup>26</sup> as well as education.<sup>27</sup> It also afforded children the right to play and recreation,<sup>28</sup> and the right to be protected from neglect<sup>29</sup> and hazardous

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<sup>23</sup> Sharon Detrick et al *'The United Nations Convention on the Rights of the Child: A guide to the 'travaux préparatoires''*, Martinus Nijhoff Publishers (1992), p. 13. See also Geraldine Van Bueren (ed) *'The international law on the rights of the child'*, Martinus Nijhoff Publisher (1995), Vol. 35, p. 7, and Hodgson (note 10 above), pp 4-5.

<sup>24</sup> See Detrick (note 23 above), p. 19. See also Kaime (note 15 above), p 12.

<sup>25</sup> See Principle 3 of the 1959 Declaration.

<sup>26</sup> See Principle 4 of the 1959 Declaration.

<sup>27</sup> See Principle 7 of the 1959 Declaration.

<sup>28</sup> See Principle 7 of the 1959 Declaration.

<sup>29</sup> See Principle 9 of the 1959 Declaration.

employment.<sup>30</sup> Moreover, the 1959 Declaration incorporated a clause on non-discrimination. It is also said that this instrument:<sup>31</sup>

was the first international instrument to enshrine the principle that children are entitled to 'special protection' and that such protection must be implemented with reference to 'the best interests of the child', which 'shall be a paramount consideration'.

The text of the 1959 Declaration reflected how the views on the rights of the child had evolved since the endorsement by the League of Nations, in 1924, of the Declaration of Geneva.<sup>32</sup> In this vein, Kaime correctly noted that by entitling children to rights, the 1959 Declaration marked a break with the notion that children were beneficiaries of charity and opened space for the assertion of children as subjects of international law.<sup>33</sup>

In summary, the differences between the two instruments under analysis included the fact that the 1959 Declaration was far-reaching and covered more issues relevant for children than the 1924 Declaration. For example, one of the aspects which markedly distinguished the two instruments was the fact that the 1959 Declaration tasked voluntary organisations and local authorities with responsibilities for children.<sup>34</sup> The imposition of duties on these entities was completely omitted in the 1924 Declaration. In addition, the 1959 Declaration made significant steps, so much so that it was described as a great conceptual leap in thinking of children's rights

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<sup>30</sup> See Principle 9 of the 1959 Declaration.

<sup>31</sup> Kaime (note 15 above), p 13.

<sup>32</sup> Detrick (note 23 above), p 14.

<sup>33</sup> Kaime (note 15 above), p 14.

<sup>34</sup> See Para. 7 of the Preamble to the 1959 Declaration.

for the time when it was adopted<sup>35</sup> in that it made reference to principles such as the best interest of the child and non-discrimination, principles later subsumed in more recent children's instruments such as the CRC and the African Children's Charter. However, like the 1924 Declaration, the 1959 Declaration had the major shortcoming of not being binding and led to the recognition that there was a need for a binding instrument to ensure effective protection of children's rights. The next section discusses this issue in more detail.

### **3.3 The need for a binding instrument protecting children's rights**

The shortcomings of children's rights instruments predating the CRC created a need to adopt a binding instrument; but, when it came to the specific nature of such an instrument, there were concerns that, since numerous other binding international law instruments such as the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic Social and Cultural Rights (ICESCR) contained standards applicable to children,<sup>36</sup> it would be a duplication of effort and resources to have a separate instrument for protecting the interest of children.

However, a dominant view came from countries which supported the adoption of a Convention for protection of children rights. They argued that in the period that preceded the adoption of the Convention children's rights were considered as forms of charity rather than legal entitlements. It

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<sup>35</sup> Van Bueren (note 1 above), p 12.

<sup>36</sup> Detrick (note 23 above), p 4.

was also argued that the instruments predating the Convention lacked a comprehensive approach to the problems that affect children.<sup>37</sup>

Consequently, in 1978, almost twenty years after the adoption of the 1959 Declaration of the Rights of the Child, a proposal was submitted by Poland to the United Nations urging it to adopt a 'Convention on the Rights of the Child'.<sup>38</sup> The Polish proposal was, to a large extent, modelled closely on the 1959 Declaration of the Rights of the Child. It is believed that by shaping the proposal closely to the 1959 Declaration, Poland expected there would be little debate and that this would ensure that the Convention was adopted before the end of 1979, the International Year of the Child.<sup>39</sup> This shows that the intention was clearly to celebrate the adoption of the Convention in the course of the acclaimed International Year of the Child.

The available information indicates that the United Nations took the Polish proposal seriously. As a result, the organisation decided to entrust the United Nations Commission on Human Rights (the Commission), currently the Human Rights Council, to diarise priority discussions with a view to the adoption of the Convention.<sup>40</sup> Ten years later a draft was submitted to General

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<sup>37</sup> As above, pp 19-29.

<sup>38</sup> See Gareth Jones (2005) *Children and development: Rights globalization and poverty*, Sage Publications, p 338, available at [http://eprints.lse.ac.uk/16971/1/Children\\_and\\_development%28LSERO%29.pdf](http://eprints.lse.ac.uk/16971/1/Children_and_development%28LSERO%29.pdf) (accessed 14 November 2012).

<sup>39</sup> Detrick (note 23 above), pp 20-21.

<sup>40</sup> In 1978, the United Nations Commission on Human Rights (Commission) adopted a resolution calling member states to the UN to submit their views on the Polish proposal. In 1979, the Commission established an 'open-ended' Working Group on the Question of a Convention on the Rights of the Child (Working Group) aiming to fast-track the Convention's drafting process. The Working group started its work immediately and by 1988 it had had come up

Assembly for adoption and on 20 November 1989 it was adopted as the 'United Nations Convention on the Rights of the Child'. The Convention came into force on 2 September 1990. Within a period of two years of it had received 192 ratifications.<sup>41</sup> Currently, 193 countries have ratified the Convention.<sup>42</sup> The only exceptions to this are the United States of America (USA), Somalia, and South Sudan.<sup>43</sup>

Importantly, the adoption of the Convention marked the beginning of a second and third stage of development of international law on children's rights, which was distinct from the first stage when the 1924 and the 1959 Declarations were adopted. In the first phase children were seen as objects needing protection; in the second and third, they were granted substantive rights and given the procedural capacity required for them to claim the exercise of these rights.<sup>44</sup> Arguably, the second and third stages are not complete but continue to develop, given that new mechanisms for promotion and protection of children's rights including the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (OPIC)<sup>45</sup> are being

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with the second and almost final draft of the text of the Convention. The draft was later submitted for adoption by the Commission. See also Cynthia Cohen, Susan Kilbourne (1998) 'Jurisprudence on the Committee on the Rights of the Child: A guide for research and analysis', *Michigan Journal of International Law*, Vol. 19, No. 3, p 636.

<sup>41</sup> See Jaap Doek (2006) 'What does the Children's Convention require', *Emory International Law Review*, Vol. 20, p 208.

<sup>42</sup> See website of the United Nations Office of the High Commissioner for Human Rights (OHCHR) for status of ratification of the CRC available at <http://www2.ohchr.org/english/law/crc.htm> (accessed 7 November 2012).

<sup>43</sup> See Chapter 1, section 1.1.

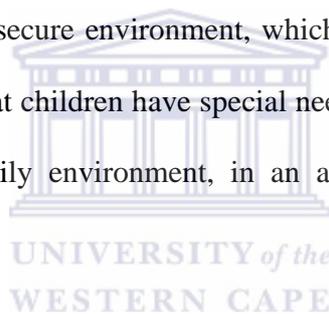
<sup>44</sup> Van Bueren (note 1 above), p 1.

<sup>45</sup> See Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (OPIC), adopted and opened for signature and ratification by UN General Assembly resolution 66/138 of 19 December 2011. See also Godfrey Odongo (2012) 'Caught between progress, stagnation and a reversal of some gains: Reflection's

adopted. Some of these mechanisms are briefly highlighted in the next section providing an overview of the CRC. This is because their analysis falls beyond the scope of this study.<sup>46</sup>

### **3.4 A synopsis on the Convention on the Rights of the Child (1989)**

The CRC represents the most comprehensive attempt to date towards universalising the dominant contemporary discourse on childhood.<sup>47</sup> The Preamble to the CRC defines the aspirations of the Convention. It makes reference to the Universal Declaration on Human Rights and alludes to the fact that in the Declaration childhood is entitled to special care and assistance. Furthermore, the Preamble to the Convention recognises explicitly that the child requires legal protection provided in a free and secure environment, which promotes its dignity and equality. More importantly, it recognises that children have special needs and that they are vulnerable and need to be brought up in a family environment, in an atmosphere of happiness, love and understanding.<sup>48</sup>



The Convention has 54 provisions which address a variety of child-related issues, including children's civil and political, and social, economic and cultural rights.<sup>49</sup> These include the rights

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on Kenya's record in implementing children's rights norms', *African Human Rights Law Journal*, Vol.12, No. 1, p 113.

<sup>46</sup> See Chapter 1, section 1.5.

<sup>47</sup> Abhinaya Ramesh (2001) 'UN Convention on the Rights of the Child: Inherent weaknesses', *Economic and Political Weekly*, p 1948.

<sup>48</sup> See Para. 7 of the Preamble to the CRC.

<sup>49</sup> See Kaime (note 15 above), p 14.

to life, survival and development;<sup>50</sup> the right to health<sup>51</sup> and the child's right to be heard in all matters that affect them.<sup>52</sup> It also covers the right to name and nationality,<sup>53</sup> freedom of expression<sup>54</sup> and religion,<sup>55</sup> the right to health<sup>56</sup> and the right to education.<sup>57</sup> The CRC embodies four pillar principles which inform its provisions:<sup>58</sup> non-discrimination;<sup>59</sup> the best interest of the child;<sup>60</sup> the child's right to life, survival and development;<sup>61</sup> and the right of the child to be heard on matters affecting him or her.<sup>62</sup>

The CRC succeeded in establishing binding mechanisms for the review of its enforcement.<sup>63</sup> To this end, Article 43 of the CRC creates a Committee on the Rights of the Child (CRC

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<sup>50</sup> Article 6 of the CRC.

<sup>51</sup> Article 24 of the CRC.

<sup>52</sup> Article 12 of the CRC.

<sup>53</sup> Article 7 of the CRC.

<sup>54</sup> Article 13 of the CRC.

<sup>55</sup> Article 14 of the CRC.

<sup>56</sup> Article 24 of the CRC.

<sup>57</sup> Articles 28 and 29 of the CRC.

<sup>58</sup> Michael Gose (2002) *'The African Charter on the Rights and Welfare of the Child'*, Community Law Centre, p 17.

<sup>59</sup> Article 2 of the CRC.

<sup>60</sup> Article 3 of the CRC.

<sup>61</sup> Article 6 of the CRC.

<sup>62</sup> Article 12 of the CRC.

<sup>63</sup> See Jaap Doek (2003) *'The UN Convention on the Rights of the Child: Some observations on the monitoring and the social context of its implementation'*, *University of Florida Journal of Law & Public Policy*, Vol. 14, p 127. See also Kaime (note 15 above), p 82.



Committee) tasked with monitoring the implementation of the Convention, and mandates it to examine the progress made by state in achieving their duties under the Convention.<sup>64</sup> Periodically, State Parties' are required to submit reports to the CRC Committee with details on the measures they have taken to give effect to the rights contained in the Convention.<sup>65</sup>

Additionally, the wide scope of the Convention is supplemented by three Optional Protocols covering diverse aspects relevant for child welfare and child protection. The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (Optional Protocol on the involvement of Children in Armed Conflict)<sup>66</sup> deals with the minimum age for recruitment of children, and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography)<sup>67</sup> protects children from abuses such as pornography and prostitution. Lastly, as mentioned in the previous section, the OPIC provides a complaint procedure which can be used to advance children's rights.<sup>68</sup>

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<sup>64</sup> See Article 43(1) of the CRC.

<sup>65</sup> A report must be submitted within two years of entry into force of the Convention for the State party concerned and thereafter every five years. See Article 44(1) (a) and (b) of the CRC. See section 3.3.4 for more details on the mandate and functions of the CRC Committee.

<sup>66</sup> Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (Optional Protocol on the Involvement in Armed Conflict), UN Doc. A/RES/54/263, adopted in 2000 and entered into force in 2002.

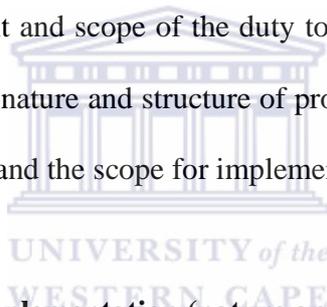
<sup>67</sup> Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography), UN Doc. A/RES/54/263, adopted in 2000 and entered into force in 2002.

<sup>68</sup> See section 3.3 above.

The CRC is celebrated for many reasons, including the fact that it was ratified very quickly, entered into force in record time, and has the longest and the most comprehensive list of human rights.<sup>69</sup> However, I submit that all these gains are empty if the CRC's implementation is not achieved. The next section explains that implementation is a peremptory duty imposed on state parties to the CRC. This is later followed by an appraisal of the framework for implementing the CRC.<sup>70</sup>

### **3.5 The duty to implement the Convention**

This section analyses the nature and structure of provisions on implementation as embodied in the CRC and investigates the ambit and scope of the duty to give effect to the Convention. The discussion opens by looking at the nature and structure of provisions for implementing the CRC, and later on investigates the ambit and the scope for implementing the CRC.



#### **3.5.1 Analysis of provisions on implementation (nature and structure)**

The Convention embodies two groups of provisions on implementation.

On the one hand, the first comprises provisions entailing the duty to implement the entire Convention. For the purposes of this study, precepts falling in this group shall be termed the “general provisions on implementation”. These include provisions such as Articles 2 (non-discrimination), 3 (best interest of the child), and 4 (commonly known as general provision on

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<sup>69</sup> Kaime (note 15 above), p 16.

<sup>70</sup> See section 3.7.

obligations under the CRC)<sup>71</sup>, which are framed in very general terms.<sup>72</sup> It is submitted that these provisions have particular significance for engendering the obligation to implement all the rights protected in the CRC and for imposing strict observance of the procedural rules on reporting and so forth. State parties are not allowed to disregard the duties engendered by such “general provisions on implementation” unless reservations are made.<sup>73</sup> The example of Article 4 of the CRC is clear in setting out the duty of state parties to take all appropriate measures to implement the rights<sup>74</sup> contained in the Convention.

On the other, the second group comprises provisions entailing the duty to implement a specific right protected in the Convention. For the purposes of this study, all provisions falling under this group shall be termed “self-executing provisions on implementation”. Often, these provisions are formulated in a precise manner encapsulating the duty to implement a particular right or a combination of rights protected within a specific provision of the CRC. Examples of these provisions are Articles 7(2) (on child’s right to registration after birth), 24(2) (on the right to health), and 32(2) (concerning the protection of children against economic exploitation).

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<sup>71</sup> See Paras. 2-3 of General Comment No. 5.

<sup>72</sup> Article 2 of the CRC provides that States undertake to ‘ensure the rights set forth in the’ Convention ‘to each child within their jurisdiction’; in Article 3 of the CRC States ‘undertake to ensure the child such protection and care as is necessary for his or her well-being’ and to ‘take all appropriate legislative and administrative measures’; and by Article 4 of the Convention States ‘undertake all appropriate legislative, administrative, and other measures for the implementation of the rights’ contained in the Convention. See Articles 2-4 of the CRC.

<sup>73</sup> According to the Vienna Convention on the Law of Treaty, a reservation is a statement by a state when signing, ratifying, accepting, approving, or acceding to a treaty, whereby the state concerned purports to exclude or to modify the legal effect of certain provisions of the treaty in their application in that state. See Articles 2(1)(d) and 19 of the Vienna Convention on the Law of Treaties (Vienna Convention 1969), adopted in 1969 and entered in force in 1980.

<sup>74</sup> My emphasis added.

It should be noted that CRC provisions on implementation, whether “general” or “self-executing”, may be formulated in a manner that either explicitly embodies the term “implementation” or uses another different term to replace it.<sup>75</sup> Indeed, the CRC very often, when the word implementation is not explicitly incorporated within the text of its provisions, uses other term, such as “*States Parties undertake to*”, or “*States Parties shall ensure*”, and “*States shall assure*”, to point to the existence of an underlying obligation to implement the Convention or a specific right protected in it.<sup>76</sup> This wording not only highlights that implementation is a duty, but shows that it is crucial for achieving the objectives of the Convention.<sup>77</sup>

### **3.5.2 The ambit and the scope for implementing the Convention**

The scope and the ambit of the duty to implement the CRC are defined in the Convention itself and in the various authoritative views expressed in the general comments of the CRC Committee which monitors implementation of the Convention.<sup>78</sup> It is possible to distinguish two elements, namely, the ‘territorial’ component capturing the ambit of the obligation to give effect the

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<sup>75</sup> See, for example, Articles 24(2) of the CRC (right to health), and 7(2) of the CRC (right to name and nationality).

<sup>76</sup> See, for example, Article 12 of the CRC (right to be heard), Article 18 of the CRC (responsibility of parents), Article 20 of the CRC (special protection for children), Article 21 of the CRC (adoption), Article 22 of the CRC (children seeking refuge), Article 27 of the CRC (living standards), Article 33 of the CRC (measures against drugs), Article 34 of the CRC (sexual exploitation and abuse), Article 35 of the CRC (abduction, sale, and traffic of children), and so forth.

<sup>77</sup> Doek shares this view. In this regard, he noted that the question, ‘What does the Children’s Convention require?’ can be answered by focusing on the actions required from state parties in order for them to implement the Convention. See Doek (note 41 above), p 199.

<sup>78</sup> David Weissbrodt et al (2011) ‘The role of the Committee on the Rights of the Child in interpreting and developing humanitarian law’, *Harvard Human Rights Journal*, Vol. 24, p 116.

Convention, and the ‘substantive’ or ‘material’ aspects relating to scope, content or subject matters in the Convention which must be implemented or translated into practice. The next sections discuss these elements.

### **3.5.2.1 Setting the ambit of the duty to implement the Convention**

With regard to the ‘territorial’ aspect (ambit), the CRC in its various provisions enjoins states to implement the Convention within their territories. This is evident in provisions such Articles 2(1) (outlawing non-discrimination), and 30 (speaking to minority and indigenous groups) which use wording such as “*within their jurisdiction*”<sup>79</sup> limiting the obligation of states to implement the Convention in their respective territories.<sup>80</sup> A similar formulation can also be found in provisions such as Articles 2(1), 30, and 38 of Convention.

When expanding on the general measures of implementation of the Convention, the CRC Committee noted that:<sup>81</sup>

[w]hen States ratify the Convention, they take upon themselves obligations not only to implement it within their jurisdiction, but also to contribute, through international cooperation, to global implementation (...)

It shows that states parties to the CRC also have a duty to ensure that the implementation of children’s rights contained in the Convention occurs in the territory of other participating states.

Possibly the question of state sovereignty could make it difficult for any state willing to assist

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<sup>79</sup> My emphasis added.

<sup>80</sup> See generally the formulation of Articles 2(1), 30, and 38 of the CRC.

<sup>81</sup> See Para. 7 of CRC Committee General Comment No. 5 on the General Measures of Implementation of the Convention on the Rights of the Child, UN Doc. CRC/GC/2003/5 (General Comment No. 5).

another sovereign state to act without trampling on the sovereignty of the benefiting state. However, the CRC makes it possible for sovereign states to assist each other in fulfilling their obligations under the Convention through international cooperation.<sup>82</sup> To this end, Article 4 of the CRC unequivocally states:

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international cooperation.<sup>83</sup>

This means that “*implementation of the Convention is a cooperative exercise of states of the world.*”<sup>84</sup> Often it is poor countries that fail to fulfil their obligations under the Convention. Elsewhere, I submitted that while this is partly due to lack of resources, it also stems from challenges that arise in international cooperation when the assistance given to poor countries has strings attached.<sup>85</sup> It becomes important to ensure that cooperation is done open-heartedly and without placing burdens on benefiting countries.<sup>86</sup> Healthier states must give these countries

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<sup>82</sup> See Article 4 of the CRC.

<sup>83</sup> My emphasis added. See also Mervat Rishmawi, ‘A commentary on the United Nations Convention on the Rights of the Child – Article 4: The nature of State Parties’ Obligations’, Martinus Publisher (2006), pp 6-7.

<sup>84</sup> See Para. 60 of General Comment No. 5.

<sup>85</sup> For details, see Aquinaldo Mandlate, ‘Implementing the Convention on the Rights of the Child in Angola and Mozambique: Opportunities and challenges’, pp 22-23, paper presented at Children’s Rights Conference held in Belfast, Northern Ireland, 1 and 2 June 2011; copy on file with the author.

<sup>86</sup> As above.

assistance to help them fulfil their duties under the Convention.<sup>87</sup> Moreover, countries needing assistance must be bold enough to request assistance from countries as well. This is mainly because the CRC enjoins state parties to demonstrate that they have implemented the rights contained in Convention “to the maximum extent of their available resources”,<sup>88</sup> and where necessary, they must seek international cooperation to fulfil their obligations.<sup>89</sup>

### 3.5.2.2 Delineating the scope of the duty to implement the Convention

The CRC also defines the material content or substantive limits defining the scope of the duty to implement the Convention. Articles 4 and 41 of the CRC are the central provisions in this regard. Article 4 provides that state parties must “undertake all appropriate (...) measures for the implementation of the rights recognised” in the Convention.<sup>90</sup> This means that states must implement all rights contained the Convention, unless they made reservations.

According to Article 41 of the CRC, states are required to implement the rights incorporated in other provisions contained in instruments which are more conducive for the realisation of children’s rights, including statutes and treaties alike.<sup>91</sup> This provision is critically important for two reasons.

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<sup>87</sup> See Wabwile for a detailed discussion on how states can help each other implementing the CRC in Michael Wabwile, ‘Legal protection of social and economic rights for children in developing countries: Reassessing international cooperation and responsibility’, Intersentia (2010), pp 45-74.

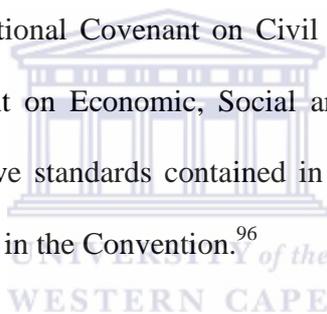
<sup>88</sup> See Article 4 of the CRC.

<sup>89</sup> See Para. 7 of General Comment No. 5

<sup>90</sup> My emphasis added.

<sup>91</sup> Article 41 of the CRC reads as follows:

First, it widens the material limits of states' duty to implement children's rights by expanding the scope of this duty to include the obligation to implement provisions of other instruments which are more conducive for the realisation of children's rights. Evidently, this helps to further children's right in particular context such as in Africa, where relevant issues of children's rights which are not fully regulated in the CRC have been regulated in other instruments such as the ACRWC. It strengthens the normative commands of relevant child-related instruments such as the ACRWC, which address certain elements of children's rights not regulated in the Convention.<sup>92</sup> Consequently, it is not surprising that the CRC Committee encourages state parties to the CRC to ratify other treaties such as the Convention on the Rights of Persons with Disabilities (CRPD),<sup>93</sup> the International Covenant on Civil and Political Rights (ICCPR),<sup>94</sup> as well as the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>95</sup> in order to ensure that the progressive standards contained in these instruments are also used to advance children's rights protected in the Convention.<sup>96</sup>



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Nothing in the present Convention shall affect any provisions which are more conducive to the realisation of the rights of the child and which may be contained in:

- (a) The law of a State party; or
- (b) International law in force for that State.

<sup>92</sup> For example, see Article 30 of the African Children's Charter dealing with children of imprisoned mothers.

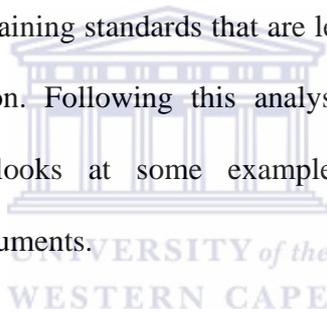
<sup>93</sup> International Convention on the Rights of Persons with Disabilities (CRPD), GA Resolution adopted 2006 and entered into force in 2008, UN. Doc. A/AC.265/2006/L.6.

<sup>94</sup> International Covenant on Civil and Political Rights (ICCPR), GA Resolution 2200A (XXI), adopted in 1966 and entered into force in 1976.

<sup>95</sup> International Covenant on Economic, Social and Cultural Rights (ICESCR), GA Resolution 2200A (XXI), adopted 1966 and entered into force in 1976.

<sup>96</sup> See Para. 17 of General Comment No. 5.

Second, Article 41 is important for indentifying the nature of child-related instruments or provisions, other than those found in the CRC, which states can employ in their respective jurisdictions to give effect to the provisions of the Convention. It makes it clear that states can implement other instruments, whether domestic laws or treaties alike, as long as these contain standards that are more conducive to the realisation of children's rights than the Convention itself. This requirement relates to the fact that the CRC sets out minimum standards for promotion and protection of children's rights and it implies that giving effect to less protective standards found in other child-related instruments amounts to a breach of the principles embodied in the Convention. This means that states parties are not allowed to implement or to give effect to any instruments containing standards that are less protective to children in relation to those found in the Convention. Following this analysis of the duty to implement the Convention, the next section looks at some examples of comparative standards on implementation from selected instruments.



### **3.6 Comparative standards on implementation of selected instruments**

It is customary to think that human rights treaties impose three levels of obligations: the obligation to respect, to protect, and to fulfil the rights protected contained in them.<sup>97</sup> These three

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<sup>97</sup> The duty to respect requires the state to refrain or to abstain from taking actions that may infringe upon the enjoyment of human rights. The duty to protect entails an obligation for the state to ensure that other stakeholders including non-state actors do not infringe upon the enjoyment of human rights, and the duty to fulfill concerns the obligation of states to adopt measures to ensure the realisation of human rights (children's human rights included). See Danwood Chirwa (2005) '*Towards binding economic, social and cultural rights obligations of non-state actors in international and domestic law: A critical survey of emerging norms*', unpublished LLD thesis, University of the Western Cape, p 181. See also Sakiko Fukuda-Parr, Terra Lawson-Remer, Susan Randolph (2009) 'An index of Economic and Social Rights fulfillment', *Journal of Human Rights*, Vol. 8, No. 3, p 198.

obligations are related to the duty to implement the specific rights protected in these instruments. In the next sections I will show how the duty to implement contained in other treaties can be used to advance the implementation of the CRC. It should be noted that the instruments which I will discuss were selected merely for the purpose of understanding the content of the duty under analysis.

### **3.6.1 Some examples from global instruments**

Three examples of global instruments are discussed: the Universal Declaration of Human Rights (UDHR),<sup>98</sup> the ICCPR, and the ICESCR. Of them, the UDHR is the only non-binding instrument. However, it was decided to include the Declaration in the discussion because there is broad consensus that it has attained a universal status and because the UDHR plays an important role in shaping the content of human right treaties such as the ICCPR and the ICESCR.<sup>99</sup>

#### **3.6.1.1 The Universal Declaration of Human Rights**

It has been emphasised that the UDHR is a non-binding instrument.<sup>100</sup> However, it incorporates provisions which are pertinent for the implementation of human rights treaties, and particularly the CRC. Many rights protected in the UDHR are accorded protection in other major human rights treaties. For example, the right to life protected in Article 3 of the UDHR is given

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<sup>98</sup> Universal Declaration of Human Rights (UDHR), GA Resolution 217/A, UN Doc. A/810.

<sup>99</sup> Beth Simmons (2009) 'Civil rights in International Law: Compliance with aspects of the 'International Bill of Rights'', *Indiana Journal of Global Legal Studies*, Vol. 16, No. 2, pp 439-440.

<sup>100</sup> Laurie-Ann Jackson (2007) *'The International Covenant on Economic, Social and Cultural Rights: A critical examination of the relative importance of resource constraints on benchmarks and benchmarking processes in the African context'*, unpublished LLM dissertation, University of Cape Town, p 9.

protection in Article 6 of the CRC and in Article 6 of the ICCPR.<sup>101</sup> Another striking example is the protection conferred to the right to health under Article 25(1) of the UDHR. This right is also protected in Article 24 of the CRC, Article 12 of the ICESCR, and Article 12(1) of CEDAW.

The proliferation of legally binding instruments containing UDHR standards means that states that ratified these instruments are committed to give effect to rights protected in the Declaration. It also indicates that the UDHR has attained a universal<sup>102</sup> status, which makes the Declaration important for understanding the standards embedded in human rights instruments such as the CRC which expand on its provisions.

The Preamble to the UDHR sets for the implementation of the Declaration. To this end, it pledges for full realisation, recognition, and observance of the rights protected in the UDHR.<sup>103</sup> According to Article 6 of the UDHR, states are required to adopt legislative measures to fulfil, for everyone, the right to be recognised as a person before the law. Article 7 of the UDHR requires states to adopt laws to ensure equality of everyone without discrimination. These provisions make it very clear that enacting legislation plays a significant role to give effect to the standards contained in the UDHR. It is submitted that the legislative measures required under the UDHR are not limited and may include, inter alia, the conclusion of global and regional treaties as well as enactment of domestic legislation (including review of domestic laws) seeking to implement the rights protected in the Declaration.

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<sup>101</sup> See Article 3 of the UDHR, Article 6 of the ICCPR, and Article 6 of the CRC.

<sup>102</sup> Jackson (note 100 above), p 9.

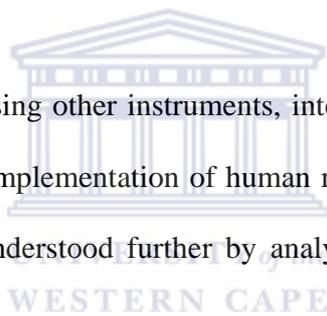
<sup>103</sup> See Paras. 6-9 of the Preamble to the UDHR.

Another striking provision referring to implementation as captured in the UDHR is Article 22 stating that:<sup>104</sup>

[e]veryone (...) has the right to social security through national and international co-operation and in accordance with the organisation and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

As can be seen, this provision makes the case for national and international cooperation among nations to ensure the realisation of the rights enshrined in the UDHR, and, more so, for the realisation of human rights contained in other instruments embodying UDHR standards (the CRC included).

As will be seen later when discussing other instruments, international cooperation is a measure which can be used to further the implementation of human rights. Reference to implementation under UDHR standards can be understood further by analysing the ICCPR and the ICESCR which expand on its standards.<sup>105</sup>



### **3.6.1.2 Illustrations from the Covenant on Civil and Political Rights**

It is laudable that the ICCPR and many other instruments, including the CRC and the Convention on Elimination of all Forms of Discrimination against Women (CEDAW),<sup>106</sup> expand on the

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<sup>104</sup> See Article 22 of the UDHR.

<sup>105</sup> Tsegaye Regassa (2009) 'Making legal sense of human rights: The judicial role in protecting human rights in Ethiopia', *Mizan Law Review*, Vol. 3, No. 2, pp 294-295.

<sup>106</sup> Convention on Elimination of all Forms of Discrimination against Women (CEDAW) adopted in 1979 and entered into force in 1981, GA Resolution 34/180, UN Doc. A/34/46.

content of civil and political rights contained in the UDHR.<sup>107</sup> Amongst many rights protected in the UDHR, the Covenant covers the right to life<sup>108</sup> and the right to equality between men and women.<sup>109</sup> It further protects the right to freedom of opinion and the right to freedom of religion.<sup>110</sup> As already pointed out, the rights indicated above and other civil and political rights are also enshrined in the CRC. In this way, it becomes easy to understand that the interpretation of provisions relating to the implementation of civil and political rights covered in the ICCPR can be used to understand how these rights must be implemented under the CRC. This was confirmed when the CRC Committee acknowledged that the interpretative views of other treaty monitoring bodies on provisions relating to CRC standards can also be used to interpret the standards of the Convention.<sup>111</sup>



Thus, similar to Article 4 of the CRC, Article 2(2) of the ICCPR states that:

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.<sup>112</sup>

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<sup>107</sup> Simmons (note 99 above), p 440.

<sup>108</sup> See Article 6 of the ICCPR and Article 3 of the UDHR.

<sup>109</sup> Article 3 of the ICCPR and Articles 1 and 7 of the UDHR.

<sup>110</sup> See Articles 18 (freedom of religion), and 19 (freedom of opinion) of the ICCPR.

<sup>111</sup> See, for example, Para. 40 of CRC Committee General Comment No. 4 on Adolescent Health and Development in the Context of the Convention on the Rights of the Child, UN Doc. CRC/GC/2003/4 (General Comment No. 4). See also Paras. 5 and 56 of General Comment No. 5.

<sup>112</sup> My emphasis added.

In interpreting this provision the Human Rights Committee, which monitors the implementation of the ICCPR,<sup>113</sup> reiterated the need for state parties to the Covenant not only to adopt legislative measures, but also to complement them with other efforts to enable individuals to enjoy their rights under the Covenant.<sup>114</sup> In a way this relates to the duties underscored in Article 4 of the CRC, which, besides enjoining states to undertake legislative measures, also requires them to adopt other measures to implement the rights enshrined in the Convention.<sup>115</sup>

Importantly, the need to adopt legislative measures and other measures to give effect to the rights protected in the ICCPR is repeatedly stressed in various general comments adopted by the Human Rights Committee.<sup>116</sup> This shows that, under the ICCPR, considerable weight is given to the role legislation and other measures can play in advancing the rights protected in the Covenant. However, it is regrettable that in its General Comment No. 3 speaking to the obligations of state in relation to the Covenant, the Human Rights Committee did not expand on what “other measures” entailed in the ICCPR mean.<sup>117</sup>

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<sup>113</sup> See Article 28 of the ICCPR.

<sup>114</sup> See Paras. 1-2 of the Human Rights Committee General Comment No. 3 on Implementation at National Level, UN Doc. CCPR General Comment No. 3 (Article 2) of 1981 (CCPR General Comment No. 3).

<sup>115</sup> See Article 4 of the CRC. See also Ramesh (note 47 above), p 1948.

<sup>116</sup> For instances, see Para. 6 of the Human Rights Committee General Comment No. 6 on the Right to Life, UN Doc. CCPR General Comment No. 6 (article 6) of 1982 (CCPR General Comment No. 6), and Paras. 11-12 of Human Rights Committee General Comment No. 20 replacing General Comment No. 7 concerning the Prohibition of Torture and Cruel Treatment or Punishment, UN Doc. CCPR General Comment No. 20 (Article 7) of 1992 (CCPR General Comment No. 20).

<sup>117</sup> This is without prejudice of the fact that the Human Rights Committee urged states to publicise the Covenant widely. See Para. 2 of CCPR General Comment No. 20.

### 3.6.1.3 The Covenant on Economic, Social and Cultural Rights

Generally, the ICESCR is a treaty representing a global international commitment to advance socio-economic and cultural rights.<sup>118</sup> Among others, it deals with the right to education<sup>119</sup> and the right to health,<sup>120</sup> which form part and parcel of children's rights incorporated in the CRC.<sup>121</sup> In this way, the ICESCR standards relating to the interpretation and application of socio-economic and cultural rights can also be used for furthering children socio-economic rights contained in the CRC. In support of this view, the argument that the interpretative views of other treaty bodies can be used to understand the duty to implement the CRC is maintained.<sup>122</sup>

Thus, Article 2 of the ICESCR is the major general legal basis covering the duties placed under the Covenant.<sup>123</sup> It states that:<sup>124</sup>

[e]ach State party to the (...) Covenant undertakes to take steps, individually and through international assistance and co-operation (...) with view to achieving progressively the realisation of the rights recognised in the (...) Covenant, by all appropriate means, including particularly the adoption of legislative measures.<sup>125</sup>

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<sup>118</sup> Jackson (note 100 above), pp 11-12.

<sup>119</sup> Article 13 of the ICESCR.

<sup>120</sup> Article 12 of the ICESCR.

<sup>121</sup> See Articles 24 and 28 of the CRC.

<sup>122</sup> See section 3.6.1.2 above.

<sup>123</sup> See Para.1 of Committee on Economic Social and Cultural Rights General Comment No. 3 on the Nature of State Parties Obligations, UN Doc CESCR General Comment No. 3 (Article 2) of 1990 (CESCR General Comment No. 3). See also Dejo Olowu, *'An integrative rights-based approach to human development in Africa'*, Pretoria University Law Press (2009), p 26.

<sup>124</sup> See Article 2 of the ICESCR.

<sup>125</sup> My emphasis added.

In interpreting this provision, the Committee on Economic Social and Cultural Rights (CESCR Committee),<sup>126</sup> which monitors the implementation of the Covenant, said that states are required to take steps to achieve the realisation of the socio-economic rights protected in the Covenant.<sup>127</sup> The CESCR Committee further explained that the duty to take steps enshrined in the Covenant is an immediate duty which may involve, for example, the adoption of legislation and policy documents envisaging the realisation of the rights in consideration. It also emphasised that taking steps to ensure the realisation of the rights under the ICESCR is an obligation of conduct.<sup>128</sup> It means that, as in the ICCPR, the ICESCR places emphasis on legislative action as a pivotal element in the promotion and protection of human rights, particularly socio-economic and cultural rights contained in the Covenant, and by implication, children's socio-economic rights protected in the CRC.<sup>129</sup> Importantly, the CESCR Committee added policy measures to the list of the type of measure that can be taken to implement the right protected in the Covenant.

The Covenant also envisages international cooperation for the implementation of the rights enshrined in the Covenant. This is evident by reference in Article 2(1) of the need for states to engage in “international assistance” and “co-operation”.<sup>130</sup>

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<sup>126</sup> The Committee on Economic Social and Cultural Rights (CESCR) was established under the United Nations Economic and Social Council.

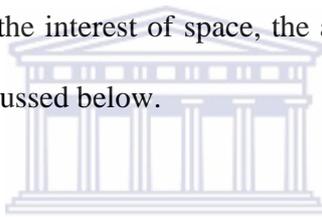
<sup>127</sup> See Paras. 2-3 of CESCR General Comment No. 3.

<sup>128</sup> This is the authors view on the interpretation of the ICESCR as given in Paras. 1-3 of CESCR General Comment No. 3.

<sup>129</sup> See section 2.3.2 above.

<sup>130</sup> See generally Article 2(1) of the ICESCR. See also Para. 13 of CESCR General Comment No. 3.

Building on the content of Article 2, the CESCR Committee explained that “*among other measures which may be considered appropriate*” to implement the Covenant, states must provide judicial remedies<sup>131</sup> as well as administrative, financial, educational and social measures.<sup>132</sup> Reference is also made, but not limited to, the need to adopt programmes envisaging the implementation of the rights protected in the ICESCR.<sup>133</sup> It is my contention that by implication of the similarities of the rights protected in the ICESCR and the CRC, all measures identified as capable to give effect to the right protected in the Covenant can be used to advance the implementation of the rights enshrined in the Convention. This creates grounds for believing that much can be learned from the rules governing the implementation of other global human right treaties. However, in the interest of space, the analysis will now explore examples from selected regional treaties, discussed below.



### **3.6.2 Examples from selected regional treaties**

Like global instruments, many regional treaties contain provisions listing certain measures which are required to give effect to their provisions. Although some of these measures may be specific to the instruments concerned, studying their provisions provides lessons on how to implement treaties like the CRC. The following sections look at examples from selected regional instruments from America, Europe and Africa. The instruments from the regions that were

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<sup>131</sup> See Para. 5 of CESCR General Comment No. 3.

<sup>132</sup> See Para. 7 of CESCR General Comment No. 3.

<sup>133</sup> See Paras. 11-12 of CESCR General Comment No. 3.

identified were selected on the grounds that they have relatively more developed human rights systems than regions such as the Asian and the Arab world.<sup>134</sup>

### 3.6.2.1 Illustrations from the American Convention on Human Rights

The American Convention on Human Rights (ACHR)<sup>135</sup> is part of the second-oldest regional system of protection of human rights.<sup>136</sup> This instrument, also known as the Pact of San José, was adopted in 1969 under the auspices of the Organisation of American States (OAS). It sets out provisions speaking to the protection and promotion of human rights of all citizens within the jurisdiction of member states of the OAS. With the exception of economic, social and cultural rights, which are not protected in the Convention, many standards of the ACHR apply to children.<sup>137</sup> These include provisions speaking to the right to name,<sup>138</sup> the right to nationality,<sup>139</sup> as well as the freedom of association.<sup>140</sup> It also has a provision speaking to the right to life.<sup>141</sup> As

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<sup>134</sup> For example, as at 2006 the revised Arab Charter of Human Rights (Arab Charter), which came into existence in late 2004, had not entered into force. The Arab Charter has also been criticised for the lack of an enforcement mechanism to fast-track implementation of the Charter. See Fekadeselassie Kidanemariam (2006) *'Enforcement of human rights under regional human rights mechanisms: A comparative analysis'*, unpublished LLM dissertation, University of Georgia, p 21.

<sup>135</sup> American Convention on Human Rights or Pact of San José (ACHR) adopted in 1969 and entered into force in 1978.

<sup>136</sup> It is believed that the European regional human rights system is the oldest. See Valerio Mazzuoli (2011) *'The Inter-American human rights protection system: Structure, functioning and effectiveness in Brazilian law'*, *African Human Rights Law Journal*, Vol. 11, No. 1, p 195.

<sup>137</sup> As above, p 198.

<sup>138</sup> Article 18 of the ACHR.

<sup>139</sup> Article 20 of the ACHR.

<sup>140</sup> Article 16 of the ACHR.

pointed out above, all these rights are protected in the CRC. In addition, the ACHR calls for the realisation of socio-economic and cultural rights, which is one distinctive aspect characterising the CRC.<sup>142</sup> It can be argued, then, that ACHR standards are relevant for promoting children's rights and, therefore, for understanding the implementation of CRC.

The ACHR states that “[e]very minor child has the right to measures of protection required by his condition as a minor on the part of his family, society and the State.”<sup>143</sup> As per Article 2 of the ACHR, states are required to adopt legislative and other measures necessary to give effect to the rights and freedoms protected in the Convention.<sup>144</sup>

The need to adopted measures to give effect to the right protected under the ACHR has been reiterated by the two oversight mechanisms (the Inter-American Commission on Human Rights<sup>145</sup> and the Inter-American Court of Human Rights)<sup>146</sup> that monitor the implementation of the Convention.<sup>147</sup> For example, the Inter-American Court's of Human Rights decision in the

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<sup>141</sup> See Article 18 and 20 of the ACHR.

<sup>142</sup> Article 26 of the ACHR. See also Article 4 of the CRC.

<sup>143</sup> Article 19 of the ACHR.

<sup>144</sup> See Article 2 of the ACHR.

<sup>145</sup> This body was originally established under a resolution of the Organisation of American States (OAS). However, later it was revamped and given powers under the ACHR. See Kidanemariam for a detailed account of the history and functions of the American Commission in Kidanemariam (note 134 above), pp 17-18.

<sup>146</sup> The Inter-American Court of Human Rights has both contentious and advisory functions. See Kidanemariam (note 134 above), pp 17-18.

<sup>147</sup> While the Inter-American Commission on Human Rights is quasi-judiciary body the Inter-American Court of Human Right exercises a fully fledged jurisdictional mandate to ensure the implementation of the rights contained in

case of “*Street Children*” (*Villagrán Moralés et al.*) v. *Guatemala*<sup>148</sup> ordered the state of Guatemala to repair damages suffered by the victims. The case concerned the violation of the right to life protected in the ACHR. The applicant argued that Guatemala violated fundamental rights of children living in the streets by not providing any support or assistance to them. It was the applicant’s contention that the Guatemala had violated the right to life protected in Article 4 of the ACHR. The Court found the respondent state of Guatemala in breach of its duties under the ACHR, and ordered it to repair the damages suffered by the victims. Although it is not known if the decision was executed, this proved that when a violation occurs, judicial remedial measures can contribute towards the implementation of ACHR standards.

In the same vein, the Inter-American Human Rights Commission has also decided many cases, including a petition concerning the violation of children’s rights by the Federative Republic of Brazil.<sup>149</sup> The latter case concerned the violation of rights protected in the ACHR pursuant to the

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the ACHR. Another distinct feature of the Inter-American system of human rights which can be used to advance the rights protected in the ACHR is the Rapporteur on the Rights of the Child, established under the Inter-American Commission on Human Rights. In discharging its duties the Rapporteur assists the Commission. To this end, the Rapporteur analyses and evaluates the situation of human rights of children, undertakes on-site visits, conducts studies and promotes activities envisaging the advancement of children’s rights. See Articles 19 and 41 of the ACHR.

<sup>148</sup> Paras. 57-64, and 97-122, *Street Children v. Guatemala*, available at <http://cidh.org/Ninez/docyjurisprudenciaengCorte.htm> (accessed 1 July 2011).

<sup>149</sup> See *Petition No. 12.328 Adolescents in custody of FEBEM*, Report No. 39/02 of October 9, 2002, available at <http://cidh.org/Ninez/docyjurisprudenciaengCIDH.htm> (accessed 1 July 2011). See also See Paras. 22-26 of *Petition No. 12.328 Adolescents in custody of FEBEM*, Report No. 39/02 of October 9, 2002, available at <http://cidh.org/Ninez/docyjurisprudenciaengCIDH.htm> (accessed on 1 July 2011), and case *12.426 y 12.427 Emasculated children of Maranhao*, Report No. 43/06 of March 15, 2006, available at <http://cidh.org/annualrep/2006eng/BRAZIL.12426-12427eng.htm> (accessed 1 July 2011).

conditions in which adolescents were being held and tortured in a prison in São Paulo. It also concerned maltreatment and the degrading conditions in which children were being held. The respondent state of Brazil argued that the petitioners did not give a true picture of the situation of prisons in the country and cited development plans to support the argument that improvements were taking place. Despite the arguments of the respondent, the Commission found the case admissible. It is submitted that this opened space to uphold children's rights to special measures of protection from the state as envisaged in the ACHR.<sup>150</sup>

Views on matters concerning the implementation of children's rights contained in the ACHR can also be found in the jurisprudence of the Inter-American Court; these are contained mainly in the Court's advisory opinions.<sup>151</sup> However, there are few instances when the Court issued advisory opinions addressing matters relating to children and the implementation of their rights. Thus far, the advisory opinion on "*Juridical Status and Human Rights of the Child*" is among the few, if not the only opinion of the Court which speak to matters concerning children.<sup>152</sup> Besides other issues addressed in that opinion, the Court adopted the concept of "comprehensive protection for children" entrenched in the CRC, which entails the transition into a system based on responsibilities and guarantees with respect to children. In addition, the Court said that the ACHR must be interpreted in a way that compels States Parties to protect children and guarantee

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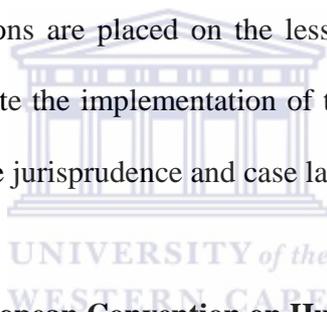
<sup>150</sup> As above.

<sup>151</sup> See Kidanemariam (note 134 above), p 18.

<sup>152</sup> Advisory opinion *OC-17/02 on Juridical Status and Human Rights of the Child*, adopted 28 August 2002, available at [http://www1.umn.edu/humanrts/iachr/series\\_A\\_OC-17.html](http://www1.umn.edu/humanrts/iachr/series_A_OC-17.html) (accessed 5 July 2011).

their rights.<sup>153</sup> It can be argued, therefore, that the judgments, standards and or opinions of the Inter-American Court and the Inter-American Commission relating to children's rights protected in the ACHR can be used to inform the manner in which the CRC may be interpreted to foster adequate implementation of the Convention.

Although the Inter-American system of human rights seems proactive in terms of ensuring the implementation of the rights protected in the ACHR, it falls short by lacking a specific document, such as general comments emanating from treaty monitoring bodies, which elaborates on the content of the provisions of the ACHR and expands on the nature of member states' obligations. However, no restrictions are placed on the lessons to be learned from the human rights system in analysis to promote the implementation of the CRC at national level given the insights that can be gained from the jurisprudence and case law of the Commission and Court.



### **3.6.2.2 Illustrations from the European Convention on Human Rights**

The European Convention on Human Rights (ECHR)<sup>154</sup> is not a child-centred instrument. However, like the ACHR, the ECHR embodies provisions that can be applied to advance children's rights as well. These include standards protecting the rights to life, and respect for privacy and family life.<sup>155</sup> Also important for children is that the ECHR warrants protection for

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<sup>153</sup> As above.

<sup>154</sup> See Section 1 of the European Convention on Human Rights (ECHR), adopted in 1950 and entered in force in 1953, as amended by Protocol No. 3 entered in force in 1970, Protocol No. 5 entered in force in 1971, and Protocol No. 8 entered in force in 1990.

<sup>155</sup> See Articles 2, and 8-9 of the ECHR.

freedom of religion and conscience.<sup>156</sup> It is submitted that there is a link between the ECHR and the CRC in that many of the rights and freedoms enshrined in the former are protected in the latter.<sup>157</sup>

Notably, the ECHR does not contain any general provision setting out member states' duties to implement the Convention. However, this obligation can be understood pursuant to Articles 19 and 25, and 45 of the ECHR. Article 19 states that:<sup>158</sup>

To ensure the observance of the engagements undertaken by the High Contracting Parties in the present Convention, there shall be set up:

1. A European Commission of Human Rights (...);
2. A European Court of Human Rights

In expanding Article 19, Article 25 of the ECHR allowed the European Commission of Human Rights, whose functions were taken over by the European Court of Human Rights,<sup>159</sup> to receive petitions alleging violation of the rights set forth in the Convention. Article 19 is further expanded in Article 45, which gives the European Court of Human Rights jurisdiction over all matters concerning the interpretation and application of the ECHR.<sup>160</sup> This means that if states parties to the ECHR fail to implement the rights contained in the Convention, the European

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<sup>156</sup> See Article 14 of the ECHR.

<sup>157</sup> See Articles 13-14 of the CRC.

<sup>158</sup> See Article 19(1) and (2) of the ECHR.

<sup>159</sup> It should be noted that under the current European system of human rights the functions of the European Commission have been replaced by the European Court of Human Rights. This was a result of reforms introduced in the European system of protection of human rights. See Kidanemariam (note 134 above), p 19.

<sup>160</sup> See Article 45 of the ECHR.

Court of Human Rights can find them in breach of their obligations under the Convention. This reveals that state parties to the ECHR have a duty to ensure implementation of the right protected in the Convention, meaning that they must take measures to that effect or they will be found in violation of their duties.

There are many instances where the European Court of Human Rights delivered judgments against states for breach of their obligations under the ECHR. Of significance for children, in the case of *X v Croatia*,<sup>161</sup> which concerned an application to adopt a child, the Court held that putting a child for adoption without the consent of the mother constitutes a violation of Article 8 of the ECHR dealing with the right to respect for privacy, family life, home and correspondence.<sup>162</sup> It is submitted that this judgment impacted on the duty of states to implement the rights protected in the ECHR. This is confirmed by the fact that by finding the respondent state in breach of the ECHR, the message was sent that all interested parties must be involved in proceedings leading to separation of children from their families or parents before the separation becomes effective. The judgement also impacted on the child's right to protection from interference in his or her family affairs and on the right to privacy, which are both protected in the CRC as well. The reason is that the Court's decision showed that, where interference has occurred, the parties concerned must be fully informed, thereby placing a duty on the state to take measures to inform the parties.<sup>163</sup>

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<sup>161</sup> See the European Court of Human Rights decision in the case of *X v. Croatia*, Judgment of 17 July 2008.

<sup>162</sup> As above.

<sup>163</sup> See Articles 9(2) and 16 of the CRC.

However, the European Court has very limited formal remedial competences to the extent that it cannot stipulate exact forms of remedies for victims of violation of rights. In this regard, the European Committee of Minister plays an important role. It collaborates by filling the gap left by the Court in providing exact forms of remedies and in following up enforcement. This is very important for the promotion of children's rights as remedies for violation of these rights can be sought through meaningful engagement between the Court and the European Committee of Ministers. In the absence of such collaborative efforts between these institutions it would be unlikely that European states in breach would take concrete measures to advance children's rights in their jurisdictions.

### 3.6.2.3 Examples from the African Children's Charter

The African Children Charter is a distinct instrument in the African human rights system<sup>164</sup> that applies specifically to children.<sup>165</sup> The language used in provisions of the African Children's Charter and the CRC is strikingly similar.<sup>166</sup> As a result of these similarities, the Charter has

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<sup>164</sup> The African system of protection of human rights has many instruments applicable to children. These include the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted in 2003 and entered in force in 2005 (Protocol on the Rights of Women), the Organisation of Africa Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted in 1969 and entered into force in 1974 (OAU Refugee Convention), and the African Youth Charter, adopted in 2006. See Also African Charter on the Rights and Welfare of the Child (African Children's Charter), adopted in 1990 and entered into force in 1999, OAU Doc. CAB/LEG 24.9/49 (1990).

<sup>165</sup> See Gose (note 58 above), p 18.

<sup>166</sup> See Dejo Olowu (2002) 'Protecting children's Rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child', *The International Journal of Children's Rights*, Vol. 10, No. (not available), p 128.

come to be known as the Convention's regional sister-treaty.<sup>167</sup> Turning to their differences, one notes that the African Children's Charter entrenches provisions which express African concerns on the need to promote and protect the rights of African Children.<sup>168</sup> There are certain aspects covered in the African Children's Charter which the CRC left out. These include, the Charter's protection for children of imprisoned mothers and internally displaced children.<sup>169</sup> In this way, the African Children's Charter complements the CRC by filling the gaps left in the Convention.<sup>170</sup> Therefore, the innovations in the African Children's Charter can be used to promote the rights of African Children and, by implication, to further the implementation of the CRC.

Article 1 of the African Children's Charter and Article 4 of the CRC are similar. Both provisions place duties upon states to adopt measures to ensure the realisation of children's rights. Article 1 of the Charter provides that:<sup>171</sup>

(..) Parties to the present Charter shall recognise the rights, freedoms and duties enshrined in this Charter and shall undertake to the necessary steps, in accordance with their Constitutional processes and with provisions to the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of the Charter.<sup>172</sup>

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<sup>167</sup> Odongo (note 45 above), p 113.

<sup>168</sup> Kaime (note 15 above), pp 22-23. See also Olowu (note 166 above), p 128.

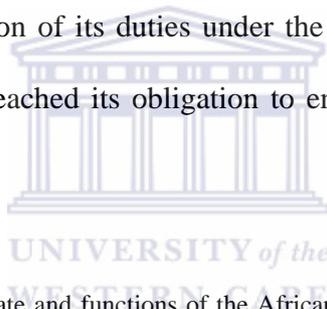
<sup>169</sup> See Articles 23(4), and 30 of the African Children's Charter.

<sup>170</sup> Olowu (note 166 above), p 128. See also Dovile Skujyte (2011) '*Right of African children under the African Charter on the rights and Welfare of the Child: the addition to the universal protection of a child*', unpublished LLM dissertation, University of Tilburg, p 5.

<sup>171</sup> See Article 1(1) of the African Children's Charter.

<sup>172</sup> My emphasis added.

As in other instruments discussed previously, this provision shows that the African Children's Charter also places a considerable weight on the need to adopt legislative and other measures to implement the rights protected in its various provisions. The Committee of Experts on the Rights and Welfare of the Child (African Committee of Experts), which monitors the implementation of the African Children's Charter,<sup>173</sup> has in the past been very silent about these obligations. Sloth-Nielsen and Mezmur rightly hoped that with the development of a strategic plan for the period 2010 to 2014 the real work of the Committee would start.<sup>174</sup> Indeed, recently the Committee began to engage more vigorously with states to remind them about their duties under the Charter.<sup>175</sup> This was confirmed in 2011 when the African Committee of Experts handed down a decision against Kenya for violation of its duties under the African Children's Charter.<sup>176</sup> The decision found that Kenya had breached its obligation to ensure that children enjoyed (among



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<sup>173</sup> See Skujyte for a details on the mandate and functions of the African Committee of Experts on the Rights and Welfare of the Child (African Committee of Experts), in Skujyte (note 170 above), pp 44-48, and Amanda Loyd (2008) 'The African regional system for the protection of children's rights' in Julia Sloth-Nielsen (ed.) 'Children's Rights in Africa: A legal perspective', Ashgate, p 34. See also Julia Sloth-Nielsen, Benyam Mezmur (2010) 'Like running on a treadmill? The 14th and 15th sessions of the African Committee of Experts on the Rights and Welfare of the Child', *African Human Rights Law Journal*, Vol. 10, No. 2, pp 534-535.

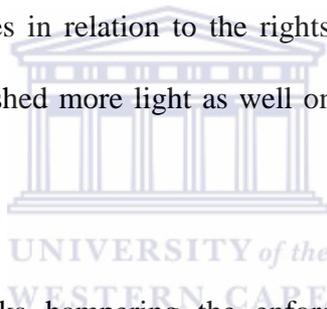
<sup>174</sup> See generally Julia Sloth-Nielsen, Benyam Mezmur (2009) 'Out of the starting blocks: The 12th and 13<sup>th</sup> sessions of the African Committee of Experts on the Rights and Welfare of the Child', *African Human Rights Law Journal*, Vol. 9, No. 1, pp 336-352.

<sup>175</sup> Sloth-Nielsen and Mezmur explain that the Committee had engaged with states parties to the African Children's Charter as early as its 12th session held in 2008, when the first state reports under the Charter were considered in Sloth-Nielsen et al (note 174 above), p 337.

<sup>176</sup> Communication 002/009 *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on behalf of children of Nubian descent in Kenya) v the Government of Kenya*, available at <http://caselaw.ihrda.org/doc/002.09/view/> (Accessed 15 November 2012).

others) their right to nationality.<sup>177</sup> In the light of the findings, the government of Kenya was recommended to implement legislative, administrative and others measures to ensure that children of Nubian descent (the main subjects of the dispute) living in Kenya acquire Kenyan nationality.<sup>178</sup> The decision of the Committee of Experts in the Kenyan case clearly shows that African states have duties in relation to the African Children's Charter, particularly to adopt measures to implement the rights protected in the Charter.

In addition, it is commendable that the African Committee of Experts is developing its first general comment on the provisions of the African Children's Charter, which is expected to expand on the obligations of states in relation to the rights under the treaty.<sup>179</sup> Arguably, the outcomes of these processes will shed more light as well on how to implement the obligations under the CRC.



Nevertheless, there are bottlenecks hampering the enforcement of the African Children's Charter.<sup>180</sup> In the past, the work of the African Committee of Experts was reportedly hampered

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<sup>177</sup> As above.

<sup>178</sup> See Lorenzo Wakefield, Maria Assim (2011) 'Dawn of a new decade? The 16th and the 17th sessions of the African committee of Experts on the Rights and Welfare of the Child', *African Human Rights Law Journal*, Vol. 11, No. 2, p 721.

<sup>179</sup> As above, p 716.

<sup>180</sup> On the strengths, however, the African continent was blessed with other human rights mechanisms which can be utilised to advance the rights protected in the African Children's Charter. These included the African Commission on Human and Peoples' Rights (African Commission), which monitors the implementation of the African Charter on Human and People's Rights. There are provisions in the ACHPR which match with the provisions of the African Children's Charter. This opens space for the African Commission to make decisions on those specific provisions and

by several functional challenges such as the lack of a secretariat and nominations for the membership of the Committee.<sup>181</sup> Although some of them have been resolved, others still remain. These include the fact that the work of Committee is limited by budgetary constraints,<sup>182</sup> and that the confidentiality required under Article 44(2) of the African Children's Charter prohibiting the publication of the findings made against states before they are approved by the Assembly of the Heads of States and Governments of the African Union, restricts the Committee by delaying the possibility of naming-and-shaming states which have violated children's rights under the African Children's Charter.<sup>183</sup> Furthermore, in the Assembly of the Heads of States, there are possibilities of executive interference of the findings of the Committee, which can also prejudice the outcomes intended in the process of protection of children's rights.



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provides the opportunity for it to further children's rights. However, only one example is known concerning a communication brought against Sudan, where the African Commission dealt with issues relating to the protection children's rights specifically. The newly created African Court of Justice and Human Rights, which was formed as a result of the merger of the African Court on Human and Peoples' Rights and the African Court of Justice, also has the potential to ensure the implementation of children's rights in the continent. However, it should be noted that at the time of writing (November 2012) the Court had not yet become operational, its mandate being carried out by the two bodies which predate the creation of the Court. Nevertheless, an African Court on Human and People's Rights is operational and children's rights can be furthered by exploring the contentious jurisdiction of the Court. See Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights (Protocol on the African Human Right's Court) adopted 1998 and entered into force in 2004. See also Oluwo (note 166 above), pp 132-134, and Danwood Chirwa (2002) 'The merits and demerits of the African Charter on the Rights and Welfare of the Child', *International Journal of Children's Rights*, Vol. 10, No. (not available), p.170.

<sup>181</sup> Oluwo (note 166 above), p 132.

<sup>182</sup> Chirwa (note 180 above), p 170. See also Olowu (note 166 above), p 132.

<sup>183</sup> Chirwa (note 180 above), p 170.

Following on the analysis above of the comparative standards for implementing children's rights, the next section examines the CRC's implementation framework. Central to this discussion is General Comment No. 5 of the CRC Committee, which provides general measures for implementing the CRC.

### **3.7 Framework for implementing the Convention on the Rights of the Child**

In 2003, thirteen years after the adoption of the CRC, the CRC Committee adopted General Comment No. 5. As pointed out, this instrument sets out a list of general measures "*intended to promote the full enjoyment of all rights*"<sup>184</sup> contained in the CRC by all children. Notably however, the measures envisaged in General Comment No. 5 add to other general measures of implementation of the CRC found in earlier and succeeding general comments adopted by the CRC Committee.<sup>185</sup> Nevertheless, General Comment No. 5 remains important as it is the chief instrument detailing the general measures required to give effect to the entire Convention, against other general comments expanding on specific provisions of the Convention. In this way, the analysis and study of this instrument contributes an understanding of the framework within which the CRC must be implemented.

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<sup>184</sup> See Para. 9 of General Comment No. 5.

<sup>185</sup> By November 2012, the CRC Committee had adopted 13 General Comments and was in the process of drafting a 14th instrument. The forthcoming CRC Committee General Comment No. 14 will focus on Child Rights and the Business Sector. For a comprehensive list of all general comments adopted by the CRC Committee see website of the United Nations High Commissioner for Human Rights (OCHR) at <http://www2.ohchr.org/english/bodies/crc/comments.htm> (accessed 12 November 2012). See also '*Children's Rights and Business: A conversation of Business and the Committee on the Rights of the Child*', available at [http://www.unglobalcompact.org/docs/issues\\_doc/human\\_rights/CRBP/CRC\\_Webinar\\_background.pdf](http://www.unglobalcompact.org/docs/issues_doc/human_rights/CRBP/CRC_Webinar_background.pdf) (accessed 12 November 2012).

Broadly speaking, General Comment No. 5 expands on Article 4 of the Convention. It is made up of six parts, the first being the introduction, which defines the object and the purposes.<sup>186</sup> The second part<sup>187</sup> speaks to the need to undertake a comprehensive review of reservations impairing the implementation of the CRC and other instruments applicable to children. The third part<sup>188</sup> calls for ratification of key human rights instruments favouring children's rights, and part four<sup>189</sup> concerns the adoption of legislative measures for implementation of the CRC. The fifth part<sup>190</sup> makes it important to ensure that children's rights are justiciable at the domestic level of states, an aspect discussed in Chapter 4 when dealing with legislative measures, and lastly, part six<sup>191</sup> deals with administrative and other measures required to give effect to the Convention.

Of the six parts, only the first lacks discussion of the measures required to implement the CRC. It is observed that the similarity between the discussions in parts two, three, four and five makes it less necessary to distinguish them, as the measures contemplated in each of these parts fall within the same category. In this regard, I contend that treaty ratification forms part of a legislative process<sup>192</sup> in the same way that making children's rights justiciable requires legislative action; by implication, the removal of reservations entered in respect of international

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<sup>186</sup> See Paras. 1-12 of General Comment No. 5.

<sup>187</sup> Paras. 13-16 of General Comment No. 5.

<sup>188</sup> Para. 17 of General Comment No. 5.

<sup>189</sup> Paras. 18-23 of General Comment No. 5.

<sup>190</sup> See Paras. 24-25 of General Comment No. 5.

<sup>191</sup> Paras. 26-73 of General Comment No. 5.

<sup>192</sup> See Philip Martin (1965) 'Madison's precedent of legislative ratification for constitutional amendments', *American Philosophical Society*, Vol. 109, No. 1, p 48.

instruments is part and parcel of a legislative process. Therefore, for explanatory reasons, the study groups the measures in these parts (parts two to five) under the category of legislative measures so that distinction is made only in respect of these and administrative and other measures contemplated in the General Comment under analysis.

### **3.7.1 Legislative measures**

According to Article 4 of the CRC, state parties are required to undertake appropriate legislative measures to implement the rights contained in the Convention. The drafters of the CRC placed emphasis on the term “appropriate” in order to describe the nature of the legislative measures required. Many scholarly works have made reference to the need to adopt such legislative measure, but they have not explained substantively what “appropriate” measures mean in the CRC context.<sup>193</sup> Similarly, General Comment No. 5 does not address this question explicitly.

However, reading between the lines of General Comment No. 5, it is possible to conclude that in order for any measure envisaging the implementation of the CRC to be appropriate, it must be taken within the framework of the Convention. It leads one to think that “appropriate legislative measures” are all such measures taken within the framework of the Convention, that is to say, ones in line with its standards.<sup>194</sup> Consequently, all measures taken outside the framework of the Convention or measures falling short of CRC standards must be seen as inappropriate.

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<sup>193</sup> For example, see Rishmawi (note 83 above), pp 23-27.

<sup>194</sup> Para. 20 of General Comment No. 5.

General Comment No. 5 further highlights that legislative measures envisaging the implementation of the CRC must be taken at international and domestic levels. At the international level, states are required to ratify, accede and adhere to key international law instruments relevant for the protection of children, including The Hague Convention on the Protection of Children and Cooperation in respect of Intercountry Adoption, and the Convention against Discrimination in Education.<sup>195</sup> States are also required to withdraw reservations in respect to provisions of the CRC, as these impact negatively on implementation.<sup>196</sup> In addition, States are reminded that other international human rights instruments also apply to children and are therefore called upon to ratify them.<sup>197</sup>

At the domestic level, States are required to undertake rigorous review of their legislation and administrative guidance. To this end, the CRC Committee encourages states to undertake legislative reviews regularly and on a permanent basis by using an article-by-article approach and taking into account the entirety of provisions in the Convention.<sup>198</sup> A call is also made for the need to involve in this process all relevant government departments, civil society, academics and children alike.<sup>199</sup> Efforts of all parties must be put together and stakeholders must be given opportunity to engage in child-related matters in order to build their capacity and disseminate

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<sup>195</sup> See Para. 17 of General Comment No. 5.

<sup>196</sup> The CRC Committee has explained that states are not allowed to enter reservations which defeat the purposes of the CRC. See Paras. 13-16 of General Comment No. 5.

<sup>197</sup> See Para. 23 of General Comment No. 5.

<sup>198</sup> See Rishmawi (note 83 above), pp 23-24.

<sup>199</sup> See Para. 18 of General Comment No. 5.

knowledge on relevant principles contained in the Convention.<sup>200</sup> The importance of involving all role players in child-law review processes cannot be overemphasised given the role they play in promoting and protecting the interests of children. In this regard, civil society organisations, for example, are well known for playing a major role in respect of this vulnerable group.

General Comment No. 5 further alludes to the importance of giving legal effect to the provisions of the CRC within domestic jurisdictions of states, either by incorporating these provisions into constitutional norms or by enacting laws reflecting them.<sup>201</sup> As will be shown later when discussing the implementation of the CRC through domestic laws and policy, domestic incorporation children's rights brings about several gains. For example, rights become justiciable and their incorporation raises the level of government accountability.<sup>202</sup> In this regard, there is a need for right-holders and those representing them to be able to invoke CRC standards in domestic courts and have them applied by national authorities.<sup>203</sup> This assertion resurrects the view that the CRC is a binding instrument containing standards which must be enforceable, and it gives credence to domestic judicial systems as mechanisms capable of upholding children's rights.

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<sup>200</sup> See Article 42 of the CRC.

<sup>201</sup> See Paras. 19 and 22 of General Comment No. 5.

<sup>202</sup> See generally Chapter 4. See also Julia Sloth-Nielsen (2008) '*Domestication of children's rights in national legal systems in African context*', in Julia Sloth-Nielsen (ed.) '*Children's Rights in Africa: A legal perspective*', Ashgate, p 64.

<sup>203</sup> See Paras. 19-20 of General Comment No. 5.

In addition, General Comment No. 5 sustains the position that it is not enough merely to incorporate the provisions of the CRC into the constitution and domestic laws but not give them legal effect. The CRC Committee asserts that for states to show that CRC standards have been given legal effect in their jurisdictions, they must not only incorporate them in their constitutions and subordinate legislation but show that the rights protected in the Convention are enjoyed and can be invoked before the courts directly.<sup>204</sup> There are several explanations for the Committee's view. For example, there are instances in which CRC standards incorporated into constitutional provisions have had no legal effect. In this regard, it was observed that in countries like Nigeria, which have a practice of incorporating human rights standards protected in treaties into the directive principles of state policies provided in the Constitutions, incorporated CRC standards such as non-discrimination take no legal effect.<sup>205</sup> Therefore, it is submitted that besides giving legal effect, incorporation must seek to promote a system where remedies are made available for cases of violation of the rights protected in Convention. This relates to the question of the justiciability of human rights,<sup>206</sup> especially children's rights, which once again is well-captured in General Comment No. 5.<sup>207</sup>

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<sup>204</sup> See also Paras. 19-21 of General Comment No. 5.

<sup>205</sup> This is the case of Nigeria, where human rights standards (including those found in the CRC) were incorporated into directive principle of state policies provided for in Constitution, but these are not binding and have no legal effect. The Convention must be interpreted within the object and purposes as well as within the intention of the signatory parties. It constitutes an element of the intentions of state parties that the provisions of the CRC have a binding effect upon them. This creates space to argue that non binding domestic laws incorporating CRC standards are in breach of the requirements of the Convention. See Livinus Uzoukwu (2010) '*Constitutionalism, Human Rights and the Judiciary in Nigeria*', unpublished LLD dissertation, University of South Africa (UNISA), p 158.

<sup>206</sup> The notion of the justiciability of human rights translates into the possibility that right-holders have to invoke them before a judicial organ or another body tasked with powers to determine whether there has been a violation of rights and to provide remedies to the victims. Consequently, rights are regarded as justiciable if the victims of

The view that key principles underlining the CRC including non discrimination,<sup>208</sup> the child's best interest,<sup>209</sup> life survival and development,<sup>210</sup> and child participation,<sup>211</sup> must be incorporated in domestic laws is reflected in General Comment No. 5.<sup>212</sup> Conspicuously, the call is made that all legislation (for example, sectoral laws on education and health) must reflect CRC principles.<sup>213</sup>

As a general legislative measure envisaging the implementation of the CRC, the Convention must prevail over domestic norms and traditional practices which are inconsistent with it.<sup>214</sup> This is congruent with the traditional view of international law scholars that international law norms must override domestic norms.<sup>215</sup> Theories negating precedence of domestic norms over international law instruments are supported by the view expressed in Article 27 of the Vienna

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violations are able to claim and obtain remedies for violations. See Ana Franco (2008) *'How to promote the justiciability of the right to food: A multidimensional strategic proposal'*, FIAN International, p 7.

<sup>207</sup> Paras. 24-25 of General Comment No. 5.

<sup>208</sup> Article 2 of the CRC.

<sup>209</sup> Article 3 of the CRC.

<sup>210</sup> Article 6 of the CRC.

<sup>211</sup> Article 12 of the CRC.

<sup>212</sup> Para. 22 of General Comment No. 5.

<sup>213</sup> Para. 22 of General Comment No. 5.

<sup>214</sup> See Para. 20 of General Comment No. 5.

<sup>215</sup> I contend that another argument which can be used to negate precedence of domestic norms over treaties is the fact that ratification is a free process which makes it illegitimate for state parties to a treaty invoke their domestic norms to evade from their international obligations. When a state ratifies a treaty it is expected to live up to its obligations under the treaty. Failure to observe the treaty equates to a breach or violation of treaty and it generates international responsibility of the state concerned towards the international community. See William Slomanson, *'Fundamental perspectives on International Law'*, Wadsworth Cengage Learning (2011), Sixth Edition, p 17.

Convention that a party may not invoke the provisions of its internal laws as justification for its failure to perform a treaty.<sup>216</sup> They argue that there is a risk of undermining the implementation of international instruments (the CRC included) in jurisdiction where domestic norms override international instruments.

Lastly, States are encouraged to enact and to implement within their jurisdictions provisions that are more conducive for the realisation of children's rights than the Convention itself.<sup>217</sup> Emphasis is placed on the word conducive, implying measures that are favourable and friendly for the realisation of children's rights. These must be in accordance with the key principles of the Convention.<sup>218</sup> This analysis is important as it shows that the Convention does not set out the highest standards of child welfare and child protection. Instead, it provides the minimum standards<sup>219</sup> based on the universally consented aspects of child welfare, and allows states to adopt higher standards for promotion and protection of children's interests. Importantly, the points remains that the passing of laws compliant with the CRC is an obligation under the Convention and not a matter of choice.<sup>220</sup>

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<sup>216</sup> See Article 27 of the Vienna Convention 1969.

<sup>217</sup> Para. 23 of General Comment No 5.

<sup>218</sup> See Articles 2-3, 6 and 12 of the CRC.

<sup>219</sup> For instance, Chirwa explains that the minimum standards found in the ACRWC were borrowed from the CRC. Chirwa (note 180 above), p 158.

<sup>220</sup> Godfrey Odongo (2005) *The domestication of international law standards on the rights of the child with specific references to juvenile justice in the African context*, unpublished LLD thesis, University of the Western Cape, p 72.

### 3.7.2 Administrative and other measures

Expanding on Article 4 of the CRC, General Comment No. 5 envisioned the need to adopt “appropriate” administrative and other measures to implement the Convention.<sup>221</sup> It was explained that the word “appropriate”<sup>222</sup> as used in the Convention and in General Comment No. 5 means that these measures must be adopted within the context of the CRC. This means that measures adopted outside the framework of the CRC, or found to be inconsistent with its standards, are inappropriate.<sup>223</sup> In this way, any states party to the Convention acting outside the framework of the Convention is in breach of the principles enshrined in Article 4.

It is noteworthy that General Comment No. 5 grouped “administrative” and “other” measures required for implementing the CRC under the same heading.<sup>224</sup> In my view this shows that there is a thin line of distinction between the two. Tentatively, however, “administrative” measures include those taken within various branches of the government, and “other” measures may include measures adopted outside government activity by Non-Governmental Organisations for instance.

General Comment No. 5 further refers to the need to develop key instruments and take a number of specific actions to give effect to the Convention. The need to develop a national strategy for children, the need to ensure coordination for implementation of children’s rights, and the need to

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<sup>221</sup> See Article 4 of the CRC.

<sup>222</sup> See section 3.7.1.

<sup>223</sup> See the discussion in the previous section.

<sup>224</sup> See Part VI of General Comment No. 5 entitled ‘administrative and other measures’.

monitor the process of implementation of the Convention are all well captured. As part and parcel of administrative and other measures required to give effect to the rights protected in the CRC, reference is made to the need to gather and analyse data and to develop progress indicators; to budget for children; and to train, and to build the capacity of, staff working with and for children. It should also be noted that there is a call for states and civil society to cooperate with and amongst each other. Lastly, the creation of independent human rights institutions with a monitoring role, the dissemination of CRC standards, and the need to make state reports under the Convention available, are included as measures to give effect to the rights enshrined in the Convention.<sup>225</sup> Each of these measures is discussed below.

In relation to the need to develop comprehensive national strategies and national plans of action for children, states are encouraged to ensure that such plans are developed based on a consultative process which includes all sectors (public and private sector and children themselves must be included).<sup>226</sup> These plans and strategies must be more than statement of intent and should go beyond statement of policies and principles by including specific achievable targets. Mention is also made that national strategic plans must be used to inform sectoral plans in various departments (including health and education), where goals are defined, measures adopted, and resources allocated for implementation.<sup>227</sup> This suggests that national action plans

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<sup>225</sup> See Paras. 26-73 of General Comment No. 5. See also UNICEF, *Implementation handbook for the Convention on the Rights of the Child*, UNICEF, Revised 3rd Edition (2007), p 55-62.

<sup>226</sup> In order to permit the participation of children the CRC Committee requires States to develop child-friendly materials which are easy and accessible for them and enhances their participation in the process. See Para. 29 of General Comment No. 5.

<sup>227</sup> Para. 32 of General Comment No. 5.

and strategies for children must define clear objectives and must include clear time-frames for the implementation of programmes and achievement of outcomes. It observed that the administrative and other measures encompassed under General Comment No. 5 make no specific reference to the need to take special action to advance the rights of girl children, who are victims of discrimination across the globe and especially in Africa.<sup>228</sup> Nevertheless, it provides for the need to take measures to protect disadvantaged groups, including orphan and children with disabilities, as well as affirmative action to promote equal enjoyment of rights between children. By implication, girls may also be included in the group of vulnerable groups needing affirmative action. However, affirmative action should not weaken the overall objective of implementing the entire Convention.<sup>229</sup> The tool under consideration also makes it clear that strategic plans for implementation of the Convention must be adopted at the highest possible level of government to ensure that they apply authoritatively across the different levels of government. Comprehensive national plans for children must be linked to other national development plans, including budgetary plans, to ensure mainstreaming and realisation of children's rights.<sup>230</sup> In addition, these plans must be developed by taking into account all the factors that make for a good strategy plan, including the pre-assessment of the situation of children, identification of the necessary

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<sup>228</sup> See Theresa Tuwor, Marie-Antoinette Sossou (2008) 'Gender discrimination and education in West Africa', *International Journal of Inclusive Education*, Vol. 12, No. 4, p 364.

<sup>229</sup> Paras. 30 and 32 of General Comment No. 5. See also UNICEF (note 225 above), p 53

<sup>230</sup> Para. 31 of General Comment No. 5.

actions to overcome possible constraints, and identification of a monitoring mechanisms to audit the progress and report on the need to update or adapt the strategy to meet new demands.<sup>231</sup>

In relation to the need to use a coordinated approach to ensure the implementation of CRC, states are encouraged to employ and to facilitate effective mechanisms of coordination among central levels of government, provincial departments and among other regional government branches and between the various levels of government ranging from the central to the provincial and district levels.<sup>232</sup> For instance, at central level the health department must coordinate with the justice department, and at provincial level these and other departments must coordinate as well. In addition, government departments at central level must coordinate with the respective departments at the lower level to ensure suitable ascription of responsibilities. State parties to the Convention are discouraged from prioritising the establishment of a central coordinating mechanisms tasked with all responsibilities for implementing the CRC as this may have the negative effect of making children less visible across other government departments. However, central coordination units can be employed to help develop a national strategy for monitoring the implementation of the Convention and to coordinate the reporting process.<sup>233</sup> As will be shown in Chapter 5, effective coordination is crucial for the realisation of children's rights.<sup>234</sup> In this

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<sup>231</sup> Paris Secretariat (2004) 'A guide to designing a national strategy for the development of statistics (NSDS)' Paris Secretariat, p 7, available at [http://siteresources.worldbank.org/SCBINTRANET/Resources/NSD\\_Guide-Nov04.pdf](http://siteresources.worldbank.org/SCBINTRANET/Resources/NSD_Guide-Nov04.pdf) (accessed 13 November 2012).

<sup>232</sup> Para. 37 of General Comment No. 5.

<sup>233</sup> Para. 39 of General Comment No. 5.

<sup>234</sup> See Chapter 5, section 5.2.

regard, the establishment of effective coordination mechanisms can enhance the capacity of government and civil society to deliver services for children.<sup>235</sup>

Drawing on Article 3(1) of the CRC, General Comment No. 5 proposes that in all actions concerning children, the best interest of the child shall be a primary consideration.<sup>236</sup> This appeal has profound implications as it reveals that if any action is to be regarded as positive for children it cannot be so unless it takes into account the child's best interest. It also furthers the idea that other important principles like non-discrimination,<sup>237</sup> child participation,<sup>238</sup> survival and development,<sup>239</sup> should also be taken into consideration as they are critical for determining the best interest of the child. Consequently, States are called upon to refrain from privatising services which are relevant for children without ensuring the necessary monitoring of the delivery of these services. In this regard, General Comment No. 5 explains that the duty of states to respect and to ensure the realisation of the children rights stipulated in the CRC includes the obligation to ensure that non-state actors operate in accordance with the provisions of the Convention. General Comment No. 5 further explains that while the CRC creates indirect obligations for non-

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<sup>235</sup> For example, see findings on the study of coordination of services for indigenous families and children in Saul Flaxman, Kristy Muir, Ioana Opera (2009) *'Indigenous families and children: coordination and provision of services'*, Commonwealth of Australia, p 13.

<sup>236</sup> See Article 3(1) of the CRC.

<sup>237</sup> See Article 2 of the CRC.

<sup>238</sup> See Article 12 of the CRC.

<sup>239</sup> See Article 6 of the CRC.

state actors, the overall duty to implement the Convention rests upon states.<sup>240</sup> This conforms to the notion held in international law that states are the main subjects of treaties.<sup>241</sup> The main benefit of this approach as it relates to the interpretation of the duties entangled in the CRC is that it binds the state to ensuring the availability of safeguards at all levels to avoid violation of children's rights.

States are also encouraged to assess on a regular basis the impact of legislation and policy on the lives of children. This means that monitoring and self-evaluation is an obligation for governments. The role of state monitoring mechanism in advancing children's rights is further discussed in Chapter 5.<sup>242</sup> In the meantime, it should be noted that independent non-state monitoring institutions such as non-governmental organisations, academic institutions, professional associations, youth groups and independent human rights institutions must also be engaged. The involvement of such independent role-players, whether state-based or not, is believed to help identify problems that impact negatively in the implementation process and aid the development of solutions to them.<sup>243</sup> The reason for this is that monitoring is a multi-purpose process which helps to measure impact and outputs as well as strengthen accountability, thereby

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<sup>240</sup> Even when the government is decentralised or when powers are delegated to other government institutions or private entities, the overall responsibility to implement the Convention remains with the State. See Paras. 40, and 43-44 of General Comment No. 5.

<sup>241</sup> Antony D'Amato (1995) 'Human rights as part of customary International Law: A plea for change of paradigms', *Georgia Journal of International and Comparative Law*, Vol. 25, p 16.

<sup>242</sup> See Chapter 5, section 5.3.

<sup>243</sup> Para. 46 of General Comment No. 5.

positively influencing the realisation of children's rights.<sup>244</sup> Monitoring and assessing implementation requires data collection and evaluation.<sup>245</sup> All relevant data collected must be disaggregated to reflect the various age-groups of children, and must include vulnerable groups such as girls, orphans and children with disabilities. General Comment No. 5 further makes the call for states to develop progress indicators to measure the extent to which they are implementing children's rights. For example, they can use school enrolment rates as an indicator to measure progress in the education sector and the number of live births per annum to determine progress in child-maternal health.<sup>246</sup> Other indicators, like the infant mortality rate, can be used to measure compliance with key principles enshrined in the CRC such as children's rights to life survival and development.<sup>247</sup>

The creation of independent human rights institutions is proposed, including Ombudsmen or Child Advocates with the mandate to monitor the activities of government and other role-players impacting on the lives of children. The available data indicate that since the early 1980s there has

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<sup>244</sup> Joachim Theis (2003) '*Rights-based monitoring and evaluation*', Save the Children, p 5, available at [http://www.crin.org/docs/resources/publications/hrbap/RBA\\_monitoring\\_evaluation.pdf](http://www.crin.org/docs/resources/publications/hrbap/RBA_monitoring_evaluation.pdf) (accessed 13 November 2012).

<sup>245</sup> Para. 48 of General Comment No. 5.

<sup>246</sup> See generally Annalena Dunkelberg, Katharina Spiess, '*The impact of child and maternal health indicators on female labour force participation after childbirth: Evidence from German*', German Institute for Economic Research (2007). See also Geeta Kingdon (2007) '*The progress of school education in India*', Global Poverty Research Group, available at <http://www.gprg.org/pubs/workingpapers/pdfs/gprg-wps-071.pdf> (accessed 13 November 2012).

<sup>247</sup> See Article 6 of the CRC.

been a mounting drive to establish independent human rights institutions for children.<sup>248</sup> Many institutions, including the United Nations Children's Fund Innocenti Research Centre (UNICEF IRC), have supported this movement by conducting research, supporting the consolidation of networks and providing technical assistance for the creation and strengthening of independent institutions.<sup>249</sup> It is observed that on establishing human rights institutions states must take into account General Comment No. 2 on the Role of Independent National Human Rights Institutions in the Protection and Promotion of the Rights of the Child (General Comment No. 2), which encourages them to guarantee human rights institutions powers to promote human rights in general and to have mandates which unfold to the sphere of promotion and protection of children rights in particular.<sup>250</sup> As will be shown later,<sup>251</sup> national human rights institutions are required to investigate violations of these rights, draft and publish opinion pieces on matters that relate to the protection and promotion of such rights, and ensure that national economic policy-makers take children's rights into account when preparing and evaluating national economic and development plans.<sup>252</sup> This shows that such institutions are extremely important and that their role cannot be underestimated in ensuring the promotion and protection of the rights defined in the CRC.

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<sup>248</sup> See UNICEF website for more details on the establishment of independent human rights institutions for children, at <http://www.unicef-irc.org/research/208/> (accessed 23 June 2011).

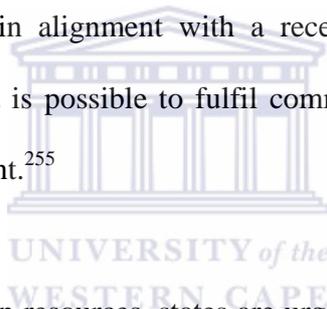
<sup>249</sup> Further details can be accessed from the UNICEF website, at <http://www.unicef-irc.org/research/202/> (accessed 23 June 2011).

<sup>250</sup> See CRC Committee General Comment No. 2 on the Role of Independent National Human Rights Institutions in the Protection and Promotion of the Rights of the Child, UN Doc. CRC/GC/2002/2 (General Comment No. 2).

<sup>251</sup> See Chapter 5 section 5.3.

<sup>252</sup> See Para. 19(a) of General Comment No. 2.

Furthermore, General Comment No. 5 gives ample acknowledgment to the fact that human and financial resources are required for implementing the CRC and sustaining the process of realising children's rights. This signals that issues of resource-allocation for children remain a challenge.<sup>253</sup> In regard to financial resources, it urges states to ensure that children's rights remain uppermost on the agenda in the budgeting processes, calling on them either to prepare budgets for children or at least to make children visible in the budget.<sup>254</sup> There is also a call to ensure that economic policies and programmes adopted by states must reflect allocation of financial resources to programmes which impact on the lives of children. All plans devised for the society, including social and economic plans, must either directly or indirectly reflect investment for children. This is in alignment with a recent finding by the United Nations Children's Fund (UNICEF) that it is possible to fulfil commitments to children if all children receive due attention and investment.<sup>255</sup>



In relation to the question of human resources, states are urged to train and to build the capacity of those who live and work with and for children (public and private institutions included); children themselves must be given the necessary training about their rights contained in the CRC.<sup>256</sup> Presently there are many documents and guidelines on how to train children and involve

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<sup>253</sup> See generally James Himes (ed.) *Implementing the Convention on the Rights of the Child: Resource mobilization in low-income countries*, Martinus Nijhoff Publishers (1995), pp 1-262.

<sup>254</sup> Paras. 51-52 of General Comment No. 5. See also UNICEF (note 225 above), pp 61-62

<sup>255</sup> See UNICEF (2012) *The state of the world's children 2012*, UNICEF, p 2.

<sup>256</sup> See Paras. 53-55 of General Comment No. 5.

them in research,<sup>257</sup> suggesting that this has become an area of substantive importance in the discourse on children's rights. Training and capacity-building must be done systematically and regularly, and these processes must be reviewed continuously. The overall objective should not only focus on generating knowledge of the Convention but also evaluate how it has contributed to developing attitude and practices that can further children's rights.<sup>258</sup>

Moreover, a strong appeal is made to implement and recognise the rights entrenched in the CRC internationally and at domestic levels. General Comment No. 5 calls on civil society organisations and the international community to be involved in the process of implementing the Convention.<sup>259</sup> As a matter of fact, it is possible to contend with certainty that the Convention itself calls for international cooperation for the realisation of children's rights with some persistence. The evidence for this argument is the chain of provisions in the Convention speaking to international cooperation among States and between them and international organisations.<sup>260</sup> It is submitted that primary attention must be given to the least-developed countries, which face huge challenges in meeting their obligations under the Convention due to lack of resources.<sup>261</sup>

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<sup>257</sup> For example, see generally Minister of Children and Youth Affairs, *'Guidance for development of ethical research projects involving children'*, Irish department of Children and Youth Affairs (2012), pp 1-18. See also generally Berry Percy-Smith, Nigel Thomas, *'A handbook of children and young people's participation: Perspectives from theory and practice'*, Routledge (2010), pp 1-378.

<sup>258</sup> Paras. 53–55 of the General Comment No. 5.

<sup>259</sup> See Paras. 56-64 of General Comment No. 5. See also UNICEF (note 225 above), p 65.

<sup>260</sup> See, for example, Articles 4, 17(b), 21(e), 22(2), 23(4), 24(4), 27(4), 28(3) 34, 35, and 45 of the CRC.

<sup>261</sup> Many countries are affected by problems of lack of sufficient resources to meet the objectives under the Convention. Nigeria is a good example of an African country affected by budgetary constraints in realising children's rights to education as defined in the CRC. See Folshade Okeshola (2012) 'Challenges facing the

This is also in alignment with the notion that aid is one of the prime instruments for advancing the economic growth required to support the implementation of human rights and therefore children's rights as well.<sup>262</sup> Furthermore, national and non-governmental organisations are also urged to cooperate; the kind of cooperation expected should go beyond financial assistance and include technical support towards adequate and effective implementation of the Convention.<sup>263</sup>

Currently, there are examples of good practices commitments by developed countries which tasked themselves to give 0.7% of their Gross Domestic Products (GDP) to assist the least developed countries in achieving the Millennium Development Goals (MDG's). This is extremely important to advance the implementation of children rights, as the MDGs are directly related to them and compel states to achieve certain development commitments including achieving universal primary education, a right protected in the CRC.<sup>264</sup> Although there may be questions about the practical implementation of the 0.7% aid assistance to the least-developed

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realisation of Millennium Development Goals (MDG's) in educational reform in Nigeria', *European Scientific Journal*, Vo. 8, No. 3, pp 203-204.

<sup>262</sup> Homi Kharas, Andrew Rogerson (2012) '*Horizon 2025: Creative destruction in the aid industry*', Overseas Development Institute, p 13.

<sup>263</sup> Para. 63 of General Comment No. 5.

<sup>264</sup> Altogether there are 12 Millennium Development Goals (MDG's) reflecting major commitment by states to address development problems until the end of 2015. These goals were incorporated into the Millennium Declaration adopted in the Millennium Summit, which is said to be the normative and contextual basis for the MDG's. See The United Nations Millennium Declaration, adopted in 2000 at the Millennium Summit, UN Doc. A/55/L.2 (Millennium Declaration). See also Salil Shetty (2005) 'Millennium Declaration and Development Goals: Opportunities for human rights', *International Journal on Human Rights*, No. 2, p 9.

countries,<sup>265</sup> there is no doubt that it can help them achieve some of the MDGs and make a greater impact on the lives of their children. Notably, for example, MDG No. 1 concerns the eradication of poverty,<sup>266</sup> MDG No. 2 pertains to universal primary education, MDG No. 4 refers to the reduction of child mortality, and MDG No. 6 addresses the problem of HIV/AIDS and other diseases such as malaria. These goals are intertwined with implications for human rights, including rights recognised in the CRC such as the rights to life, survival and development, and the right to education.<sup>267</sup>

As noted above, international cooperation should include cooperation between states and other entities working in the field of children's rights such as International Organisations (IO's) like the United Nations Children's Fund (UNICEF) and the Office for the High Commissioner for Human Rights (OHCHR).<sup>268</sup> Major role-players such as the World Bank, the International Monetary Fund (IMF) and the World Trade Organisation (WTO) are urged to ensure that

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<sup>265</sup> Many questions radiate around the absorptive capacity of foreign aid, such as the problem of supply concerns and the distorted incentives as well as the problem of the extent to which donor aid can be delivered given certain issues around the political environment of donor and benefiting countries. See details in United Nations, *Economic development in Africa – Doubling Aid: making the 'Big Push' work*, United Nations (2006), pp 35-61, available at [http://unctad.org/en/Docs/gdsafrika20061\\_en.pdf](http://unctad.org/en/Docs/gdsafrika20061_en.pdf) (accessed 13 November 2012).

<sup>266</sup> In this regard, it is said that the MDGs represent the world biggest promise to reduce poverty. See David Hulme (2007) *The making of the Millennium Development Goals: Human development meets results-based management in an imperfect world*, Brookes World Poverty Institute, p 2.

<sup>267</sup> See Articles 6(1) and (2) and 28 of the CRC. See also See Philip Alston, 'A human rights perspective on the Millennium Development Goals', paper presented at the Human Rights Perspective on Millennium Development Goals held in New York University School of Law, November 2003, p 3; copy on file with the author.

<sup>268</sup> This reminds one of recent efforts by the African Committee of Experts on the Rights and Welfare of the Child that created a platform to strengthen cooperation with stakeholders involved in doing work for children in a session held in 2010. For more detail about this session, see Sloth-Nielsen et al (note 173 above), pp 534-556.

cooperation is in the best interest of the child.<sup>269</sup> This reminds that certain policies and programmes, including the structural adjustment programmes of the IMF, had the effect of causing more poverty in Africa, thus contradicting the principles of the best interest of child.<sup>270</sup> There is, therefore, a need to ensure positive engagement when dealing with these institutions.

General Comment No. 5 reflects well the “do’s” and “don’ts” that states must consider when implementing the CRC. Although the Comment may have certain weaknesses in respect of its depth of specificity, analysing them is beyond the scope of this study; it suffices to say, though, that one of the things making General Comment No. 5 valuable is precisely its high degree of generality: it stipulates general implementation measures without intending to prescribe specific ones.<sup>271</sup> This makes it an important tool for assessing implementation across different national situations, and it will be used as such in the coming chapters as a guideline for gauging the extent to which the countries under study, Angola and Mozambique, have given flesh to the lineaments of the Convention. In doing so, the study will base its discussions on the measures identified in General Comment No. 5 (legislative, administrative and other measures). However, for explanatory reasons aligned to the objectives of the study, all such administrative and other measures will be reclassified into a group contemplating institutional measures and policy

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<sup>269</sup> Para. 64 of General Comment No. 5.

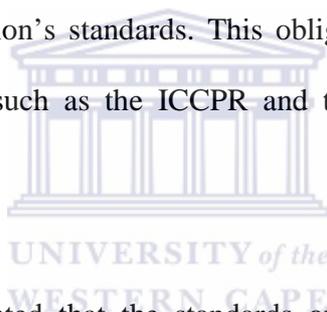
<sup>270</sup> See Asad Ismi (2004) *‘Impoverishing a continent: The World Bank and the IMF in Africa’*, Halifax Initiative Coalition, p 9.

<sup>271</sup> See the Foreword to General Comment No. 5.

measures.<sup>272</sup> This is mainly due to the fact that administrative measures, as seen from the discussions above, fall within the institutional level (coordination and monitoring mechanisms).

### **3.8 Conclusion**

This chapter discussed some of the main gains that the CRC brought to the universal discourse focusing on the implementation of children's rights. Beginning with an analysis of the 1924 and the 1959 Declarations of the Rights of the Child, as part of the first instruments advancing children's rights, the chapter elevates the importance of the CRC as a binding and internationally accepted instrument containing standards applicable to children. It showed that state parties have a duty to implement the Convention's standards. This obligation was also seen in relation to other human rights instruments, such as the ICCPR and the ICESCR whose standards also protect children.



Additionally, the chapter highlighted that the standards of the CRC cannot be materialised universally unless they are translated into practice. To this end, it discussed the measures proposed by the CRC Committee to enable states to achieve the objectives underlying the Convention. These include the adoption of appropriate legislative, administrative and other measures recognised in Article 4 of the CRC.

Furthermore, the chapter showed that by proposing a framework of general rules for implementing the Convention, the CRC Committee wisely left it up to the participating states to ensure the implementation of the rights recognised in the CRC. In the next chapters, I will assess

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<sup>272</sup> See Chapter 1, section 1.2.

how the countries under examination (Angola and Mozambique) are fairing in giving effect to the standards of the CRC. As mentioned earlier, the enquiry will be based on an assessment of laws, policies, institutional and administrative measures that these two countries have taken.<sup>273</sup>



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<sup>273</sup> See Chapter 1, section 1.5.

**CHAPTER 4**

**IMPLEMENTING**

**THE CONVENTION ON THE RIGHTS OF THE CHILD IN**

**THE COUNTRIES UNDER EXAMINATION THROUGH DOMESTIC LAWS**

**AND POLICIES**

**4.1 Introduction**

As already discussed, the implementation of the United Nations Convention on the Rights of the Child (CRC) requires states to ensure that children are able to enjoy effectively their rights under the Convention; it was also observed (in Chapter 3) that the Convention requires states to adopt measures that translate its standards into practice.<sup>1</sup> This chapter proceeds, then, to examine the legal framework and policy measures Angola and Mozambique have adopted to give effect to the CRC within their domestic jurisdictions.

After an overview of international law instruments they have ratified, the chapter discusses, in section 4.3, the status of the CRC in the two countries to highlight their commitment to giving effect to the Convention. Section 4.4 and 4.5 survey the domestic legal framework, including constitutional provisions and relevant statutes regulating children's rights, while section 4.6 deals with policy instruments relevant for advancing these rights. Given the importance of the

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<sup>1</sup> See Chapter 3, section 3.7.

resources required to advance children's rights, the section also investigates the relationship between budgetary concerns and the realisation of these rights through policy measures.

As pointed out in chapter 3,<sup>2</sup> the choice to use laws to assess the extent to which these countries have implemented the CRC is partly for explanatory reasons, but also owed to the assertion that laws can be used as tools to advance human rights protected in international instruments.<sup>3</sup> Consequently, by examining the laws of these countries, it is easy to discern whether they are capable of advancing the right protected in the CRC. By the same token, the lack of comprehensive policy tools to advance children's rights is regarded as a major obstacle to their realisation,<sup>4</sup> making it imperative to ascertain if the two countries have policies covering these rights and, if so, how effective such policies are in advancing them.

The chapter argues, first, that the countries under examination are bound to the CRC and other child-related instruments which oblige them to implement children's rights domestically. Next, it contends that while there are many positive indicators, much more needs to be done to fill the gaps affecting the legal protection afforded to children and the policies envisaging the implementation of the CRC. In this regard, it is reiterated that some of the major problems obstructing the implementation of the CRC in Angola and Mozambique are the persistent lack of

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<sup>2</sup> See Chapter 3, section 3.7.

<sup>3</sup> See Michelo Hansungule (2010) '*Domestication of international human rights law in Zambia*' in Magnus Killander (ed.) '*International law and domestic human rights litigation in Africa*', Pretoria University Law Press, pp 71-74.

<sup>4</sup> Nigel Thomas (2011) '*Children's Rights: Policy into Practice*', Centre for Children and Young people, Background Briefing Series No. 4, p 13.

regulations required to give effect to the laws that domesticate the Convention, gaps in the laws, and fragile policies. The conclusion summarises the main findings and makes recommendations to advance the systems in both jurisdictions.

#### **4.2 Overview of child-related instruments ratified by the countries under the study**

It has been said that the CRC is a comprehensive human rights treaty in that it covers civil, political, socio-economic and cultural rights of children.<sup>5</sup> However, there are other instruments containing provisions that may be applied to protect children; a few most relevant to Angola and Mozambique are mentioned below. The Committee on the Rights of the Child (CRC Committee), which monitors the implementation of the CRC, has repeatedly asked that all state parties to the Convention ratify these instruments.<sup>6</sup>

As state parties to the CRC, Angola and Mozambique ratified the International Covenant on Civil and Political Rights (ICCPR)<sup>7</sup> and the Convention on the Elimination of All forms of

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<sup>5</sup> Save the Children UK Africa Programme, *Legal and policy frameworks to protect the rights of vulnerable children in Southern Africa*, Save the Children (2006), p 8.

<sup>6</sup> See Para. 17 of the Committee on the Rights of the Child (CRC Committee) General Comment No. 5 on the General Measures for the Implementation of the Convention on the Rights of the Child, UN Doc. CRC/CG/2003/5 (General Comment No. 5). See also Nevena Sahovic, Jaap Doek, Jean Zermatten, *The Rights of the Child in International Law – Rights of the Child in a nutshell and in context: about Children’s Rights*, Stampfli Publishers (2012), p 73.

<sup>7</sup> International Covenant on Civil and Political Rights (ICCPR), GA Resolution 2200A (XXI), adopted in 1966 and entered into force in 1976. Angola ratified the ICCPR in 1992 and Mozambique in 1994. For status of ratification of United Nations treaties see website of the Office of the United Nations High Commissioner for Human Rights (OHCHR) at [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en) (accessed 13 June 2012).

Discrimination against Women (CEDAW).<sup>8</sup> While the ICCPR deals with civil and political rights generally, CEDAW captures and strengthens the position of women in addressing problems such as discrimination and harmful cultural practices affecting them.<sup>9</sup> The relevance of CEDAW to advance women's rights, and particularly the rights of the girl child, cannot be overemphasised in a continent where women are prone to many discriminatory practices.<sup>10</sup> Furthermore, both countries ratified the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography (Optional Protocol on the Sale of Children),<sup>11</sup> the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict (Optional Protocol on the Involvement of Children in Armed Conflict) and many other instruments.<sup>12</sup>

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<sup>8</sup> Convention on Elimination of all Forms of Discrimination against Women (CEDAW) adopted in 1979 and entered into force in 1981, GA Resolution 34/180, UN Doc. A/34/46. Angola ratified CEDAW in 1986 and Mozambique in 1997.

<sup>9</sup> See, for example, Articles 1-2, and 12 of the CEDAW.

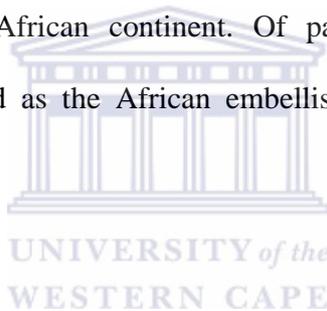
<sup>10</sup> See Chapter 2, sections 2.4 and 2.5. See also generally Savitri Goonesekere, Rangita Alwis (2005) *Women's and children's rights in a human rights based approach to development*, United Nations Children's Fund (UNICEF), pp 1-43.

<sup>11</sup> Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (Optional Protocol on the Sale of Children), GA Res. 54/263, Annex II, 54 U.N. GAOR Supp. (No. 49) at 6, UN Doc. A/54/49, Vol. III (2000), entered into force on 15 January 2002. Angola ratified in 2005 and Mozambique ratified it in 2003.

<sup>12</sup> Including the ILO Convention on the Minimum Age for Admission for Employment (Convention 138), adopted in 1973 and entered into force in 1976. This instrument was ratified by Angola in 2001 and Mozambique in 2003. The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (Optional Protocol on the Involvement of Children in Armed Conflict), adopted in and entered into force in. Angola ratified in 2007 and Mozambique ratified in 2004. Angola and Mozambique also ratified the ILO Convention 182 on the Elimination of the Worst Forms of Child Labour adopted 1999 and entered in force 2000. See also Mezmur for a detailed account of the value of this instrument in Benyam Mezmur (2005) *Children at both ends of the gun: Towards a comprehensive legal approach to the problem of child soldiers in Africa*, unpublished LLM dissertation, Centre for Human Rights of the University of Pretoria, pp 13-14.

These two instruments and the recently adopted Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (OPIC), complement CRC standards and are therefore important to advance children's rights.<sup>13</sup>

At the regional level Angola and Mozambique ratified the African Charter on Human and Peoples' Rights (ACHPR)<sup>14</sup> and the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention).<sup>15</sup> In addition, they ratified the African Charter on the Rights and Welfare of the Child (ACRWC), also known as the African Children's Charter.<sup>16</sup> The above instruments are indispensable tools to advance human rights (children's human rights included) in the African continent. Of particular significance, the African Children's Charter, also described as the African embellishment to the global protection of



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<sup>13</sup> See Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (OPIC), adopted and opened for signature and ratification by UN General Assembly resolution 66/138 of 19 December 2011, and see generally Yanghee Lee (2010) 'Communication procedure under the Convention on the Rights of the Child: 3<sup>rd</sup> Optional Protocol', *The International Journal of Children's Rights*, Vol. 18, No. 4, pp 567-583. See also Radhika Coomaraswamy (2010) 'The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict – Towards Universal Ratification', *The International Journal of Children's Rights*, Vol. 18, No. 4, pp 535-549.

<sup>14</sup> African Charter on Human and Peoples' Rights (ACHPR) adopted in 1981 and entered into force in 1986, OAU Doc.CAB/LEG/67/3, rev.5, 21 I.L.M 58 (1982). Angola ratified the ACHPR in 1990 and Mozambique in 1989.

<sup>15</sup> OAU Convention Governing the Specific aspects of Refugee Problems in Africa (OAU Refugee Convention), adopted in 1969 and entered into force in 1974. Angola ratified the OAU Refugee Convention in 1981 and Mozambique in 1989.

<sup>16</sup> African Charter on the Rights and Welfare of the Child (African Children's Charter or ACRWC), adopted in 1990 and entered into force in 1999, OUA Doc. CAB/LEG/24.9/49 (1990).

children's rights,<sup>17</sup> contains provisions complementing the CRC.<sup>18</sup> In this regard, both the Charter and the CRC contain similar non-discrimination provisions (Article 3 of the ACRWC and Article 2 of the CRC); at the same time the Charter adds a clause speaking to the need to eliminate harmful traditional practices (Article 21 of the ACRWC), which is not captured in the CRC.<sup>19</sup> The Charter affords protection to the boy and girl child.<sup>20</sup> Angola and Mozambique have also ratified the Protocol to ACHPR on the Rights of Women in Africa (African Women's Protocol),<sup>21</sup> which, like CEDAW, is particularly significant to advance the rights of the girl child in Africa.

However, these countries have not ratified other important instruments protecting children interests. For example, Angola has not ratified the International Convention on the Rights of Persons with Disabilities (CRPD)<sup>22</sup> containing standards which may be utilised to protect

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<sup>17</sup> See Eric Njungwe (2009) 'International protection of children's rights: An analysis of African attributes in the African Charter on the Rights and Welfare of the Child', *Cameroon Journal on Democracy and Human Rights*, Vol. 3, No. 1, p 11.

<sup>18</sup> See Dejo Olowu (2002) 'Protecting children's rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child', *The International Journal of Children's Rights*, Vol. 10, No. (not available), p 128.

<sup>19</sup> See Eva Brems, *'Human rights: Universality and diversity'*, Martinus Nijhoff Publishers (2001), p 142

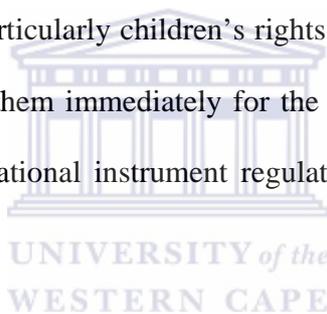
<sup>20</sup> See Frans Viljoen (2009) 'An introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa', *Washington and Lee Journal of Civil Rights and Social Justice*, Vol. 16, No. 1, p 17.

<sup>21</sup> Protocol to the African Charter on Human and Peoples' Rights on the Right of Women in Africa (African Women's Protocol), adopted in 2003 and entered into force in 2005. Angola ratified the African Women's Protocol in 2007 and Mozambique in 2005.

<sup>22</sup> International Convention on the Rights of Persons with Disabilities (CRPD), GA Resolution adopted 2006 and entered into force in 2008, UN. Doc. A/AC.265/2006/L.6. Mozambique ratified the CRPD in 2012.

children affected with disabilities.<sup>23</sup> Likewise, Mozambique has not ratified the International Covenant on Economic Social and Cultural Rights<sup>24</sup> dealing with socio-economic and cultural rights including, the rights to education, health and shelter,<sup>25</sup> which are also important for children. Moreover, neither Angola nor Mozambique ratified the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Convention on Intercountry Adoption),<sup>26</sup> which protects children against unlawful placements in countries different from their own country of origin.<sup>27</sup>

It is submitted that, if ratified, these instruments can broaden the legal basis for the promotion and protection of human rights, particularly children's rights, in these countries. Therefore, both countries must consider ratifying them immediately for the benefit of their children. However, the CRC remains the chief international instrument regulating children's right in Angola and



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<sup>23</sup> For example, Article 3 of the CRPD dealing with non-discrimination, equality and respect for human dignity can be used to advance the rights of children with disabilities.

<sup>24</sup> This assertion was made earlier. See Danwood Chirwa (2005) *'An overview of the impact of the International Covenant on Economic, Social, and Cultural Rights in Africa'*, Community Law Centre, University of the Western Cape, p 5. Angola ratified the Covenant in 1992.

<sup>25</sup> See Articles 11, 12 and 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), GA Resolution 2200A (XXI), adopted 1966 and entered into force in 1976.

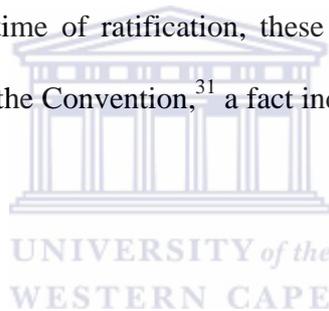
<sup>26</sup> Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Convention on Intercountry Adoption), adopted in 1993 and entered into force in 1995.

<sup>27</sup> For discussion of case law involving the Hague Convention on Intercountry Adoption, see Benyam Mezmur (2009) *'Intercountry adoption as a measure of last resort in Africa: Advancing the rights of a Child rather than a right to a Child'*, *Sur International Journal of Human Rights*, Vol. 6, No. 10, p 83-103. See also generally Sabina Albrecht (2006) *'Intercountry Adoption: A Swiss perspective'*, unpublished LLM dissertation, University of Cape Town, pp 1-88.

Mozambique, and the main concern of this thesis. The next section explores the status of the Convention in these jurisdictions.

#### **4.3 Status of the CRC in the countries under the study**

The CRC has garnered considerable international support.<sup>28</sup> As pointed out in chapter 1, this is seen in its almost-universal ratification within two years after its adoption.<sup>29</sup> Like many other countries, Angola and Mozambique were not tardy in joining the ratification process. Angola ratified the Convention in 1990, about a year after it was adopted, and Mozambique took slightly longer before it deposited the instruments of ratification in 1994.<sup>30</sup> It is notable that, contrary to what seemed the practice at the time of ratification, these countries made no reservations in respect to any of the provisions of the Convention,<sup>31</sup> a fact indicating their strong endorsement of the CRC's standards.



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<sup>28</sup> See Jaap Doek (2003) 'The U.N. Convention on the Rights of the Child: Some observations on the monitoring and the social context of its implementation', *University of Florida Journal of Law and Public Policy*, Vol. 14, No. 126, pp 1-2.

<sup>29</sup> As was stated in Chapter 1, section 1.1.

<sup>30</sup> Information is available at the website of the Office of the United Nations High Commissioner for Human Rights (OHCHR) at [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en) (accessed 13 June 2012).

<sup>31</sup> See Chapter 3, section 3.7. See also Schabbas explains that the nearly universal ratification of the CRC had been affected by a large volume of reservations. See details in William Schabbas (1996) 'Reservations to the Convention on the Rights of the Child', *Human Rights Quarterly*, Vol. 18, p 473.

However, it has been found that the status given to the CRC in the domestic legal order is a key determinant in whether the Convention is implemented or not.<sup>32</sup> This, in turn, depends greatly upon the relationship between international law and domestic legal norms. Two systems govern this relationship: monism and dualism.<sup>33</sup> In monist systems, ratified international law is directly incorporated into domestic law and becomes part of municipal law, while in dualist systems the opposite occurs and incorporation of treaties into the domestic legal order is possible only through the enactment of domestic legislation.<sup>34</sup>

Articles 13(1) of the Angolan Constitution and Article 18(1) of the Mozambican Constitution regulate the relationship between international law and domestic norms, and are central provisions for this debate. The Angolan law provides that:<sup>35</sup>

(...) international law instruments received in accordance with the constitutional precepts are part of the domestic legislation (...)

For its part, the Mozambican counterpart states that:<sup>36</sup>

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<sup>32</sup> Philip Veerman, Barbara Gross (1995) 'Implementation of the United Nations Convention on the Rights of the Child in Israel, the Weste Bank and Gaza', *The International Journal of Children's Rights*, Vol. 3, p 297. See also Francois-Xavier Bangamwabo (2010) '*The implementation of international law and regional human rights instruments in Namibia*' in Anton Bosl, Nico Hom (eds.) '*Human Rights and the rule of law in Namibia*' Konrad Adenauer Stiftung, p 174.

<sup>33</sup> See generally Palmer for more details on mixed legal systems in Vernon Palmer (2008) 'Two rival theories of mixed legal systems', *Electronic Journal of Comparative Law*, Vol. 12, No. 1, pp 1-28.

<sup>34</sup> See Hansungule (note 3 above), pp 71-72.

<sup>35</sup> Articles 13(1) of the 2010 Constitution of Angola.

<sup>36</sup> See Article 18(1) of the 2004 Constitution of Mozambique.

(...) validly approved and ratified International treaties and agreements shall enter into force in the Mozambican legal order.

As can be seen, these provisions reflect a monist approach to the relationship between international law and municipal law, which means that ratified instruments such as the CRC form part of the domestic laws of the countries under consideration. It means that, international law norms which were not ratified do not form part of the municipal laws of these countries. Furthermore, these provisions make international law standards contained in ratified instruments like the CRC and the African Children's Charter directly applicable in these countries and invocable before their courts.<sup>37</sup>

Nevertheless, as will be explained later in Chapter 5, direct application of treaty norms in courts in Angola and Mozambique is not very common. This is partly because of lack of training on and poor understanding of treaty litigation by lawyers and advocates in these countries. Likewise, the use of constitutional litigation techniques by lawyers in these countries is not very common for similar reasons.<sup>38</sup> Often these professionals prefer to use subordinate legislation to make arguments in courts. In the face of this situation, it becomes important to investigate if these countries have enacted laws giving effect to CRC standards in order for them to advance

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<sup>37</sup> Hakan Hyden, *Implementation of International Conventions as a socio-legal enterprise: Examples from the Convention on the Rights of the Child*, in Jonas Grimheden, Rolf Ring (eds.) *Human rights law: From Dissemination to application*, Martinus Nijhoff Publishers (2006), p. 377. See also Nundy Kuruna (2004) *The Global status of legislative reforms related to the Convention on the Rights of the Child*, Global Policy Section, UNICEF, p 8.

<sup>38</sup> See Aquinaldo Mandlate, Serge Kamga, *Exploring the possibilities for impact litigation to promote children's rights in Portuguese and French speaking African countries*, research report submitted to the Centre for Child Law of the University of Pretoria (2011), pp 2-8.

children's rights in their jurisdictions. What follows, then, is an analysis of the legislative measures the two countries have taken.<sup>39</sup> The analysis of constitutional recognition of children's rights will precede the discussion on the domestic norms protecting children's rights in view of the fact that the constitution is the mother law of these countries in analysis and therefore has logical priority.

#### **4.4 Constitutional recognition of children's rights**

The notion that constitutional precepts must incorporate children's rights is laudable.<sup>40</sup> There are various reasons for this. For example, it is thought that constitutional incorporation of children's rights lays the foundation for the implementation of these rights at the national level since these rights become binding upon all subordinate authorities.<sup>41</sup> In this way, the constitutionalisation of children's rights promotes accountability and ensures conformity of all state actions with the rights under analysis.<sup>42</sup> It is also believed that providing for children's rights in constitutional norms, especially children's socio-economic rights, has the potential to ensure prioritisation of

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<sup>39</sup> See Chapter 3, section 3.7.1 discussions on legislative measures. See also United Nations Children's Fund (UNICEF) *Handbook on legislative reform: Realising children's rights*, United Nations Children's Fund (UNICEF) (2008), Vol. 1, p 1.

<sup>40</sup> As above.

<sup>41</sup> Julia Sloth-Nielsen, *Domestication of children's rights in national legal systems in African context: Progress and prospects*, in Julia Sloth-Nielsen (ed.) *Children's Rights in Africa: A legal perspective*, England, Ashgate (2008), p 64. See also Julia Sloth-Nielsen (2012) *Consultancy Report: Initial review of the draft Constitution of Zambia from a children's rights perspective*, p 2; copy on file with the author.

<sup>42</sup> See *Unity Dow vs. The Court of Appeal*, cited in a UNICEF (note 39 above), p 109.

these rights in the allocation of resource for their realisation.<sup>43</sup> This means that children's rights will be prioritised alongside other legitimate interests in the event of scarcity of resources when states are confronted by the need to make choices on how to spend resources. Lastly, the inclusion of children's rights in constitutional norms '*helps to underline the key message in the Convention – that children alongside adults are holders of human rights.*'<sup>44</sup>

The incorporation of children's rights in the Constitutions of Angola and Mozambique must thus be commended. It is submitted that the ratification of the CRC and the African Children's Charter played a significant role in the construction of children's rights defined in the constitutions of these countries. The primary effect of this was to reflect the countries' commitment to the realisation of children's rights protected in the CRC and ACRWC. Of special importance is that the incorporation of children's rights in the constitutions gave rise to the assertion that children's rights are autonomous and not subsumed within parental rights, as is often argued.<sup>45</sup>

It is also impressive to note that even before ratifying the CRC and the ACRWC, Angola and Mozambique had constitutions speaking to certain rights applicable for children. For example,

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<sup>43</sup> Odongo citing Sloth-Nielsen in Godfrey Odongo (2012) 'Caught between progress, stagnation and a reversal of some gains: Reflection on Kenya's record in implementation children's right's norms', *African Human Rights Law Journal*, Vol. 12, No. 1, p 130.

<sup>44</sup> See Para. 21 General Comment No. 5.

<sup>45</sup> See Barbara Woodhouse (1999) 'The constitutionalization of children's rights: Incorporating emerging human rights into constitutional doctrine', *Journal of Constitutional Law*, Vol. 2, No. 1, p 9

the 1975 Constitution of Angola protected everyone's right to education.<sup>46</sup> As was pointed out, this right also applied to children. Similarly, the 1975 Constitution of Mozambique protected everyone's right to nationality<sup>47</sup> and singled out the right to special protection for orphaned children.<sup>48</sup> Children were also mentioned in the 1990 Constitution of Mozambique, which was enacted before the country became a state party to the CRC and the ACRWC, and in the 1992 Constitution of Angola<sup>49</sup> passed shortly after Angola ratified the Convention.<sup>50</sup>

These instruments will not be discussed in detail because they have been replaced by new Constitutions.<sup>51</sup> However, in brief, the 1990 Constitution of Mozambique housed rights for children, and incorporated certain key principles, which were not found in the country's 1975 Constitution.<sup>52</sup> For example, it made provisions on the right to health and on the principle of the right to non-discrimination which were neglected under the 1975 Constitution.<sup>53</sup> Turning to Angola, its 1992 Constitution was the first country's constitution to single out a specific

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<sup>46</sup> See Article 29 of the 1975 Constitution of Angola.

<sup>47</sup> Article 5 of the 1975 Constitution of Mozambique.

<sup>48</sup> See Article 38 of 1975 Constitution of Mozambique.

<sup>49</sup> See *Preambulo da Lei de revisão Constitucional No. 23/92, de 16 de Setembro* (Angolan Constitutional Amendment Act of 1992).

<sup>50</sup> Angola ratified the Convention in 1990.

<sup>51</sup> Aquinaldo Mandlate, *Implementing the Convention on the Rights of the Child in Angola and Mozambique: Opportunities and challenges*, paper presented at Children's Rights Conference held in Belfast, Northern Ireland, 1 and 2 June 2011; copy on file with the author.

<sup>52</sup> Aquinaldo Mandlate (2010) *The protection and enforcement of socio-economic rights in Lusophone countries in Africa: Challenges in Angola, Cape Verde and Mozambique*, ESR Review, Community Law Centre, Vol. 11, No. 3, pp 22-23.

<sup>53</sup> See Article 56(4) of the 1990 Constitution of Mozambique.

provision speaking to children's socio-economic rights<sup>54</sup> and to incorporate a provision capturing the duties of the states in relation to these rights.<sup>55</sup> In relation to the duties of the state, Article 31 of this instrument imposed a requirement on the state to:

[c]ollaborate with the family and the society to promote the development of the child and to create the conditions that were necessary for their socio-economic and cultural rights.<sup>56</sup>

Commenting on this provision relating to children's socio-economic rights, Sloth-Nielsen observes that, as part of the Bill of Rights entrenched in the 1992 Constitution of Angola, Article 30(1) contrasted with the general proposition of many African constitutions, which place socio-economic rights for children in the directive principles of state policy.<sup>57</sup> In this way, it can be argued, the 1990 Constitution of Mozambique and the 1992 Constitution of Angola were important in advancing children's rights.

However, as was pointed out, Angola and Mozambique now have new Constitutions.<sup>58</sup> The new Constitution of Mozambique (2004 Constitution) and the current Constitution of Angola (2010 Constitution) are more relevant to advancing children's rights than their previous constitutions in that the latter contain provisions which are more progressive than those in the previous constitutions.<sup>59</sup> In addition, these new constitutions retain all the rights afforded to children under

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<sup>54</sup> See Article 30 of the 1992 Constitution of Angola.

<sup>55</sup> See Article 31 of the 1992 Constitution of Angola.

<sup>56</sup> Translation by the author.

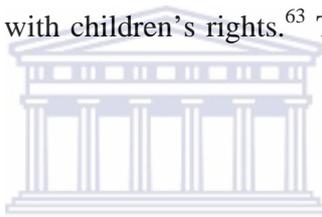
<sup>57</sup> Sloth-Nielsen (note 41 above), p 59.

<sup>58</sup> See generally Mandlate (note 51 above).

<sup>59</sup> As above.

the earlier constitutions and add further protection by including progressive standards capturing other rights that were neglected in the previous constitutions. For example, in both countries the constitutions retain provisions speaking to the right to nationality<sup>60</sup> and the right to special protection before the law,<sup>61</sup> which were also captured in earlier constitutions. In terms of the addition of further protection to children, both allow children to enjoy all the rights otherwise afforded to adults, with the exception of rights which are only given to adults by virtue of their age and maturity.<sup>62</sup>

Regarding the progressive standards capturing children's interests, the new constitutions single out provisions specifically dealing with children's rights.<sup>63</sup> Thus, Article 80 of the Constitution of Angola states that:



1. Children shall have the right to receive special attention from the family, society and the state which, by working closely together, must ensure that they are fully protected against all forms of neglect, discrimination, oppression, exploitation and abuse of authority, within the family and their institutions.
2. Public policies regarding the family, education and health must safeguard the principle of the best interest of the child, as a means of guaranteeing their full physical, mental and cultural development.

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<sup>60</sup> See Article 9(2) of 2010 Constitution of Angola, and Articles 23-24 of 2004 Constitution of Mozambique.

<sup>61</sup> See Article 80(3) of the 2010 Constitution of Angola, and Article 47(1) of the 2004 Constitution of Mozambique.

<sup>62</sup> See Tyabazayo for a similar view in Phumlani Tyabazayo (2009) *'The duty of the state to give effect to the rights of children in child-headed households in the context of Section 28(1)(b) and (c) of the Constitution of the Republic of South Africa, 1996'*, unpublished LLM dissertation, University of South Africa, p 19. See also Article 54(1) of the 2010 Constitution of Angola, and Article 73 of the 2004 Constitution of Mozambique.

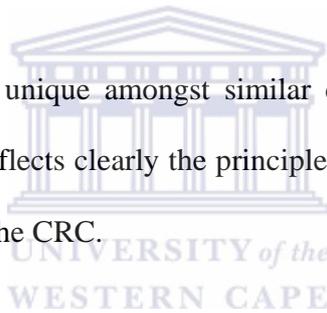
<sup>63</sup> A similar view is expressed by Sloth-Nielsen. See Sloth-Nielsen (note 41 above), pp 57-64.

3. The state shall ensure special protection for children who are orphaned, disabled, abandoned or in any way deprived from a family environment.
4. The state shall regulate the adoption of children, promoting their integration into a family environment and striving to ensure their full development.
5. Minors of school age are forbidden to work, under the terms of the law.<sup>64</sup>

On the other hand, Article 47 of the Constitution of Mozambique provides that:

1. Children shall have the right to protection and the care required for their well being.
2. Children may express their own opinion freely on the issues that relate to them, according to their age and maturity.
3. All acts carried out by public entities or private institutions in respect of children shall take into account, primarily, the best interest of the child.

As can be seen this provision is unique amongst similar constitutional precepts speaking to children's rights inasmuch as it reflects clearly the principle of respect of the views of the child which is captured in Article 12 of the CRC.



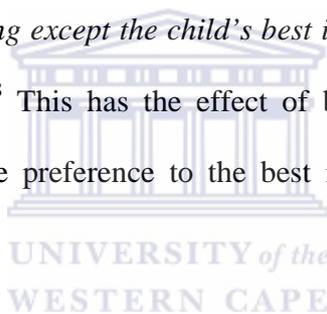
It is submitted that the incorporation of specific provisions capturing children's right in the new constitutions of Angola and Mozambique was a striking development aimed at enhancing protection for them. This is borne out of the fact that the provisions contain elements from the

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<sup>64</sup> This provision expands protection for orphaned and disabled children, which was not covered in the 1992 Constitution of Angola. However, the provision under analysis failed children by taking away the duty of the state to 'promote the harmonious development of the personality of young people and create conditions for the fulfilment of economic social and cultural rights of youth', as stated in the 1992 Constitution of Angola. See Mandlate (note 51 above).

CRC, a state of affairs which helps to strengthen the possibility of implementing the rights protected in the Convention in these two jurisdictions.<sup>65</sup>

One of the striking developments was the domestication of Article 20 of the CRC standard, which binds states to provide special protection for children. This provision is of particular relevance for children deprived of a family environment who are in need of special care and assistance by the state.<sup>66</sup> The constitutional laws of Angola and Mozambique have also incorporated basic principles underlying the CRC.<sup>67</sup> In this regard, the CRC best interest principle, thought to portray a “*bossy*” image of the child as to suggest that when decisions affecting children are made, nothing except the child’s best interests matters’, is reflected in the two provisions discussed above.<sup>68</sup> This has the effect of binding Angolan and Mozambican public and private entities to give preference to the best interest of the child in all matters affecting the latter.



Furthermore, the Angolan law includes a non-discrimination clause<sup>69</sup> while the Mozambican law separately embraces the principle on the right of the child to be heard captured in Article 12 of

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<sup>65</sup> This is supported by Sloth-Nielsen’s assertion that modern African Constitutions spell out the commitments of democratic government and lay the foundation for further implementation of children’s rights at national level. See Sloth-Nielsen (note 41 above), p 64.

<sup>66</sup> See Tyabazayo (note 62 above), p 20.

<sup>67</sup> See Article 80(2) of 2010 Constitution of Angola and Article 47(3) of 2004 Constitution of Mozambique.

<sup>68</sup> Admark Moyo (2012) ‘Reconceptualising the “paramountcy principle”’: Beyond the individualistic construction of the best interest of the child’, *African Human Rights Law Journal*, Vol. 12, No. 1, p 143.

<sup>69</sup> See Article 80(1) of 2010 Constitution of Angola.

the CRC.<sup>70</sup> These standards are described as principles forming the soul of the CRC<sup>71</sup> and must be regarded as foundational pillars for the application and interpretation of constitutional norms of Angola and Mozambique. This has the particular effect of promoting children's rights. For example, the fact that the principle of the right of the child to participate is constitutionally incorporated strengthens the aspiration to promote the participation of children in the construction of a democratic society. This implies that children must be allowed to express their views and must have their voices heard in all matters affecting them.<sup>72</sup> In this way, the constitutional protection of the principle of the child's right to participate is fundamental to securing the realisation of children's rights, including other rights such as children's right to freedom of expression and their right to freedom of thought which are encompassed under the child's participation rights.<sup>73</sup> In the same vein, by providing for the best interest of the child in constitutional norms, the prospects are encouraging for practical consideration of this standard at subordinate levels, especially if it is used as a rule of procedure binding all authorities.<sup>74</sup> This would mean raising the possibilities for consideration of the child's best interest in decisions

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<sup>70</sup> See Article 47(2) of 2004 Constitution of Mozambique.

<sup>71</sup> See Para. 12 of General Comment No. 5.

<sup>72</sup> See generally Lansdown for more details on the right of the child to participate in the construction of a democratic society in Gerison Lansdown (2001) *'Promoting children's participation in democratic decision-making'*, UNICEF Innocenti Research Centre. See also Christine Nomdo, *'Children's involvement in government policy and budget analysis'*, available at [http://www.ci.org.za/depts/ci/pubs/pdf/general/gauge2010-11/sa\\_child\\_gauge\\_2010-11\\_policybudget.pdf?phpMyAdmin=xGIUwSo1y0U00fk9xyQp8iqGULa](http://www.ci.org.za/depts/ci/pubs/pdf/general/gauge2010-11/sa_child_gauge_2010-11_policybudget.pdf?phpMyAdmin=xGIUwSo1y0U00fk9xyQp8iqGULa) (accessed 13 August 2012).

<sup>73</sup> Louise Ehlers, Cheryl Frank (2008) *'Child participation in Africa'* in Julia Sloth-Nielsen (ed.) *'Children's Rights in Africa: A legal perspective'*, Ashgate, p 122.

<sup>74</sup> See Zermatten for the application of the best interest standard as a rule of procedure in Jean Zermatten (2010) *'The best interest of the child principle: Literal analysis and function'*, *The International Journal of Children's Rights*, Vol. 18, No. 4, p 485.

taken by public and private institutions, as well as any other entities where decisions affecting children are taken.

The Mozambican Constitution has another important provision speaking to children's rights. Thus, Article 121 of the Mozambican Constitution, which is generally termed 'childhood', states that:

1. All children have the right to protection from the family, from society and from the state, having in mind their full development.
2. Children, in particular orphans and disabled and abandoned children, shall be protected by the family, by society and by the state against all forms of discrimination, ill treatment and the abusive use of authority within the family and in other institutions.
3. Children shall not be discriminated against on the grounds of their birth, nor shall they be subjected to ill treatment.
4. Child labour shall be prohibited, whether the children are of compulsory school going age or any other age.

As can be seen, this provision strengthens the constitutional protection afforded to children in Article 47 of the Mozambican law. This is mainly due to the fact that Article 121 elaborates on the child's right to non-discrimination and brings on board the child's right to development, which is not protected in Article 47.<sup>75</sup>

In elaborating upon the non-discrimination clause, Article 121(3) makes it illegal to discriminate against children on the grounds of the geographical place where they are born. In this way, this provision becomes important to protect children, especially refugee children from neighbouring countries. Furthermore, Article 121(2) prohibits all forms of discrimination against children in

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<sup>75</sup> See Article 121(2) and (3) of 2004 Constitution of Mozambique.

the family and other (public or private) institutions.<sup>76</sup> Again, the positive effect of this provision for protecting children against all form of discrimination cannot be overemphasised.<sup>77</sup> The right of the child not to be discriminated against constitutes one of the four principles underlying the CRC, and together with the child's right to development, which is also covered in Article 121, is regarded as one of the components forming the soul of the Convention.<sup>78</sup> Of special importance is that the essence of non-discrimination principle is to ensure that all child rights apply to every child without exception;<sup>79</sup> thus, by its incorporation, the provision makes the Constitution a progressive tool to advance children's rights.

Despite the remarkable features of the Constitution of Mozambique, there are certain features which make the Angolan Constitution interesting to international lawyers. On this note, the Angolan law does not protect all four principles underlying the CRC, but it reiterates that international law instruments can be used to protect human rights which are not covered in the Constitution. In this regard, Article 26(1) of the Angolan Constitution is central for stating that fundamental rights established in the Constitution shall not exclude other rights contained in

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<sup>76</sup> As above.

<sup>77</sup> For example, see Schulze for details on how non-discrimination clauses such as Article 121 of the 2010 Constitution of Mozambique can be employed to advance the rights of children with disabilities in Marianne Schulze, *'A handbook on the human rights of persons with disabilities: Understanding the UN Convention on the Rights of Persons with Disabilities'*, Handicap International, 3rd Edition (2010), p 17.

<sup>78</sup> See Save the Children UK South Africa Programme (2006) *'Legal and policy frameworks to protect the rights of vulnerable children in Southern Africa'*, Save the Children, p 8.

<sup>79</sup> See Sahovic et al (note 6 above), p 92.

international law instruments.<sup>80</sup> This provision creates space for the domestication of principles which are not explicitly incorporated in the Angolan Constitution (such as the child's right to life, survival and development; and the right of the child to participate). On account of this, I submit that Article 26(1) of the law under consideration is extremely important to give effect to all principles and standards embedded in treaties relating to children, such as the CRC and the ACRWC, and to promote the advancement of children's rights in Angola.<sup>81</sup>

Furthermore, Article 26(2) provides for the relevance of international law when used as an interpretative tool to advance human rights, particularly children's rights, within the context of the Angolan legal system. In its progressive manner, the provision at hand states that:<sup>82</sup>

[c]onstitutional norms and all other provisions contained in legislation relating to fundamental rights must be interpreted in accordance with international law instruments.

I believe that the aim of this provision, when placed within the framework of instruments pertaining to children such as the CRC and the African Children's Charter, is to ensure successful implementation of children's rights. A similar view has been stated in relation to Section 39(1)(c) of the South African Constitution, which obliges courts to consider international

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<sup>80</sup> See Article 26(1) of the Angolan Constitution.

<sup>81</sup> In this regard, it is noted that certain rights entrenched in human rights treaties do not have constitutional equivalents; as a result, general domestic provisions like Article 26 help to bring those international standards to the domestic legal order. See Magnus Killander, Horace Adjolohoun (2009) *International law and domestic human rights litigation in Africa: An introduction*, in Magnus Killander (ed.) *International law and domestic human rights litigation in Africa*, Pretoria University Law Press, p 16.

<sup>82</sup> See Article 26(2) and (3) of the 2010 Constitution of Angola.

law when interpreting the Bill of Rights.<sup>83</sup> Arguing in these terms, Ngidi asserted that by taking their obligation under Section 39(1) of the Constitution very seriously, South African courts have developed better standards for children and contributed to developing South African child law and jurisprudence.<sup>84</sup> This leads one to think that if Angolan courts apply Article 26 of the Constitution correctly, they will be able to contribute positively towards the advancement of children rights as their South African peers have done. The significance of this cannot be overstated in the context of a country where the role of domestic courts has been tarnished for developing poor jurisprudence, as is highlighted in the next chapter.<sup>85</sup>

Having discussed the constitutional incorporation of children's rights, the chapter turns to the next section which investigates the development of the laws and examines the statutes governing children's rights in Angola and Mozambique. The reason for analysing domestic laws is that protection given to children's rights in the Constitution needs to be backed by legislative enactment to develop the constitutional norms.<sup>86</sup>

#### **4.5 Child laws of Angola and Mozambique: Reform processes and the statutes**

This section discusses the laws relating to the promotion and protection of children's rights in Angola and Mozambique. Significant attention is placed on discussing the child-welfare statutes

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<sup>83</sup> See Section 39(1) of the South African Constitution, Act 108 of 1996 (South African Constitution).

<sup>84</sup> See Ronaldah Ngidi (2010) *The role of international law in the development of children's rights in South Africa: A children's rights litigator's perspective*, in Magnus Kilander (ed.) *International law and domestic human rights litigation in Africa*, Pretoria University Law Press, pp 173-176.

<sup>85</sup> See Chapter 5, section 5.4.2.2.

<sup>86</sup> See also Sahovic et al (note 6 above), p 73.

and juvenile justice laws. For explanatory reasons other statutes will be discussed later.<sup>87</sup> The discussion looks first at the reform processes leading to the enactment of these laws and later analyses the law themselves. The analysis of the law reform process of Mozambique covers both the development of the country's child-welfare and the juvenile justice statutes. By contrast, only the reform pertaining to the development of the Angolan child-welfare statute is discussed. This is because no information was available in relation to the development of the juvenile justice statute of Angola, which predates the country's child-welfare statute enacted recently in the last quarter of 2012.

#### **4.5.1 Exploring the child law reform processes of Angola and Mozambique**

The Ugandan child law reform experience is often described as the first and pioneer project to take place in Africa.<sup>88</sup> However, many African countries, after ratifying the CRC, followed the Ugandan example, with the Convention serving as a springboard for this process.<sup>89</sup> Before then, many were saddled with antiquated colonial statutes regulating children's rights.<sup>90</sup> Angola and Mozambique were no exception, and needed new legislation that matched the CRC and other instruments applicable to children. Mozambique was first to go through the (child-welfare law) reform process before Angola. The Mozambican reform process started with a 1998 study

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<sup>87</sup> See section 4.4.3.

<sup>88</sup> Julia Sloth-Nielsen (2008) 'A developing dialogue- Children's right's, children's law and economics: Surveying experiences from Southern and Eastern African law reform processes', *Electronic Journal of Comparative Law*, Vol. 12, No. 3, p 1.

<sup>89</sup> See Kuruna (note 37 above), p 13. See also Julia Sloth-Nielsen, Belinda Van Heerden (1997) 'New child care and protection legislation for South Africa? Lessons from Africa', *Stellenbosh Law Review*, Vol. 1, p 266.

<sup>90</sup> Sloth-Nielsen (note 88 above), p 1.

detailing the main laws applicable to children. Owing to the name of its author, the study became known as the Sacramento study.<sup>91</sup> Basically, it assessed the laws relating to children against the country's Constitution and international law norms. The CRC and the African Children's Charter were the main instruments used to inform the review process.<sup>92</sup> It is believed that the Sacramento study did not consider many other important documents speaking to children's rights such as the two Optional Protocols to the CRC (1999) and the Hague Convention on Inter-country Adoption, because when it was carried out, Mozambique had not ratified many of them.<sup>93</sup> This means that the Sacramento study had unavoidable gaps inasmuch as it did not deal with the standards of protection of children's rights contained in instruments which were not ratified.

Notably, however, the study found that the legislation pertaining to children was outdated and lacked coverage of international standards relating to the protection and promotion of children's rights. It also found that the law focusing on the interests of children had not considered the local context, characterised by socio-economic hardship and barriers affecting children, and revealed that these laws were fragmented and difficult to access. The study further highlighted a lack of clear responsibilities and duties amongst institutions tasked with the realisation of children's rights, and weak coordination amongst them.<sup>94</sup> Arguably, these gaps limited the extent to which the CRC was applied in Mozambique. Despite these findings, the insufficiencies of the

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<sup>91</sup> See Julia Sloth-Nielsen, Jacqueline Gallinetti (2004) *'Legal reform for the protection of children in Mozambique'*, UNICEF and MINCAS, p 13.

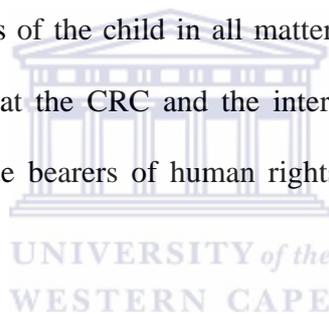
<sup>92</sup> As above.

<sup>93</sup> As above.

<sup>94</sup> As above, pp 15-21.

Sacramento study, including the fact that it did not cover all relevant instruments applicable to children, meant it was necessary to carry out further studies.

Eventually another review process took place,<sup>95</sup> informed by consultative workshops, interviews with stakeholders working on or dealing with children rights, including, the judiciary, the police, social workers, representatives of local Non-Governmental Organisations (NGO's), International Non-Governmental Organisations (INGO's), government departments, and others. Children were also involved in the new process through exercises aimed to ensure their participation and the expression of their views.<sup>96</sup> On the one hand, this showed compliance with the principle that due weight must be given to the views of the child in all matters affecting them.<sup>97</sup> On the other, it showed recognition of the fact that the CRC and the international community acknowledged them as social actors<sup>98</sup> and as true bearers of human rights.<sup>99</sup> Regional workshops were also



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<sup>95</sup> The team of consultants included Professor Julia Sloth-Nielsen (currently a member of the African Committee of Experts on the Rights and Welfare of the Child – African Committee of Experts) and Professor Jacqueline Gallinetti (former coordinator of the Child Law Project of the Community Law Centre, University of the Western Cape).

<sup>96</sup> See Sloth-Nielsen and Gallinetti for references on Mozambique as a good practice example on the age of criminal capacity in Julia Sloth-Nielsen, Jacqueline Gallinetti (eds.) (2004) *Child Justice in Africa: A guide to good practice*, Community Law Centre, p 57.

<sup>97</sup> See Lothar Krappmann (2010) 'The weight of the child's view (Article 12 of the Convention on the Rights of the Child)', *The International Journal of Children's Rights*, Vol. 18, No. 4, p 501.

<sup>98</sup> Didier Reynaert et al (2009) 'A review of children's rights literature since the adoption of the United Nations Convention on the Rights of the Child', *Childhood*, Vol. 16, No. 4, p 521. See also generally Anne Smith (2007), 'Children as social actors: An introduction', *The International Journal of Children's Rights*, Vol. 15, No. 1, pp 1-4.

<sup>99</sup> Dominik McGoldrick (1991) 'The United Nations Convention on the Rights of the Child', *International Journal of Law and the Family*, Vol. 5, No. 2, p 132.

organised with representatives from all regional provinces (ten in the country) participating in the process.<sup>100</sup>

The new review recaptured many findings of the Sacramento study and identified other challenges obstructing the advancement of children's rights. For example, it highlighted that the existing laws lacked a definition of a child aligned to the CRC and failed to protect children from abuses such as pornography, stigma and discrimination linked to HIV/AIDS. It also showed multiple areas where laws existed but were weak and needed strengthening. These include, for instance, the fact that there was a need to strengthen the law covering aspects of children in need of alternative care, which failed to enumerate a range of options of alternative care to meet the standards outlined in the CRC.<sup>101</sup> It suffices to say that the new review largely captured the challenges that needed to be addressed in order to bring Mozambican domestic laws into conformity with treaties applicable to children, particularly the CRC.

Recommendations were made for the government law reform unit, known as the *Unidade Técnica de Reforma Legal (UTREL)*,<sup>102</sup> to address the challenges identified during the drafting process of the new child law. As part of the recommendations, the government was asked to establish a mechanism to coordinate and monitor the implementation of children's rights, and to ensure that the four cardinal principles of the CRC (non-discrimination, best interest of the child,

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<sup>100</sup> Sloth-Nielsen et al (note 91 above), p 13.

<sup>101</sup> As above, pp 8-9.

<sup>102</sup> See The African Child Policy Forum (2007) *In the best interests of the child: Harmonising laws in Eastern and Southern Africa*, The African Child Policy Forum, p 93.

child right to life, survival and development, and the right of the child to participate) be reflected in the new legislation.<sup>103</sup> The overall objective was to ensure that a comprehensive child law covering all aspects of children's interests was adopted.

However, despite the call for the adoption of a comprehensive law, the reform process culminated with enactment of two distinct statutes focusing on children's rights: one statute covering child social welfare issues,<sup>104</sup> and another regulating juvenile justice.<sup>105</sup> In other jurisdictions the rationale for establishing such separate juvenile justice systems against the possibility of linking both child welfare and juvenile justice concerns in one piece of legislation has been attributed primarily to the need to address the specific needs of children who come into conflict with the law and to ensure better and successful system of reintegration for these children.<sup>106</sup> In this regard, it is argued further that it is incumbent upon states to decide the option of consolidating their legislation on children's rights into a single comprehensive statute after the review process or to adopt the approach leading to enactment of thematic legislation on children where the review process yields more than one statute.<sup>107</sup> However, it is not clear why the

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<sup>103</sup> Sloth-Nielsen et al (note 91 above), pp 8-9.

<sup>104</sup> Act No.7/2008, of 9 July 2008, approves the Mozambican Children's Act (Act No. 7/2008 of 9 July 2008).

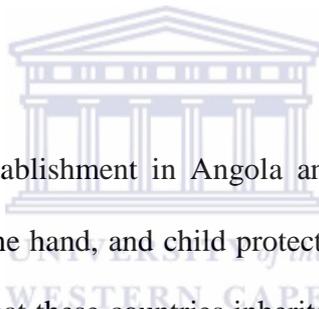
<sup>105</sup> Juvenile justice is to be understood as entailing all the necessary procedures or processes of dealing with children or persons below 18 years who commit or are accused of committing a crime. See Joan Kariuki (2010) *'Towards a child rights approach: A comparative analysis of the juvenile justice reform process in Kenya and South Africa'*, unpublished LLM dissertation, Central European University, pp 4-5. See also Act No. 8/2008 of 15 July 2008, Mozambican Juvenile Justice Act (Act No. 8/2008 of 15 July 2008).

<sup>106</sup> Geraldine Van Bueren, *'The international law on the rights of the child'*, Martinus Nijhoff Publishers (1995), p 175.

<sup>107</sup> The African Child Policy Forum (note 102 above), p 20.

Mozambican experience came up with two separate statutes focusing on children, especially when there were recommendations for the enactment of a holistic law, but I will try to address this as I briefly explain some aspects of the colonial history of Mozambique and Angola below.

Angola apparently did the same, by providing for judicial bodies tasked with the administration of justice for children in a separate statute, which is different from the country's child-welfare law. Thus, the Angolan Juvenile Justice Act<sup>108</sup> remains on the statute book to deal with children in conflict with the law, and the recently enacted Law on the Protection and Holistic Development of Children (Angolan Children's Act)<sup>109</sup> addresses the protection and welfare aspects of children's rights.



As I promised to explain, the establishment in Angola and Mozambique of distinct statutes covering juvenile justice, on the one hand, and child protection and social welfare on the other, can be attributed only to the fact that these countries inherited separate colonial laws on each of these subjects. Indeed, in Mozambique and Angola the colonial era saw distinct statutes being adopted to regulate issues of child social welfare and juvenile justice respectively. In these countries, for most of the period after independence colonial laws on children's rights, including the 1966 Civil Code covering social welfare issues,<sup>110</sup> and Decree No. 417/71,<sup>111</sup> speaking to

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<sup>108</sup> See Act No. 9/96 of 19 April 1996, Angolan Juvenile Justice Act (Act No. 9/96 of 19 April 1996).

<sup>109</sup> See Act No. 25/2012 of 22 August 2012 approving the Angolan Children's Act (Act No. 25/2012 of 12 August 2012).

<sup>110</sup> See 1966 Civil Code.

<sup>111</sup> Decree No 417/71 of 29 September 1971 (Decree No. 417/71).

juvenile justice, remained applicable, with the result that their reform processes, which began much later, sought to improve the system inherited from the Portuguese colonial administration rather than change that original structure.

With regard to Angola, there is very little information about the initial stages of the (child-welfare) reform process, with the government bearing the greatest responsibility for this thanks to its monopoly of the process.<sup>112</sup> The available information indicates that the process was not very open to public participation and had little involvement by civil society organisations such as UNICEF and Save the Children, which are known for working for the advancement of children's rights.<sup>113</sup> In this regard, it is said, for instance, that UNICEF was only given three days to provide comments on the Bill that was later passed into law.<sup>114</sup> Arguably, this was too short a time in view of the amount of information that had to be prepared. In addition, there is no evidence pointing to the involvement of children in the process. Consequently, it can be argued that besides violating the celebrated principle that good review of (child) legislation is done through a widely participatory process involving all institutions working with children, the reform process also violated the principle governing the need to promote child participation in decisions affecting them, which contradicts a tenet of best practice according to which child law reform must be open to wide participation by children.<sup>115</sup>

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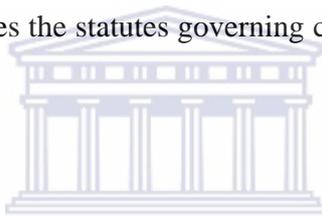
<sup>112</sup> See Aquinaldo Mandlate, 'Brief review: Angolan Law on the Protection and Holistic Development of Children', Community Law Centre (2012), p 11, research report submitted to UNICEF Angola; copy on file with the author.

<sup>113</sup> As above.

<sup>114</sup> Information obtained during author's visit to Angola (July-August 2012).

<sup>115</sup> See Daksha Kassan (2004) 'Participation by children' in Julia Sloth-Nielsen, Jacqueline Gallinetti (eds.) 'Child Justice in Africa: A guide to good practice', Community Law Centre, pp 54-69.

Nevertheless, Angola's Children's Act, resulting from the previous initiatives, finally came into existence towards the end of the third quarter of 2012. The drafting process was initiated in 2010 when the government wanted to adopt an 'early childhood development policy.' In 2011, a draft policy was submitted for discussion under the National Child Forum organised by the National Children's Council.<sup>116</sup> The discussions concluded that the country needed an early childhood law which would be developed from the draft 'childhood development policy'. However, the process became very ambitious and ended with a comprehensive Bill covering the rights of all children (from 0 – 18 years). As was pointed out, the Bill has now been enacted into law and covers many aspects of children's lives. With the process of the development of child laws having now been considered, the next section explores the statutes governing children's socio-welfare rights in the two countries.



#### **4.5.2 Child welfare statutes of Angola and Mozambique**

The children's statutes of Angola<sup>117</sup> and Mozambique<sup>118</sup> are the primary instruments setting out standards for the promotion and protection of children's rights in the jurisdictions concerned. They set out clear obligations binding the governments of these countries, as well as parents and society at large, to promote the implementation of children's rights. Both statutes envisage the

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<sup>116</sup> As will be discussed in the next chapter, the Angolan National Children's Council is responsible to coordinate the implementation of children's rights. Mozambique and other countries have their children's rights coordination mechanisms established under the Children's Act. However, the establishment in Angola of a coordination mechanism predates the enactment of the country's Children's Act. This is commendable because in many countries the opposite seems to be the norm. See Mandlate (note 112 above), p 12.

<sup>117</sup> Act No. 25/2012 of 22 August 2012.

<sup>118</sup> Act No.7/2008 of 9 July 2008.

advancement of children's rights as defined in the Constitution, the CRC, the ACRWC and other instruments relating to the subject.<sup>119</sup> As will be discussed shortly, both Acts contain a comprehensive list of civil and political rights protected in the CRC and the ACRWC, and include fundamental principles underlying these instruments.<sup>120</sup>

Of particular significance, the statutes of Angola and Mozambique replaced outdated colonial laws such as the 1966 Civil Code, which applied in all Portuguese colonies (Angola and Mozambique included) with discriminatory provisions. In this regard, Article 1604 of the Civil Code, is one example of the provisions in the colonial legislation that needed to be repealed for its discriminatory treatment of children: it allowed girls to get married earlier (16 years) than boys (18 years). Consequently, it can be argued that the new laws not only envisioned advancing children's rights defined in the CRC and the ACRWC; they were also intended to address the challenges posed by antiquated colonial laws, which were discriminatory, deficient in purpose and lacking in depth in relation to issues bearing on the advancement of children's rights.<sup>121</sup>

The Children's Act of Mozambique enacted in 2008 has multiple provisions relating to the CRC and other instruments relevant to children.<sup>122</sup> For example, Article 3 of the Act contains a similar definition of a child as is found in the CRC and the ACRWC, stating that a child is every person

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<sup>119</sup> See Article 1(3) of Act No. 25/2012 of 22 August 2012, and Article 1 of Act No. 7/2008 of 9 July 2008.

<sup>120</sup> See Mandate (note 112 above), p 7.

<sup>121</sup> See the Preamble to the Children's Act.

<sup>122</sup> See generally Mandate (note 51 above).

below the age of eighteen years.<sup>123</sup> By including a clear definition of a child, the Mozambican law obviated the discrepancies to which children would otherwise be subjected in the absence of clear standards. It should be noted that the concept of a child incorporated in the Mozambican children's law is closer to the definition provided in the ACRWC than in the CRC. This is due to the fact that, similar to the latter treaty, the Mozambican domestic law captures a fixed definition (18 years) that cannot be subjected to alternative prescriptions at the domestic level.<sup>124</sup> The effect is to outlaw all socio-cultural practices, such as initiation rites and child marriage, which presuppose and prescribe contrary methods of determining when a child attains the age of majority.<sup>125</sup>

Importantly, all four pillar principles reflected in the CRC and ACRWC (namely, the principle of non-discrimination; the principle of the best interest of the child; the principle on the child's rights to life, survival and development; and the principle of respect for the views of the child),<sup>126</sup> discussed in section 4.4, are incorporated in the child laws of Angola and Mozambique.<sup>127</sup>

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<sup>123</sup> See Article 3 of Act No. 7/2008 of 9 July 2008, Article 1 of the CRC, and Article 2 of the ACRWC.

<sup>124</sup> Njungwe (note 17 above), p 12.

<sup>125</sup> See generally John Davis, '*Wilderness rites of passage: Initiation, growth, and healing*', pp 1-18, available at <http://www.johnvdavis.com/wild/WRoP%2011-26-03.pdf> (accessed 12 November 2012).

<sup>126</sup> See Child Right Information Network (2009) '*Guide to non-discrimination and the CRC*', Child Rights Information Network, p 4.

<sup>127</sup> See Articles 7 (non-discrimination), 6 (best interest), 14 (right to life), and 35 (right to participate) of Act No. 25/12 of 22 August 2012. See also Articles 2 (non-discrimination), 9 (best interest), 11-20 (right to life), and 5 (right to participate) of Act No. 7/2008 of 9 July 2008.

Article 6 of the Angolan Children's Act and Article 9 of the Mozambican law have a common definition of best interest of the child. They state that the child's best interest is:<sup>128</sup>

[e]verything required to defend and to safeguard the integrity and the identity as well as the development and maintenance of the child's well-being.

This elaboration of the best interest standard in the statutes concerned is laudable for providing clear directives to inform decisions that may affect the integrity and the well-being of children.<sup>129</sup>

This adds to the fact that the principle under analysis applies to all children and relates to the specific aspects of children's rights such as adoption<sup>130</sup> and conditions of alternative care for children deprived of a family environment,<sup>131</sup> which are some of the major problems affecting many African children (those in Angola and Mozambique included).

By the common Articles 4 of the two statutes under analysis, refugee children have the right to equal protection as have other children under the law of Angola and Mozambique.<sup>132</sup> The protection given to refugee children in these statutes is to be commended, bearing in mind that

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<sup>128</sup> Article 9(3) Children's Act of 2008.

<sup>129</sup> Lynne Kohm (2008) 'Tracing the foundation of the best interest of the child standard in American jurisprudence', *Journal of Law and Family Studies*, Vol. 10, No. 2, p 371.

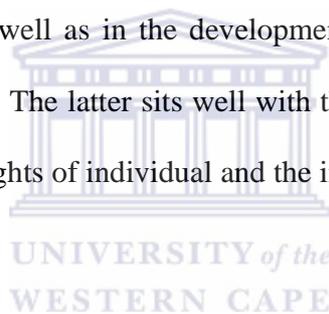
<sup>130</sup> See generally Sarah Sargent (2009) *The best interest of the child in inter-country adoption: A constructivist and comparative account*, unpublished PhD thesis, De Montfort University, pp 1-323, See also generally Ezra Griffith, Rachel Bergeron (2006) 'Cultural stereotypes die hard: The case of transracial adoption', *Journal of the American Academy of Psychiatry and the Law Online*, Vol. 34, No. 3, pp 303-314.

<sup>131</sup> Maria Assim (2009) *In the best interest of children deprived of a family environment: A focus on Islamic kafalah as an alternative care option*, unpublished LLM dissertation, Centre for Human Rights of the University of Pretoria, p 27.

<sup>132</sup> See Article 4(4) of Act No. 25/12 of 22 August 2012, and Article 4(2) of Act No. 7/2008 of 9 July 2008.

Angola and Mozambique host many refugees from neighbouring countries in the region.<sup>133</sup> Notably, women and children are the most vulnerable groups accounting for the large number of the refugee population of these countries. It therefore suffices to justify the need for affording them legal protection. The protection of refugee children also shows the commitment of these countries to fulfil their duties under the OAU Refugee Convention, which compels state to promote and protect the rights of this vulnerable group.<sup>134</sup>

Furthermore, the Angolan and the Mozambican law underscore that children have rights and duties.<sup>135</sup> Among these duties, children must respect their parents and are required to participate in the affairs of their families as well as in the development of the state and the community, based on their age and maturity.<sup>136</sup> The latter sits well with the African concept of human rights based on the need to balance the rights of individual and the interests of the community.<sup>137</sup> In this



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<sup>133</sup> Mpho Makhema (2009) 'Social protection for refugees and asylum seekers in the Southern Africa Development Community (SADC)', The World Bank, p 8.

<sup>134</sup> Jamil Mujuzi (2009) 'The African Commission on Human and Peoples' Rights and the promotion and protection of refugees' rights', *African Human Rights Law Journal*, Vol. 9, No. 1, pp 164-166.

<sup>135</sup> See Article 34-37 of Act No. 25/12 of 22 August 2012, and Article 8 of Act No. 7/2008 of 9 July 2008.

<sup>136</sup> See Articles 34 (respect for parents), and 35 (participate) of Act No. 25/12 of 22 August 2012. See also Article 8(a) of Act 7/25 of 9 July 2008.

<sup>137</sup> See also Chuma Himonga (2008) 'African customary law and children's rights: intersections and domains in a new era' in Julia Sloth-Nielsen (ed.) 'Children's Rights in Africa: A legal perspective', Ashgate, pp73-74. See also generally Julia Sloth-Nielsen, Benyam Mezmur (2008) 'A dutiful child: Implications of Article 31 of the African Children's Charter', *Journal of African Law*, Vol. 52, No. 2, pp 159-189.

regard, the duty endows children with agency and responsibility by conceiving of them as actors who must contribute positively to the development of a collective society.<sup>138</sup>

The laws under analysis also contain many civil and political rights. Some examples of prominent civil and political rights protected include the rights to life, dignity,<sup>139</sup> health<sup>140</sup> and education.<sup>141</sup> Children's right to a name<sup>142</sup> and the right to freedom of movement are also covered. These rights are protected in the CRC and the ACRWC. Other aspects of social welfare of children protected in these statutes include provisions for the establishment and management of child-care institutions that form part of the system of protection of children's rights.<sup>143</sup> This means that the children's statutes of Angola and Mozambique are good vehicles to facilitate the implementation of the Convention and the Charter in the jurisdictions concerned.

Moreover, children are also given other rights which are not necessarily protected in the provisions of the statutes under analysis. For example, under Article 3 of the Angolan law and Article 4(1) of the Mozambican statutes, children enjoy rights protected in other instruments. This does not only show the similarity between these instruments, but also widens the basis for

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<sup>138</sup> Rachel Hinton (2008) 'Children's participation and good governance: Limitations of the theoretical literature', *The International Journal of Children's Rights*, Vol.16, No. 3, p 290.

<sup>139</sup> Article 8 of Act No. 25/12 of 22 August 2012, and Articles 23 and 40 of Act No. 7/2008 of 9 July 2008.

<sup>140</sup> Article 14 of Act No. 25/12 of 22 August 2012, and Article 12-13 of Act No. 7/2008 of 9 July 2008.

<sup>141</sup> See Articles 11-13 of Act No. 25/12 of 22 August 2012, and 28 of Act No. 7/2008 of 9 July 2008.

<sup>142</sup> Article 21 of Act No. 25/12 of 22 August 2012, and Article 26 of Act No. 7/2008 of 9 July 2008.

<sup>143</sup> See, for example, Articles 73-76 of Act No. 7/2008 of 9 July 2008. See also generally Deborah Frank et al (1996) 'Infants and young children in orphanages: One view from pediatrics and child psychiatry', *Pediatrics*, Vol. 97, No. 4, pp 569-578.

protection for children by entitling them to the enjoyment of other rights inherent to human beings that are not specifically regulated under these statutes.<sup>144</sup>

However, despite the similarities, the Angolan and Mozambican child welfare statutes differ in a number of respects. The differences are mainly the result of certain innovative features of the Angolan law, notably the fact that it includes a section enumerating eleven commitments between the government and its partner agencies towards the advancement of children's rights.<sup>145</sup> In this regard, the first four commitments relate to children between zero and five, and speak to factors concerning life-expectancy, food and nutritional security, birth registration and early childhood education.<sup>146</sup> Commitment five (primary education)<sup>147</sup> is linked to the obligation under Article 28 of the CRC concerning the need to achieve universal primary education discussed later in chapter 6, and commitment six (juvenile justice)<sup>148</sup> is connected to Articles 37 and 40 of the Convention. A notable development linked to the eleven commitments is the concomitant inclusion of measurable goals and timeframes stipulating by when these goals must be achieved. This is in line with CRC Committee recommendation that states must develop comprehensive national strategies for children, rooted in the Convention.<sup>149</sup> For instance, by 2015 the Angolan government must increase the level of literacy among children to as much as

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<sup>144</sup> Article 4(1) of the Children's Act of 2008.

<sup>145</sup> See Articles 29-31 of Act No. 25/12 of 22 August 2012.

<sup>146</sup> See Commitments No. 1-4.

<sup>147</sup> See Commitment No. 5.

<sup>148</sup> See Commitment No. 6. See also generally Chapter 6.

<sup>149</sup> See Paras. 28-36 of General Comment No. 5. See also Chapter 3, section 3.7.2.

90% and reduce gender disparities in schools to 80%.<sup>150</sup> Plans are also in place to reduce infant mortality to less than 50%.<sup>151</sup> The incorporation of these goals in Angolan domestic law has the effect of catalysing the necessary political action, including resource mobilisation, for the realisation of children's rights defined in the CRC.<sup>152</sup> Other areas of concern include addressing the problem of HIV/AIDS (Commitment No. 7) and dealing with violence against children (Commitment No. 8). Ensuring participation of children and dissemination of children's rights through the media (Commitment No.10), and making provisions for sports and culture, as well as making investments for children through the budget of the state (Commitment No. 11) are also captured.<sup>153</sup> It is submitted that the eleven commitments highlighted are part and parcel of Angola's efforts to harmonise the country's children's law to the CRC and other instruments relating to children.<sup>154</sup> Moreover, the fact that all eleven commitments were given legal status means that they are binding and place obligations on the Angolan government to ensure that the goals defined in each of the eleven commitments are achieved.

Another innovative aspect of the Angolan Children's Act is the fact that it enumerates a list of actors (including the state, the family and local authorities) involved in the so-called 'system of

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<sup>150</sup> See Commitment No. 5. See also National Council for Children (2007) '*Commitments between the government, the UN system and partners regarding children in Angola*', National Council for Children, p 7.

<sup>151</sup> As above.

<sup>152</sup> David Parker, Claudio Sepúlveda (1995) '*Children's rights to survival and healthy development*', in James Himes (ed.) '*Implementing the Convention on the Rights of the Child: Resource mobilization in low-income countries*', Martinus Nijhoff Publisher, p 89.

<sup>153</sup> See Article 30(2) of Act No. 25/12 of 22 August 2012.

<sup>154</sup> The African Child Policy Forum, '*Harmonisation of children's laws in Eastern and Southern Africa: Angola country brief*', The African Child Policy Forum (2012), p 3.

protection and integral development of the child', which are not included in the Mozambican law. All business actors within the public domain, economic and social agents of the private sector, civil society organisations, and autonomous local government entities are part of this system.<sup>155</sup> The law places a duty on them to coordinate and to collaborate in their activities to ensure the realisation of children's rights.<sup>156</sup>

In addition, the Angolan law compels all government departments working with children to submit proposals to obtain funding to cover their activities in areas concerning the interests of children.<sup>157</sup> Furthermore the law requires the inclusion of these proposals in the budget pertaining to the functioning of the departments concerned, but makes no provision compelling government to ensure availability and expenditure of funds once the proposal is approved. This may require some further thought. Nevertheless, the explicit mention of the need to budget for children is commendable in view of the assertion that realisation of children's rights, especially children's socio-economic rights, requires investments.<sup>158</sup> In sum, this leads one to believe that Angola has one of the most progressive child laws in the region, albeit that its implementation is yet to be asserted.<sup>159</sup>

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<sup>155</sup> See Article 32 of Act No. 25/12 of 22 August 2012.

<sup>156</sup> Article 30 of Act No. 25/12 of 22 August 2012.

<sup>157</sup> See Article 62 of Act No. 25/12 of 22 August 2012.

<sup>158</sup> See Mbazira for reference of the need of budgets for the realisation of socio-economic rights in Christopher Mbazira, *'Litigating socio-economic rights in South Africa: A choice between corrective and distributive justice'*, Pretoria University Law Press (2009), pp 5 and 31.

<sup>159</sup> See Mandlate (note 112 above), p 11.

Despite the remarkable features of the Angolan child law and the promising standards of the CRC incorporated in the Mozambican statute, some major weaknesses can be identified. In general, both instruments have manifold gaps that weaken the protection afforded to children. In this regard, they are silent on numerous matters that have become part and parcel of modern legislation regulating children's rights. For instance, they have no provisions addressing the problem of female genital mutilation (FGM), known to affect the girl child's right to health negatively,<sup>160</sup> by reducing their reproductive chances and causing them adverse problems relating to their physical or physiological development.<sup>161</sup> Nothing in the two laws show eagerness to protect children living in child-headed households, a common phenomenon inherited from the Angola and Mozambique political strife, which took the lives of many parents and left many children orphaned. Additionally, inter-country adoption is not regulated, creating space for children to be victimised through child trafficking under the guise of adoption, or other illicit practices as have been identified in other intercountry adoption processes in Africa.<sup>162</sup>

Furthermore, the laws of the countries concerned lack provisions regulating access to contraceptives for children and do not stipulate if children need or do not need parental consent

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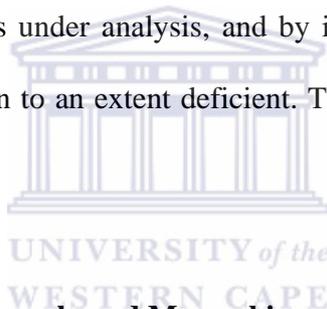
<sup>160</sup> Rose Gaway, Rosemary Mukasa (2005) 'The African Women's Protocol: A new dimension for women's rights in Africa', *Gender and Development*, Vol. 13, No. 3, p 44.

<sup>161</sup> Concellia Ondiek (2010) *The persistence of female genital mutilation (FGM) and its impact on women's access to education and empowerment: A study of Kuria District, Nyanza Province of Kenya*, unpublished Doctor of Literature and Philosophy thesis, University of South Africa, p 45.

<sup>162</sup> Benyam Mezmuz, *Sins of the saviours: Child trafficking in the context of intercountry adoption in Africa*' Information document No. 2 for the attention of the Special Commission of June 2010 on the practical operation of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Inter-country Adoption, available at <http://www.hcch.net/upload/wop/adop2010id02e.pdf> (accessed 8 October 2012).

for HIV testing. These matters relate to the right to health protected under the CRC and ACRWC, and serve to ensure the child's autonomy in medical decision-making.<sup>163</sup> Furthermore, neither piece of legislation has provisions dealing with the confidentiality of the results, provisions required to protect the right to privacy of children who are subjected to HIV testing.<sup>164</sup> Therefore, it is submitted, Angola and Mozambique can learn from the experience of progressive child-laws in countries within the region that do address these issues.<sup>165</sup>

Lastly, the gaps in the statutes under analysis are exacerbated by the fact that corresponding regulations to ensure full implementation have not been enacted. In view of these gaps, implementation of the two statutes under analysis, and by implication, of the standards of the CRC and the ACRWC, will remain to an extent deficient. There is hence an immediate need to address them.



#### **4.5.3 Juvenile justice statutes of Angola and Mozambique**

It was pointed out above that Angola and Mozambique inherited a juvenile justice statute from the Portuguese colonial administration.<sup>166</sup> The antiquated colonial statute subjected all children in conflict with the law to a separate court system different from the courts which would

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<sup>163</sup> See Chuma Himonga, Anita Cooke (2007) 'A child's autonomy with special reference to reproductive medical decision-making in South African law', *The International Journal of Children's Rights*, Vol. 15, No. 3-4, p 323.

<sup>164</sup> This is possibly understandable given that Angola and Mozambique have laws for the health sector prohibiting staff in the Health Department from disclosing information regarding the HIV status of patients.

<sup>165</sup> For example, see Section 130(2) of the South African Children's Act No. 38 (South African Children's Act), concerning HIV testing for children.

<sup>166</sup> See section 4.5.2. See also Decree No. 417/71 of 29 September 1971.

administer justice for adult offenders.<sup>167</sup> The system then was such that children who committed criminal offences were placed under the jurisdiction of ordinary courts, called ‘children’s courts’, when deciding on matters relating to this vulnerable group.<sup>168</sup> Given the new developments, especially the ratification of treaties such as the CRC and the ACRWC, with emphasis on diversion and disposal of cases outside formal court proceedings, the colonial law became outdated and had to be replaced.

Of the countries in the study, Angola was first to enact a new statute on juvenile justice replacing the colonial law in 1996.<sup>169</sup> The implementation of a new statute in Mozambique was done much later, in 2008.<sup>170</sup> The Angolan juvenile justice law is complemented by another statute, which establishes the procedures regarding the administration of justice for children.<sup>171</sup> It is submitted that these statutes give effect to CRC standards compelling states parties to the Convention to establish laws, procedures, authorities and institutions specifically applicable to children alleged as accused of, or recognised as having infringed the penal law.<sup>172</sup>

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<sup>167</sup> Maria Medina, ‘*Lei do Julgado de Menores e Código de Processo de Julgado de Menores anotados*’, 2ª Edição Revista e Atualizada, Coleção Faculdade de Direito da Universidade Agostinho Neto (2008), p. 15.

<sup>168</sup> See Jacqueline Gallinetti (2007) ‘*The Tribunale des Minores and the recognition of the need for separate courts for children in Mozambique*’ in The African Child Policy Forum, ‘*Realising rights for children - Good practice: Eastern and Southern Africa*’, The African Child Policy Forum, p. 24.

<sup>169</sup> See generally Act No. 9/96 of 19 April 1996.

<sup>170</sup> See generally Act No. 8/2008 of 15 July 2008, Mozambican Juvenile Justice Act (Act No. 8/2008 of 15 July 2008).

<sup>171</sup> See generally Act No. 6/03 of 28 January 2003, approves Angolan Juvenile Justice Procedures (Act No. 6/03 of 28 January 2003).

<sup>172</sup> Article 40(3) of the CRC.

The current juvenile justice laws of Angola and Mozambique are informed by the principle that children are subjects of rights and not mere objects of the justice system.<sup>173</sup> This is confirmed by the fact that under these laws children are provided with the right to participate by expressing their views in judicial proceeding concerning them, a fact which emphasises that courts have responsibilities to hear children's voices.<sup>174</sup> (The participation of children in judicial proceedings will be explored in further detail in the next chapter.<sup>175</sup>)

There are similarities and differences between the new laws and colonial juvenile justice statutes. Regarding the similarities, the colonial statute and the new laws express a common desire for the need for specialised institutions to deal with children in conflict with the law.<sup>176</sup> However, as was pointed out above, during the colonial era the ordinary courts, called 'children's courts' when dealing with young offenders, would administer justice for children. By contrast, under the new laws either specialised courts were established or specialised sections within the ordinary courts are responsible to deal with children in conflict with the laws. In this regard, Angola created a system of specialised sections, whereas Mozambique established specialised separate judicial bodies with powers to administer justice for children who commit criminal offences.<sup>177</sup>

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<sup>173</sup> Thoko Kaime, *The African Charter on the Rights and Welfare of the Child: A socio-legal perspective*, Pretoria University Law Press (2009), pp 12-14.

<sup>174</sup> See generally Judy Cashmore, Patrick Parkinson (2007) 'What responsibility to courts have to hear children's voices?', *The International Journal of Children's Rights*, Vol. 15, No. 1, pp 43-60.

<sup>175</sup> See Chapter 5, section 5.4.2.1.

<sup>176</sup> See Article 1 of Act No. 9/96 of 19 April 1996, and Article 2 of Act No. 8/2008 of 15 July 2008.

<sup>177</sup> See Medina for details on the Angolan children's court in Medina (note 167 above), pp 15-16. See Gallinetti for to establishment of children's court in Mozambique in Gallinetti (note 168 above), p 24.

As under the colonial statute, in the new laws the bodies tasked with administration of justice for children can apply criminal preventive measures and protective measures for children subjected to their jurisdiction. Some examples of criminal preventive measures which these bodies can apply include the placement of children in care-institutions for rehabilitation and education, and ordering community service.<sup>178</sup> Regarding the criminal preventive measures, the jurisdiction of these bodies is primarily in relation to young offenders under the age of sixteen years. This is in line with Article 40(4) of the CRC which envisages the application of alternatives to imprisonment of children in conflict with the law.<sup>179</sup>

The protective measures (which are not necessarily criminal in their nature) are aimed mainly at protecting children facing the risk of being neglected, mistreated or affected by other abuses.<sup>180</sup> They also seek to protect children whose physical or moral well-being is threatened.<sup>181</sup> Examples of protective measures found in the Angolan law include instructing the family of the child to report permanently to the court on his or her well-being,<sup>182</sup> and placement of child in a substitute family.<sup>183</sup> In Mozambique, the court can, inter alia, make maintenance orders and decide on the exercise of the parental powers.<sup>184</sup>

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<sup>178</sup> See Article 17 of Act No. 9/96 of 19 April 1996, and Article 27 of No. 8/2008 of 15 July 2008.

<sup>179</sup> Articles 3(a) and 12 of Act No. 9/96 of 19 April 1996, and Article 24(1) of Act No. 8/2008 of 15 July 2008.

<sup>180</sup> See Article 14 of Act No. 9/96 of 19 April 1996, and Article 46 of Act No. 8/2008 of 15 July 2008.

<sup>181</sup> Medina (note 167 above), pp 36-42.

<sup>182</sup> See Article 15(a) of Act No. 9/96 of 19 April 1996.

<sup>183</sup> See Article 15(c) of Act No. 9/96 of 19 April 1996.

<sup>184</sup> See Article 46 (g) and (p) of Act No. 8/2008 of 15 July 2008.

Of particular significance, the Angolan statute has a firm stance and limits the jurisdiction of the bodies tasked with the administration of justice for children to persons less than sixteen years; it admits no exception. However, the Mozambican juvenile justice statute shows more flexibility, by allowing these bodies to apply criminal preventive measures and protective measures to children above sixteen years and below eighteen when matters involving them are brought to their attention. Exceptionally, the Mozambican law also gives jurisdiction to courts to deal with persons above eighteen and below twenty-one years when their cases are pending before the court and it is proven that the offender lacks the necessary understanding of the consequences of his or her criminal acts, or when he or she is failing to cope with the preventive measures or protective measures applied.<sup>185</sup> In practical terms, the Mozambican approach has the positive effect of allowing children (defined as persons below 18) to remain subject to the jurisdiction of the children's court after they cross over the age of criminal capacity (defined as sixteen years). The importance of this cannot be overemphasised in a world where states are being challenged with recurrent calls to lower the age of criminal capacity.<sup>186</sup>

There are three stages in the juvenile justice process envisaged under the laws of the countries under examination, these being the (1) pre-trial, (2) trial, and (3) the post-trial stages.<sup>187</sup> The first and the third stages are discussed here. However, for explanatory reasons the second stage will

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<sup>185</sup> Article 26 of Act No. 8/2008 of 15 July 2008.

<sup>186</sup> See Charmain Badenhorst (2006) '*Criminal capacity of children*', unpublished Doctorate in Literature and Philosophy thesis, University of South Africa, pp 24-29.

<sup>187</sup> This is similar in relation to other African countries including Kenya and South Africa. Both these countries offer good comparative examples for Angola and Mozambique for being in the African region. See Kariuki (note 105 above), p 41.

be explored in chapter 5 when dealing with the administration of justice for children under the court systems of Angola and Mozambique.<sup>188</sup>

Compared to the old colonial legislation, the new laws of the countries concerned introduced a pre-trial procedure termed *inquerito social*, which was not provided under the old legislation. As part of the juvenile justice procedure, the *inquerito social* is mandatory under the current laws.<sup>189</sup> It is a crucial phase in the pre-trial (juvenile) justice system, involving the need to establish the physical and mental situation of the child to inform the decision of the court.<sup>190</sup> It involves the need to assess the condition in which the child lives, as well as to establish whether or not the child was subjected to sexual abuse or other forms of maltreatment.<sup>191</sup> As would be expected, this process relies on the support of social workers and other skilled personnel such as medical doctors.

It should be noted that the implementation of this procedure may face challenges in the two countries concerned. This is mainly because they have insufficient qualified professionals to do the assessments required. For instance, in 2004 Mozambique had less than ten social workers for

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<sup>188</sup> See generally Chapter 5, section 5.4.2.

<sup>189</sup> See Article 10 of Act No. 6/03 of 28 January 2003 approves Juvenile Justice Procedures for implementation of the Angolan Juvenile Justice Act (Act No. 6/03 of 28 January 2003). See also Article 20 of Act No. 8/2008 of 15 July 2008.

<sup>190</sup> Godfrey Odongo (2005) *'The domestication of international law standards on the rights of the child with specific reference to juvenile justice in the African context'*, unpublished LLD thesis, University of the Western Cape, 242-243.

<sup>191</sup> See Article 18 Act No. 6/03 of 28 January 2003, and Article 76 of Act No. 8/2008 of 15 July 2008.

the whole country.<sup>192</sup> The number of social workers in Mozambique may have increased, but not sufficiently to deal with the demand. It is submitted that the limited number of trained professionals in Mozambique undermines the implementation of the *inquerito social* as required by the law. In the same vein, Angola is recovering from the civil war which devastated the country, and the challenges of finding trained professionals are the same as those in Mozambique.

In relation to the third stage (post-trial) of the juvenile justice process, the two laws under analysis make provisions for periodic assessments of children sentenced to criminal preventive measures discussed.<sup>193</sup> Again, this was not a requirement under the colonial statute. Notably, the current law of Angola compels all support structures tasked with the implementation of criminal preventive measures to inform the court on how children are coping with these measures. The research found that this information must be given to courts after every two years.<sup>194</sup> Similarly, the law of Mozambique requires such information to be sent to the court after every twelve months.<sup>195</sup> Medina notes that these (periodic) assessments are essential as parts of a system of administration of justice for children. In her view they enable the courts to evaluate how their decisions are being implemented and to make adaptations or alterations to suit them to particular situations if necessary.<sup>196</sup> Consequently, it can be argued that in the broad realm of international

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<sup>192</sup> Sloth-Nielsen (note 88 above), p 16.

<sup>193</sup> See Article 33 of Act No. 6/03 of 28 January 2003. See also Article 167 of Act No. 8/2008 of 15 July 2008.

<sup>194</sup> See Article 33 of Act No. 6/03 of 28 January 2003.

<sup>195</sup> See Article 167 of Act No. 8/2008 of 15 July 2008.

<sup>196</sup> Medina (note 167 above), pp 111-112.

norms on juvenile justice, the assessments provided for in the laws of the two countries represent good-practice examples of the domestication of international norms pertaining to children, including the CRC and the ACRWC which speak to this aspect of the law.<sup>197</sup>

It was mentioned that the laws under consideration also provide for support structures to assist in the implementation of the decisions adopted in the (juvenile) justice process. These structures were incorporated in the new laws as part of the legacy of the colonial legislation. Examples of support structures envisaged under the current laws include institutions such as rehabilitation centres and psycho-medical facilities which implement orders issued by judicial bodies administering justice for children.<sup>198</sup> However, very few of these are operational in Angola, and Mozambique has a total lack of such facilities.<sup>199</sup> Additionally, both countries have insufficient judicial bodies to administer justice for children, a matter which will be addressed in the next chapter.<sup>200</sup> Thus, despite the gains that the new juvenile justice laws brought for children in the two countries, many challenges still have to be confronted. Addressing the challenges identified is a necessary step to facilitate implementation of the new statutes and hence to promote the application of CRC standards as domesticated in these laws.<sup>201</sup>

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<sup>197</sup> See Sloth-Nielsen and Gallinetti for Mozambique as a good practice example on the age of criminal capacity. Sloth-Nielsen et al (note 96 above), p 83.

<sup>198</sup> See Articles 41-44 of Act No. 6/03 of 28 January 2003. See also Article 157 of Act No. 8/2008 of 15 July 2008.

<sup>199</sup> Mandate (note 51 above), p 11.

<sup>200</sup> See Chapter 5, section 5.4.2.1.

<sup>201</sup> See Article 157(3) of Act 8/2008 of 9 July 2008. See also Article 40(3) of the CRC. See Foley for further examples of support structures for the administration of juvenile justice in Edmund Foley (2012) *'From old Jeshwang to Kanifing: Improving children's access to justice in the Gambia – Challenges and prospects'* in

#### **4.5.4 Defining the current legal position in the two jurisdictions**

The discussions above showed a growing concern by Angola and Mozambique to align their child laws with their obligations under CRC and the ACRWC. This is largely demonstrated by the domestication of the standards of the Convention and the Charter in the child laws of these countries.<sup>202</sup> However, there is need to devote considerable attention to ensuring practical implementation of the existing laws by addressing the gaps that were identified. Enabling regulations to facilitate the implementation of child-welfare statutes and supporting structures to strengthen the juvenile justice process aimed at advancing children's rights must be put in place. However, as the systems of the two countries stand, there is no doubt that the results are encouraging for children and their legitimate rights.

#### **4.6 Protection of children's rights in other (selected) domestic instruments**

The CRC Committee noted that a comprehensive review of all domestic legislation<sup>203</sup> and related administrative guidance to ensure full compliance with the CRC is an obligation under the Convention.<sup>204</sup> The previous sections showed that the standards of the CRC and the ACRWC have been largely incorporated into the child-welfare and juvenile justice statutes of Angola and Mozambique.<sup>205</sup> The next sections build on the previous analysis by looking into the family law

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Community Law Centre, *'Article 40: The dynamics of youth justice and the Convention on the Rights of the Child in South Africa'*, Community Law Centre, Vol. 14, No. 1, pp 2-4.

<sup>202</sup> See generally section 4.5.

<sup>203</sup> My emphasis added.

<sup>204</sup> See Para. 18 of General Comment No. 5. See also UNICEF (2007) *'Implementation handbook for the Convention on the Rights of the Child'*, UNICEF, Revised 3rd Edition, p 53.

<sup>205</sup> See section 4.5.2., and 4.5.3.

statutes, domestic violence legislation and the trafficking laws of the countries under examination.

#### **4.6.1 Children's rights under the family law statutes of Angola and Mozambique**

The family is one of the most important institutions interfacing with children's rights,<sup>206</sup> and it concerns adults and children alike. As pointed out in Chapter 2, before independence Angola and Mozambique were under Portuguese colonial administration.<sup>207</sup> During that time, many aspects of the family life of these countries were regulated by the Portuguese 1966 Civil Code.<sup>208</sup> After independence, substantive parts of the Civil Code were amended because they stood in contradiction with the new social-political and economic orders. This saw new statutes being enacted. To be more precise, in 1988, Angola enacted a Family Code<sup>209</sup> rooted in the principles of equality, solidarity and mutual assistance among all members of the family.<sup>210</sup> Unlike the discriminatory colonial laws, which distinguished between children born in marriage and outside of it, the new law of Angola introduced standards more conducive to the realisation of children's

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<sup>206</sup> See generally Barbara Schneider et al (2005) '*Family matters: family structure and child outcome*', Alabama Policy Institute, pp 1-43.

<sup>207</sup> See Chapter 2, section 2.2.

<sup>208</sup> Maria Medina, '*Direito de Família*', Escolar Editora (2011), p 47.

<sup>209</sup> Act No. 1/88 of 20 February 1988 approves the Angolan Family Code (Act No. 1/88 of 20 February 1988).

<sup>210</sup> Medina (note 208 above), p 50.

rights by requiring equal treatment for them all.<sup>211</sup> This had particular significance for children's rights, especially for promotion of equality rights for Angolan girls.<sup>212</sup>

By contrast, the new family statute of Mozambique was enacted in 2004.<sup>213</sup> Similarities exist between this law and the Angolan 1988 statute. They both have equality clauses and introduced new concepts replacing certain terms inherited from the antiquated colonial laws. For example, they instituted the *união de facto* or *de facto* unions, defined as a stable and lasting relationship between persons of the opposite sex who are not married.<sup>214</sup> This helped to improve the systems in these countries by strengthening the legal protection afforded to children, especially for children born in *de facto* unions where parents are unmarried. In the light of the developments under the current family law of Angola and Mozambique, parents living in *de facto* settings are required to register their children in the same way that children born under marriage are.<sup>215</sup> This obligation had not existed in the previous laws of these countries.<sup>216</sup>

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<sup>211</sup> As above, pp 45-55.

<sup>212</sup> The African Child Policy Forum (2006) '*What children and youth think – Angola: A statistical presentation of opinions and perceptions of children and youth in Angola*', The African Child Policy Forum, p 13.

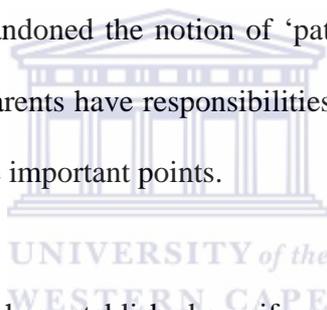
<sup>213</sup> Act No. 10/2004 of 25 August 2004 approves Mozambican Family Law (Act No. 10/2004 of 25 August 2004).

<sup>214</sup> See Article 35 of Act No. 1/88 of 20 February 1988 Family Code of Angola, and Article 202(1) of Act No. 10/2004 of 25 August 2004.

<sup>215</sup> Prior to this development parents living in *de facto* unions were not compelled to register their children at all. See Articles 225(2), 277(2), and 205(1) of Act No. 10/2004 of 25 August 2004.

<sup>216</sup> See also Medina (note 208 above), pp 45-55.

The Mozambican law also introduced the concept of ‘parental responsibilities’<sup>217</sup> which replaced the old notion of ‘paternal powers’ under colonial law. The new concept holds that parents have shared duties and responsibilities towards their children, whereas the old one held that only the father was vested with obligations over the child.<sup>218</sup> It can therefore be argued that the inclusion of ‘parental powers’ in the new family law statute of Mozambique helps to advance children’s rights to the extent that both parents have duties and responsibilities to provide and care for their children. This is important for children in the world today (and in Mozambique), where high rates of divorce and separation are destructive for the family unit and leave children potentially vulnerable if there are no good laws creating a shared responsibility.<sup>219</sup> In the case of Angola, while its law has not formally abandoned the notion of ‘paternal powers’ it inherited from the colonial statute, in practice both parents have responsibilities towards their children.<sup>220</sup> Even so, the law should be clarified on these important points.



Furthermore, the Mozambican law has established a uniform standard for marriage for boys and girls at 18 years,<sup>221</sup> as opposed to the 18 years for boys and 16 for girls provided under the repealed Civil Code. This helps to counter negative customary practices violating the rights of

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<sup>217</sup> Articles 283 and 284 of Act No. 10/2004 of 25 August 2004.

<sup>218</sup> Odongo (note 43 above), p 124.

<sup>219</sup> See generally Adegoke for factors causing family breakdown and divorce, in Thomas Adegoke (2010) ‘*Socio-cultural factors as Determinants of Divorce Rates among Women of Reproductive Age in Ibadan Metropolis, Nigeria*’, Stud Tribes Tribals, Vol. 8, No. 2, pp 107-114.

<sup>220</sup> See Medina (note 208 above), pp 45-55.

<sup>221</sup> However, exceptionally, boys and girls can marry at sixteen. See Article 30(2) of Act No. 10/2004 of 25 August.

the girl child,<sup>222</sup> including early marriage, which is widespread in the Mozambique.<sup>223</sup> The Angolan law still retains the 18 years age of marriage requirement for boys and 16 for girls,<sup>224</sup> thus violating the non-discrimination clause rooted in the CRC. This inconsistency needs to be addressed in order to strengthen the legal protection accorded to children, particularly young girls, who are at risk of being married at early ages. Nevertheless, this law should be commended for its inclusion of the principles of equality, solidarity and mutual assistance amongst family members, all of which tend to advance the rights of children.<sup>225</sup>

#### **4.6.2 Protection of children's rights under domestic violence legislation**

Angola and Mozambique have legislation outlawing domestic violence countering this negative practice affecting many young girls in Africa.<sup>226</sup> In this regard, Mozambique enacted a Domestic Violence Act;<sup>227</sup> especially applicable to women, it protects girls as well. By contrast, Angolan

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<sup>222</sup> See generally Rita Mutyaba (2011) 'Early marriage: A violation of girls' fundamental human rights in Africa', *The International Journal of Children's Rights*, Vol. 19, No. 2, pp 339-355. See also Lea Mwambene, Julia Sloth-Nielsen (2011) 'Benign accommodation? Ukuthwala, 'forced marriage' and the South African Children's Act', *African Human Rights Law Journal*, Vol. 11, No. 1, pp 1-22.

<sup>223</sup> See generally Population Council, 'Mozambique: Child marriage briefing' (2004), available at <http://www.popcouncil.org/pdfs/briefingsheets/MOZAMBIQUE.pdf> (accessed 3 November 2012).

<sup>224</sup> See Para. 26 of CRC Committee Concluding Observations and Recommendations on Angola's state party report submitted under Article 44 of the CRC, UN Doc. CRC/C/AGO/CO/2-4.

<sup>225</sup> Medina (note 208 above), p 50.

<sup>226</sup> See generally The African Child Policy Forum (2011) 'Violence against children in Africa: A compilation of the main findings of the various research projects conducted by the African Child Policy Forum (ACPF) since 2006', The African Child Policy Forum, pp 1-39.

<sup>227</sup> See generally Act No. 29/2009 of 29 September 2009 approves Mozambican Domestic Violence Act (Act No. 29/2009 of 29 September 2009).

law is much broader and covers many aspects of domestic violence whether committed against men or women.<sup>228</sup>

Importantly, these laws have provisions outlawing sexual, physical, psychological, financial, and moral violence which can be utilised to advance children's rights.<sup>229</sup> Both the Angolan and Mozambican laws criminalise sexual relations without consent of the victim.<sup>230</sup> However, the Mozambican law goes much further than the Angolan law by providing harsher punishments for perpetrators who consciously transmit infectious diseases to victims. In this regard the Mozambican law imposes imprisonment sentences of up to twelve years for perpetrators found guilty for committing domestic violence, as against two years in Angola.<sup>231</sup> Nevertheless, put another way, the statutes of these countries are consistent with CRC standards to the extent that they aim to protect the moral and physical integrity of children and outlaw all forms of violence committed against them.<sup>232</sup> Their major weakness, however, is the fact that they do not provide for the necessary monitoring mechanisms, which are indispensable to ensure effective implementation.<sup>233</sup>

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<sup>228</sup> Act No. 25/11 of 14 July 2011 approves Angolan Domestic Violence Act (Act No. 25/11 of 14 July 2011).

<sup>229</sup> See Articles 1-6 of Act No. 25/11 of 14 July 2011, and Articles 1-5 of Act No. 29/2009 of 29 September 2009.

<sup>230</sup> Article 3(2) of Act No. 25/11 of 14 July 2011.

<sup>231</sup> See Article 25 of Act No. 25/11 of 14 July 2011, and Articles 17-18(1) of Act No. 29/2009 of 29 September 2009.

<sup>232</sup> See Eileen Skinnider, '*Violence against children: International criminal justice norms and strategies*' (1999), p 2, available at <http://www.icclr.law.ubc.ca/Publications/Reports/VACHildren.pdf> (accessed 29 November 2012)

<sup>233</sup> United Nations, '*Handbook for legislation for violence against women*', United Nations (2009), p 22.

Having been enacted in 2011, the Angolan law is slightly more recent and it is difficult to say much about its implementation, whereas the Mozambican statute has been in place since 2009 and by now the first signs of implementation should have been visible. However, there are concerns that the latter is not been utilised fully to protect school girls against violence,<sup>234</sup> as perpetrators who commit offences against them are said to escape unpunished very often.<sup>235</sup> Consequently, on a practical level, it means that the implementation of the CRC in Mozambique through the domestic violence statute is still faced with serious challenges, given the reluctance of the general public to utilise its provisions fully. It indicates that grass-roots work needs to be done to educate people about the content and the repercussions of the law.

#### **4.6.3 Children's rights and anti-trafficking initiatives**

Mozambique has addressed human trafficking through domestic legislation.<sup>236</sup> This represents a victory for children's rights since women and children are the ones who are most affected by trafficking worldwide.<sup>237</sup> The Anti-trafficking Act<sup>238</sup> of Mozambique outlawed all practices described as trafficking in humans or persons. In terms of the law, trafficking includes, amongst other activities, the recruitment, transportation and placement of persons (women and children

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<sup>234</sup> Gawayana et al (note 160 above), p 43.

<sup>235</sup> Information available on the website of the Children's Rights Information Network (CRIN) at <http://www.crin.org/resources/infodetail.asp?id=23877> (accessed 20 June 2012).

<sup>236</sup> See Jacqueline Gallinetti, Daksha Kassan (2008) '*Trafficking of children in Africa: An overview of research, international obligations and existing legal provisions*', in Julia Sloth-Nielsen (ed.) '*Children's rights in Africa: A legal perspective*', Ashgate, p 249.

<sup>237</sup> See Tandeka Mashiyi (2010) '*The effectiveness of human child trafficking legislation in South Africa*', unpublished LLM dissertation, Faculty of Law, Nelson Mandela Metropolitan University, South Africa, p 1.

<sup>238</sup> See Act No. 6/2009 of 9 July 2009, Mozambique Anti-trafficking Act (Act No. 6/2009 of 9 July 2009).

included) for commercial or sexual exploitation or to obtain illicit gains.<sup>239</sup> It is commendable that the law criminalises the trafficking in humans, and especially trafficking of women and children.<sup>240</sup> The importance of this law cannot be overemphasised for the way in which it complements the role of the Optional Protocol to the CRC on the Sale of Children, which protects children from sexual exploitation,<sup>241</sup> and for giving effect to the standards of the United Nations Convention Against Transnational Organised Crime, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (PALERMO Protocol),<sup>242</sup> which Mozambique ratified.<sup>243</sup>

Unlike Mozambique, Angola has only participated in international, regional and sub regional initiatives aiming to address human trafficking, but it has not enacted a law on the subject.<sup>244</sup> This makes it necessary for Angola to enact an anti-trafficking law to strengthen the legal base for the protection for children who may be victimised by traffickers.

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<sup>239</sup> See Carlos Serra, 'Tráfico de pessoas em Moçambique – da retórica das palavras à dinamica da acção' (date was not available), p 28, available at [http://www.protectionblog.org/wp-content/uploads/2012/02/FDC\\_Trafico\\_de\\_Menores\\_em\\_Mo%C3%A7ambique.pdf](http://www.protectionblog.org/wp-content/uploads/2012/02/FDC_Trafico_de_Menores_em_Mo%C3%A7ambique.pdf) (accessed 30 November 2012).

<sup>240</sup> See Act No. 6/2009 of 9 July 2009.

<sup>241</sup> See generally Marta Pais (2010) 'The protection of children from sexual exploitation Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography', *The International Journal of Children's Rights*, Vol. 18, No. 4, pp 551-566.

<sup>242</sup> United Nations Convention against Transnational Organised Crime, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (PALERMO Protocol), adopted 2000 and entered into force in 2003, UN Doc. A/53/383.

<sup>243</sup> Mozambique ratified the PALERMO Protocol in 2006.

<sup>244</sup> See Paras. 404-410 of Angola's consolidated Second, Third, and Fourth state party report submitted to the CRC Committee, UN. Doc. CRC/C/AGO/2-4 (2010).

Although Mozambique has a law and Angola does not, curbing trafficking remains problematic in the two countries. While the legal gap in Angola needs to be addressed, studies show that despite having anti-trafficking legislation, Mozambique records many cases of trafficking of women and children.<sup>245</sup> Examples of this include the Diana's case and 39 other children who were reportedly being trafficked through the central province of Manica.<sup>246</sup> This brings into relief the need to ensure practical implementation of international law instruments in both countries, including application of CRC standards compelling states to protect children against trafficking.<sup>247</sup>

#### 4.7 Policy reform and formulation

The role played by policies in defining the extent to which children's rights can be realised has been emphasised.<sup>248</sup> As discussed in chapter 3, the interests of children must constitute the central point of government policies across all sectors, including plans about health, education, defence and transport.<sup>249</sup> The next sections discuss some of the policies affecting the implementation of children's rights in Angola and Mozambique. As would be expected, these

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<sup>245</sup> See generally Save the Children (2009) '*O tráfico interno e exploração de mulheres e crianças em Moçambique*', Save the Children, pp 1-98.

<sup>246</sup> See Serra for more details on these cases in Serra (note 239 above), p 8.

<sup>247</sup> See Article 35 of the CRC. See also Sandrine Valentine (2003) 'Trafficking of child soldiers: Expanding the United Nations Convention on the Rights of the Child and its Optional Protocol on the Involvement of Children in Armed Conflict', *New England Journal of International Law and Comparative Law*, Vol. 18, No. 1, p 112.

<sup>248</sup> See Sahovic et al. (note 6 above), p 78. See also Council of Europe (1996) '*The rights of the child: A European perspective*', Council of Europe Publishing, p 5.

<sup>249</sup> See Chapter 3 section 3.7.2, and Paras. 9 and 51 of General Comment No. 5. See also UNICEF (note 204 above), pp 58-59.

countries have many policies in this area, and discussing them all would be difficult. Thus, the few policy tools discussed here (state budgets, national plans of action for children, poverty reduction papers, and initiatives for orphans and vulnerable children) are chosen on the grounds that they are closely linked to the advancement of children's interests. However, the educational plans of both countries (also closely related to the interest of children) have been left out here because they will be discussed in Chapter 6.<sup>250</sup>

#### **4.7.1 Children's interests in the state budgets of the countries under the study**

The budget of any given state is central for the realisation of human rights in general and children's rights in particular. This is because the budget is used as a tool to allocate resources for the realisation of these rights. Consequently, analysing budgets helps to assess how much governments allocate to the realisation of children's rights.<sup>251</sup> It may be unrealistic to say that state budgets will necessarily reflect allocations of funds for children.<sup>252</sup> However, the inclusion of certain key areas in the budget, such as expenditure on education and social welfare, reflects how children's rights are being implemented or at least indicates whether a state is committed to the realisation of these rights. Therefore, state budgets can be used as a starting point to

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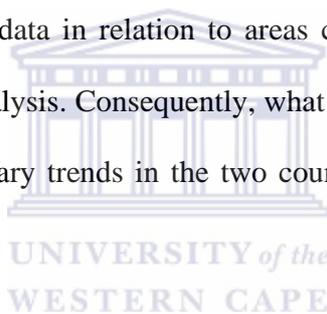
<sup>250</sup> See Chapter 6, section 6.4.

<sup>251</sup> Debbie Budlender, Paula Proudlock (2010) '*Child centered analysis of government budgets 2010-2012*', available at [http://www.ci.org.za/depts/ci/pubs/pdf/researchreports/child\\_centred\\_budget\\_analysis\\_2010-2012.pdf](http://www.ci.org.za/depts/ci/pubs/pdf/researchreports/child_centred_budget_analysis_2010-2012.pdf) (accessed 8 August 2012).

<sup>252</sup> The African Child Policy Forum (2011) '*The African Report on Child Wellbeing 2011: Budgeting for Children*', The African Child Policy Forum, p 1.

determine whether the interests of children are taken seriously<sup>253</sup> and if there is a realistic and adequate allocation of resources to fulfil these interests.<sup>254</sup> What is crucial, therefore, is to ensure that the needs of children are being addressed in the government's overall budget.

Based on the above, analysing state budgets implies accessing grass-roots information about the application of the budget at multiple departmental levels. There was little access to such information, and in some cases information was not available at all in respect to the countries under examination.<sup>255</sup> This undermined the scope of the research and made it imperative to look only at certain aspects of the budget of the countries. Also, a common lack in the two countries, is that of clear disaggregation of data in relation to areas concerning children's rights, which added further constraints to the analysis. Consequently, what is provided here is sufficient, albeit brief, analysis to show the budgetary trends in the two countries, and, arguably, to sustain the arguments presented.



A consideration of the state budgets of the countries in the study showed some interesting gains for children. Between 2009 and 2012 the annual budgets for these countries increased in allocation of funds to the few areas reflected in the budget affecting the interests of children,

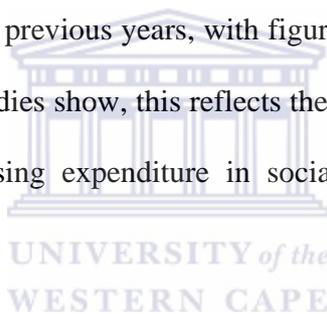
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<sup>253</sup> See generally Michael Freeman (2007) 'Why it remains important to take children's rights seriously', *The International Journal of Children's Rights*, Vol. 15, No. 1, pp 5-23.

<sup>254</sup> UNICEF (note 204 above), pp 61-62.

<sup>255</sup> The author was unsuccessful in obtaining relevant information from Angolan authorities, with the exception of a few documents provided by the Angolan Department of Action and Social Reinsertion (*Ministério de Acção e Reinserção Social*). No information at all was obtainable from Mozambique.

including, but not limited to, education, health, and social welfare.<sup>256</sup> For example, in 2010 Mozambique increased by 8.7% the amount of expenditures on public services invested in 2009.<sup>257</sup> Arguably, most of these investments improved the situation of children in the country inasmuch as their interests are covered by public services such as education and transport. In the same year (2010), the health sector received 12.7% of the Mozambican budget, which represented an increase of one percent compared to the amount invested in 2006.<sup>258</sup> By contrast, in 2010 Angola only put 6.2% of its budget into the health sector, which was less (in terms of percentage and not the actual figure) than the amount invested by Mozambique. However, the amount invested in the health sector by Angola in 2010 was more than what the country had invested in that particular sector in previous years, with figures being as low as 4.4% invested in 2004.<sup>259</sup> Therefore, as previous studies show, this reflects the ambition of the governments in the two countries to continue increasing expenditure in social areas, especially areas affecting children.<sup>260</sup>



However, a study showing the performance of selected African governments (Angola and Mozambique included) in terms of budgeting for children, and taking into account the level of

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<sup>256</sup> See Action for Global Health (2011) *Health spending in Mozambique: The impact of current aid structures and aid effectiveness*, Action for global Health, pp 7-9, and The African Child Policy Forum (note 252 above), pp 2-4.

<sup>257</sup> Details available at [http://www.portaldogoverno.gov.mz/noticias/news\\_folder\\_politica/abril-2010/orcamento-do-estado-orcado-em-118-mil-milhoes-de-meticais/](http://www.portaldogoverno.gov.mz/noticias/news_folder_politica/abril-2010/orcamento-do-estado-orcado-em-118-mil-milhoes-de-meticais/) (accessed 18 May 2012).

<sup>258</sup> See Action for Global Health (note 256 above), p 8.

<sup>259</sup> See The African Child Policy Forum (note 252 above), p 1.

<sup>260</sup> See Jessica Hagen-Zanker et al (2010) *Financing social protection in the light of international spending target: A public sector spending review*, Overseas Development Institute, p 34.

economic development, highlighted that resource-constrained countries like Mozambique scored favourably in terms of providing for their children.<sup>261</sup> It also showed that relatively high-income countries like Angola (which has natural resources) invested less in children – mainly, it was argued, because of lack of political commitment.<sup>262</sup> This was despite the fact that the budgets of these high-income countries showed consistent increases in resource allocation for areas covering children’s interests, which suggests that those countries were spending less on their children than what they could afford. Therefore, the concern is that, while the incorporation of aspects covering the interests of children into the state budget of the study countries and the general increase of resource allocation into these areas is laudable, there is general need for these countries, particularly Angola, to increase the amount of investments for areas overlapping with children’s interests to the maximum extent of their available resources. Besides helping these countries make concrete gains for their children, this would help them to fulfil their obligations under Article 4 of the CRC, which compels states to apply the maximum of their available resources to the implementation of the rights protected in the Convention. If these countries fail to act in such a manner, they will have not have met their duties under the Convention.

#### **4.7.2 National action plans for children**

As part of the general measures required for implementing the CRC,<sup>263</sup> Mozambique has conceived a comprehensive National Programme of Action for Children (NPA).<sup>264</sup> The

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<sup>261</sup> The African Child Policy Forum (note 252 above), p 107.

<sup>262</sup> As above.

<sup>263</sup> See Paras. 29-33 of General Comment No. 5. See also UNICEF (note 204 above), p 58.

<sup>264</sup> National Plan of Action for Children 2006-2010.

importance of developing these instruments became visible after the World Summit for Children, when states were urged to adopt National Plans of Action to advance children's rights.<sup>265</sup> Ledogar maintains that the NPA has great potential to incorporate time-bound objectives with corresponding strategies, programmes, budgets and measurements mechanisms for assuring minimum sets of children's rights.<sup>266</sup> In this light, they are important vehicles to promote the realisation of children's rights.

The Mozambican NPA, currently under review, identifies certain priority areas for state intervention in relation to children. These include basic education, child survival, child protection and child development, as well as sports.<sup>267</sup> It also covers the need to adopt domestic legislation and to reinforce child participation through juvenile parliaments.<sup>268</sup> The Mozambican NPA further requires the government to implement the recommendations coming from children's initiatives including the country's juvenile parliament, and it urges the state to ensure access for children to pre-school as a major priority. Inasmuch as the implementation outcomes for the previous NPA include the enactment of various pieces of legislation focusing on children, including the statutes discussed in sections 4.6.1 and 4.6.2 above, it is hoped that the

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<sup>265</sup> See UNICEF (note 204 above), p 58.

<sup>266</sup> Robert Ledogar (1995) 'Realising rights through national programmes of action for children', in James Himes (ed.) 'Implementing the Convention on the Rights of the Child: Resource mobilization in low-income countries', Martartinus Nijhoff Publishers, p 55.

<sup>267</sup> See National Plan of Action for Children 2006-2010.

<sup>268</sup> As above. See also Leanne Johnny (2006) 'Reconceptualising childhood: children's rights and youth participation in schools', *International Education Journal*, Vol. 7, No. 1, p 17.

implementation of the new NPA will yield positive results<sup>269</sup> In line with the objectives defined in the new NPA the government of Mozambique has decided to implement pre-school education as of 2013 (this was not subject to serious attention before the NPA was implemented), which is a good starting point. In the light of the above, it can be said that the new NPA will contribute towards the achievement of children's rights to education defined in the CRC.

Angola was also commended for setting concrete goals to realize children's rights in its NPA.<sup>270</sup> In fact, the Angolan experience is commended for the fact that it has become established practice that the government reviews the NPA every two years through the National Forums for Children mentioned in section 4.5.1 above. The Angolan NPA for children has also yielded positive results. In this regard, it has helped to place children on the national agenda and it led to the adoption of a normative instrument<sup>271</sup> which makes birth registration free for all children less than five years. Arguably, this was an important development for the promotion and protection of the rights of the Angolan children, considering that in other countries like Mozambique, birth registration is only free during the first 120 days, implying that it carries an expense when it is done at a later stage.<sup>272</sup> Importantly, the Angolan NPA further makes identification documents

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<sup>269</sup> See Ministério da Mulher e da Acção Social (2010) *'Avaliação do Plano Nacional de Acção para a Criança e do Plano de Acção para as Crianças Orfãs e Vulneráveis'*, Ministério da Mulher e da Acção Social, pp 34-36.

<sup>270</sup> See Para. 12 of CRC Committee Recommendations and Concluding Observations on Angola's state party report submitted under Article 44 of the CRC, UN Doc. CRC/C/AGO/CO/2-4 (2010).

<sup>271</sup> Decree No. 31/07 of 14 May 2007 approving a free birth and death registration system for Angola (Decree No. 31/07 of 14 May 2007).

<sup>272</sup> See Para. 80 of Mozambique state party report submitted to the CRC Committee under Article 44 of the CRC, UN Doc. CRC/C/MOZ/2 (2009).

free for children up to eleven years.<sup>273</sup> This development also contributes towards the implementation of children's rights in Angola.

In summary, the above shows that the two countries under examination have done well by adopting NPAs for children. Most importantly, this has the specific effect of advancing the objectives defined in the CRC.

#### **4.7.3 Policy action and plans for orphans and vulnerable children**

Mozambique has implemented an Action Plan for Orphans and Vulnerable Children (PACOV).<sup>274</sup> According to available information, Angola is preparing a similar instrument but has not yet approved it.<sup>275</sup> For its part, the Mozambican PACOV devises strategies to protect orphans and vulnerable children (OVC). According to the PACOV, orphaned children are children who have lost one or both parents. The PACOV defines vulnerable children to include children who are affected or infected with HIV, children in child-headed families and children in families headed by elderly persons. Reference to children affected or infected with HIV is important in a world where many people are dying because of this malevolence.<sup>276</sup> In addition,

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<sup>273</sup> See statement of Hon. Maria Sá Magalhães former Vice-Minister for the Department of Action and Social Reinsertion in her capacity of Head of the Angolan Delegation for the 55th Session of the CRC Committee, available at [http://www2.ohchr.org/english/bodies/crc/docs/statements/Angola\\_statement55.pdf](http://www2.ohchr.org/english/bodies/crc/docs/statements/Angola_statement55.pdf) (accessed 15 August 2012).

<sup>274</sup> See the Action Plan for Orphans and Vulnerable Children 2006.

<sup>275</sup> See details at [http://www.riatt-esa.org/sites/default/files/files/resources/Legal\\_Frameworks\\_and\\_Policies.pdf.pdf](http://www.riatt-esa.org/sites/default/files/files/resources/Legal_Frameworks_and_Policies.pdf.pdf) (accessed 24 October 2012).

<sup>276</sup> Ebenezer Durojaye (2006) 'Advancing gender equity in access to HIV treatment through the Protocol on the Rights of Women in Africa', *African Human Rights Law Journal*, Vol. 6, No. 1, p 188.

under the PAVOC, vulnerable children include children in families with adults who are chronically ill, street children, children in prisons, and children in mental health institutions. Under the PACOV vulnerability also encompasses children with disabilities, children victimized by violence, and children subjected to sexual exploitation or other abuses. It further includes children subjected to child labour and victims of trafficking, as well as children in early marriage, and refugee and internally displaced children.<sup>277</sup> Some of the priority areas identified on the Mozambican PACOV include strengthening institutional capacity of Department of Women and Social Action, increasing the number of HIV testing centres for youth and children, and training the community and families on how to deal with OVC.<sup>278</sup> As can be seen, the relevance of the PACOV cannot be overemphasised in a context of a country where approximately 1.8 million children are orphans, of which 510,000 were orphaned by HIV/AIDS.<sup>279</sup> If implemented effectively, the PACOV should definitely yield positive results and contribute towards the realisation of the objectives of the CRC.

However, from the time of its inception, there have been many problems with ensuring monitoring and evaluating the implementation of the objectives identified in the PACOV. This problem has been attributed partly to the fact that the body responsible to coordinate and monitor the implementation of children's rights was established at a later stage.<sup>280</sup> Consequently, while

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<sup>277</sup> See the Action Plan for Orphans and Vulnerable Children 2006.

<sup>278</sup> See the Action Plan for Orphans and Vulnerable Children 2006.

<sup>279</sup> See the website of Children's Rights Information Network (CRIN) at <http://www.crin.org/resources/infodetail.asp?id=23877> (accessed 21 June 2012).

<sup>280</sup> Ministério da Mulher e Acção Social (note 269 above), pp 33-34.

the gains in Mozambique should be celebrated, it is important to ensure effective monitoring of the PACOV for greater effectiveness.

On the other hand, Angola needs to adopt a strategy or policy for OVCs as soon as possible, as countless OVCs in the country need assistance.<sup>281</sup> This must be seen as part of the country's commitment to implement the CRC. In the absence of a comprehensive plan or a strategy for OVC, Angola still lags behind the obligations under the Convention.

#### **4.7.4 Poverty reduction strategies**

It was found that the interests of children are protected in policy documents seeking to reduce poverty in Angola and Mozambique. It is observed that many countries developed such poverty reduction tools after they saw the need to take ownership of social policies (including policies affecting children) in response to the failure of the structural adjustment programmes and aid conditionalities of the World Bank and the International Monetary Fund.<sup>282</sup>

The current Mozambican Action Plan for the Reduction of Poverty (PARP)<sup>283</sup> is an extension of the country's previous five-year plans on the subject. The first plan ran between 2001 and 2005, and the second was in place until the end of 2010. The current one is expected to run until 2014, and it envisages reducing the level of poverty to 42% at the end of its implementation. One of the

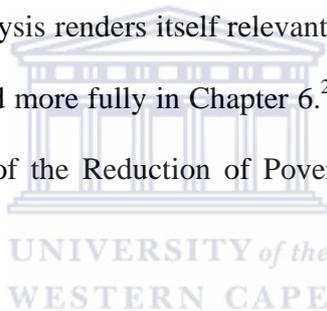
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<sup>281</sup> See Save the Children UK '2010 Report on the multi-sectoral workshop on the legal and policy framework for children', Save the Children UK (2010), p 13.

<sup>282</sup> Caroline Harper, Nicola Jones (2009) 'Raising the game - Briefing Paper No. 56', Overseas Development Institute, p 3.

<sup>283</sup> See the Action Plan for the Reduction of Poverty 2011-2014.

objectives of this policy tool is to ensure inclusive economic growth in Mozambique, which should include economic growth for everyone including children, adults and the elderly alike.<sup>284</sup> The tool also aims to promote employment, and thus makes provision for training and teaching of citizens, including children.<sup>285</sup> Additionally, it seeks to ensure human and social development and to promote good governance. Arguably, all these areas affect the development of children as well, making it difficult to think of any objective of the tool under consideration which does not relate to children's rights. Consequently, I submit that if this plan is implemented adequately it will help to improve the lives of many children,<sup>286</sup> particularly those living in rural areas, where economic conditions are poorer than in urban areas. Again, regarding the aim to promote employment, the policy under analysis renders itself relevant for the development of educational strategies for children, as discussed more fully in Chapter 6.<sup>287</sup> In this way, it can be argued that the Mozambican Plan of Action of the Reduction of Poverty is indispensable to promote the objectives of the CRC.



By contrast, Angola has no specific poverty reduction strategy in accordance with international standards. Instead, it has many poverty reduction strategies integrated in several projects which

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<sup>284</sup> Mthuli Ncube, Abebe Shimeles (2012) Audrey Verdier-Chouchane, 'South Africa's quest for inclusive development', Working Paper Series, African Development Bank, pp 9-11.

<sup>285</sup> See the Action Plan for the Reduction of Poverty 2011-2014.

<sup>286</sup> For child poverty in Mozambique see <http://www.crin.org/resources/infodetail.asp?id=23877> (accessed 21 June 2012).

<sup>287</sup> See details in Chapter 6, section 6.4.

are managed by different government departments.<sup>288</sup> The sad reality is the fact that obtaining coordination between these departments is not something that is always possible and this may undermine consolidated efforts to address the situation of children in Angola.<sup>289</sup> It means that unless Angola progresses to a point where all poverty reduction strategies are integrated into one policy document informing all actions implemented separately among the various stakeholders involved in the process, the country will have difficulties in implementing certain objectives of the CRC. Thus, Angola must prioritise the adoption of a comprehensive policy tool targeting poverty.

#### **4.7.5 Balancing the policy options in the countries under the study**

The discussions above showed incontrovertibly that children are becoming more visible in the policies and programmes relating to children in the two countries under analysis. It is clear that working towards achieving the objectives defined in instruments pertaining to children such as the CRC and the ACRWC is to a much greater degree than previously part of the agenda of the governments of the two countries under this study. For example, on the positive aspects, it was shown that more resources are being allocated through the general state budgets of Angola and Mozambique to areas pertaining to children.

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<sup>288</sup> See generally African Development Fund, *2010 Report on the implementation of the project on the Institutional and Capacity Building for Poverty Reduction in Angola*, African Development Bank, 2010, available at <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/Angola%20-%20APPROVED%20-%20ICBPR.pdf> (accessed 10 August 2012).

<sup>289</sup> As above.

However, there are still many concerns. For example, major implementation gaps remain in Mozambique, and Angola still lacks some of the vital tools required to advance children's rights. Hence, despite the gains made, these countries must not celebrate until they can address all the challenges discussed in the sections analysing their policies; doing so will enable them to achieve some of the objectives defined in the CRC.

#### **4.8 Conclusion**

As noted elsewhere,<sup>290</sup> this chapter reiterates that the practice of states can give substantive meaning to formal provisions of international law treaties. As discussed in this chapter, the various examples of child-related legislative and policy measures implemented in Angola and Mozambique show, to some extent, their commitment to give effect to the provisions of the CRC. In this regard, it was highlighted that the two countries have largely domesticated CRC principles and standards in their domestic laws and have adopted policies that favour the implementation of the rights defined in the Convention. This answers the question as to whether the CRC has been domesticated and given legislative and policy effect in these countries.

However, the chapter also demonstrates that there are still many gaps in the laws and policies affecting the implementation of the CRC in both countries. To recapitulate a few, there are problems with lack of implementing regulations for the child-welfare statutes of Mozambique and Angola. Another problem is the fact that in some instances the available laws are weak and fail to cover certain aspects of children's rights. For instance, children living in child-headed

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<sup>290</sup> See Ogongo (note 190 above), p 127.

households are left out completely and denied the full legal protection envisaged under CRC.<sup>291</sup> In addition, the child laws of both countries have no provisions on inter-country adoption, a subject of significant interest in Africa<sup>292</sup> due to increasing interest by foreign nationals willing to adopt children in the continent.<sup>293</sup> All this is consistent with the proposition that in many countries, especially certain African countries, certain areas of child laws are less developed or are still developing. Moreover, the chapter illustrated that the policy gaps in the two countries, especially in Angola where policy initiatives are lacking, undermine the implementation of children's rights defined in the CRC. Consequently, in the light of the current gaps, it is submitted that the CRC has been implemented only partially by the countries under analysis. This raises the need for them to address the gaps identified in order for them to comply fully with the obligations under the Convention and to improve the lives of their children.

This chapter has reviewed laws and the policies; the next chapter takes the discussion further by analysing the extent to which the CRC has been given effect to in Angola and Mozambique through the adoption of administrative and institutional measures.

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<sup>291</sup> See Para 31 of CRC Committee General Comment No. 3 on HIV/AIDS and the Rights of the Child, UN Doc. CRC/GC/2003/3 (General Comment No. 3). See also generally Hye-Young Lim (2000) *'Legally recognising child-headed households through a rights based approach: The case of South Africa'*, unpublished LLD thesis, Centre for Human Rights, University of Pretoria.

<sup>292</sup> Assim (note 131 above), p 27.

<sup>293</sup> Benyan Mezmur (2009) 'From Angelina (to Madonna) to Zoe's Ark: What are the A-Z lessons for intercountry adoptions in Africa', *International Journal of Law, Policy and Family*, Vol. 23, No. 2, pp 145-146.

**CHAPTER 5**

**IMPLEMENTING**

**THE CONVENTION ON THE RIGHTS OF THE CHILD IN**

**THE COUNTRIES UNDER EXAMINATION THROUGH ADMINISTRATIVE**

**AND INSTITUTIONAL MEASURES**

**5.1 Introduction**

The previous chapter examined the policy measures and legal framework that Angola and Mozambique adopted to implement the rights contained in the Convention on the Rights of the Child (CRC). This chapter builds on the previous one by discussing the institutional and administrative measures adopted by the two countries. Section 5.2 examines mechanisms for coordinating the implementation of children's rights. The discussions revolve around their composition, mandates and the nature of their decisions. They also highlight the challenges faced by these institutions in promoting children's rights.<sup>1</sup>

Section 5.3 looks at mechanisms for monitoring the implementation of children's rights. It starts with an analysis of international instruments applicable to these institutions and later narrows down the discussion to the mandates of monitoring mechanisms in respect of factors that interface with children's rights. The principles enshrined in General Comment No. 5<sup>2</sup> adopted by

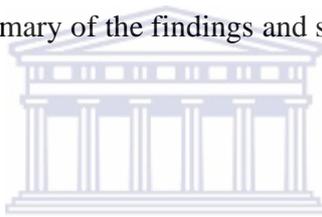
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<sup>1</sup> See generally section, 5.2.2 below.

<sup>2</sup> See CRC Committee General Comment No. 5 on General Measures of Implementation of the Convention on the Rights of the Child, UN Doc. CRC/GC/2003/5 (General Comment No. 5).

the CRC Committee which monitors the implementation of the CRC are used to examine the composition of these mechanisms. Section 5.4 scrutinises the role played by courts in administering justice for children. The section highlights the strengths and the weaknesses of courts involved in the administration of justice for children.

In sum, the chapter underscores that the role of institutions involved in the work for children strongly depends on their compositional structure, their mandates and the nature of their decisions. It also argues that it is imperative to strengthen the mandate of these institutions to make children's rights a reality.<sup>3</sup> To achieve this, the chapter proposes legislative review. Section 5.5, the conclusion, provides a summary of the findings and some recommendations for adequate implementation of the CRC.



## **5.2 Children's rights coordinating mechanisms in the countries under analysis**

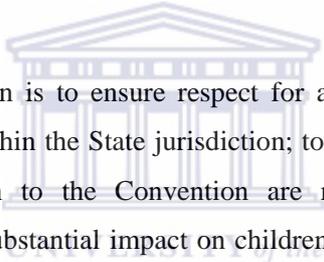
This section discusses mechanisms for coordinating the implementation of children's rights. CRC Committee General Comment No. 5 on general measures for the implementation of the Convention on the Rights of the Child will be used for guidance throughout the analysis. As it was pointed out at the outset of the chapter, the discussion starts by highlighting international standards on the role of domestic coordination mechanisms and later explores the coordination mechanisms in the two countries being profiled.

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<sup>3</sup> This has been reiterated in many instances and different contexts regarding the promotion and protection of human rights. Dinokopila, for example, advocates the need for the government of Botswana to strengthen its institutions to advance the protections of the rights of persons with disabilities. For details, see Bonolo Dinokopila (2011) *The rights of persons with disabilities in Botswana: policy and institutional framework* in Ilze Grobbelaar-du Plessis, Tobias van Reenen (eds.), *Aspects of disability law in Africa*, Pretoria University Law Press, p 272.

### **5.2.1 International law on the role of domestic coordination mechanisms**

It is submitted that CRC Committee General Comment No. 5 is the key instrument setting out the role of domestic mechanisms for coordination of the implementation of children's rights.<sup>4</sup> In terms of this General Comment, mechanisms that coordinate the implementation of children's rights are expected to make children more visible and ensure that their rights are made a reality on the ground.<sup>5</sup> They must be capable of coordinating the implementation of children's rights across all levels of the government. These include, for instance, the central, provincial and district levels of government. Furthermore, coordinating mechanisms should aim to have children's rights respected by the government. These views are well captured in the CRC Committee's assertion that:<sup>6</sup>



[t]he purpose of coordination is to ensure respect for all of the Convention's principles and standards for all children within the State jurisdiction; to ensure that the obligations inherent in ratification of or accession to the Convention are not only recognized by those large departments which have a substantial impact on children – education, health or welfare and so on – but right across Government, including for example departments concerned with finance, planning, employment and defence, and at all levels.

Notably, however, General Comment No. 5 does not provide clear details about the composition and the structure of domestic coordination mechanisms for the implementation of children's rights. In this regard, the discretion is left for state parties to the CRC to decide how these mechanisms must be composed structurally. Nevertheless, General Comment No. 5 provides an important pointer concerning the role of these coordination mechanisms. It articulates that

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<sup>4</sup> CRC Committee General Comment No.5.

<sup>5</sup> See Para. 39 of General Comment No. 5.

<sup>6</sup> Para. 37 of General Comment No. 5.

coordination institutions must play a key role in ensuring that children's rights are kept visible across all sectors of the government.<sup>7</sup> In expanding on this, the CRC Committee explains that making children's rights visible is an objective that can be easily achieved if coordination mechanisms are positioned closer to the decision-making bodies. In the light of this, I contend that it is the Committee's belief that these mechanisms must be positioned close to decision-making authorities in order for them to have the desired influence on all government sectors at various levels.<sup>8</sup> The Committee has celebrated the existence of domestic coordination mechanisms for children's rights, showing evidence that coordination can bring gains in the promotion of the rights in consideration.<sup>9</sup> Bearing in mind the importance of these mechanisms as asserted by the CRC Committee's views, the next section turns the discussion to an analysis of the coordination mechanisms of the two countries under examination.

### **5.2.2 Coordination mechanisms in the countries under analysis**

Many years after ratifying the CRC, Angola and Mozambique saw the importance of creating coordinating mechanisms to advance children's rights in their jurisdictions. Angola was the first to establish such a coordination mechanism when, in 2007, it created the *Conselho Nacional da Criança (CNAC)*, which was tasked with the responsibility to coordinate actions regarding the implementation of all policies and initiatives affecting children.<sup>10</sup> Prior to CNAC, the coordination of matters involving children was done through a multi-sectoral commission

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<sup>7</sup> See Para 39, General Comment No. 5.

<sup>8</sup> See Para. 39 of General Comment No. 5.

<sup>9</sup> See Para. 37 of General Comment No. 5.

<sup>10</sup> See Decree No. 20/07 of 20 April 2007 on the establishment of the Angolan National Council for Children and the specific regulations (Decree No. 20/07).

involving various government departments, including the Ministry of Justice and the Ministry of Assistance and Social Integration. The multi-sectoral commission was dissolved when it was realised that it lacked the necessary powers to pursue its mandate effectively.<sup>11</sup> The CNAC was then created, and has since become the major stakeholder coordinating the implementation of children's rights in Angola.

In Mozambique, the first centralised coordination mechanism was institutionalised in 2009. The National Council for Child Rights, also known as the *Conselho Nacional dos Direitos Criança (CNDC)*, is the body responsible for this, but its mandate seems limited to coordination of actions envisaging the implementation of the Children's Act.<sup>12</sup> Nevertheless, the proposition that the Children's Act represents a compilation of all other instruments regulating children's rights in the country renders the mandate of the CNDC perfect for it to ensure the implementation of children's rights as provided for in the CRC.<sup>13</sup> The creation of the CNDC followed the acknowledgement that the interests of children were dealt with by various public and private institutions and that there was little or no coordination among them.<sup>14</sup> This brought to the fore the need to strengthen institutional coordination and cooperation among the stakeholders to ensure effective service delivery. It was found that effective coordination would be achieved

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<sup>11</sup> Ministério de Assistência e Reinserção Social (2006) '*II Fórum Nacional da Criança*', Ministério de Assistência e Reinserção Social, p 12; copy on file with the author.

<sup>12</sup> Article 71 of Children's Act of 2008 of 9 July 2008 (Mozambican Children's Act or Act No. 8/2008) and Decree No. 8/2009 of 31 March 2009 on the establishment of the Mozambican National Council on Child Rights (Decree No. 8/2009).

<sup>13</sup> Carlos Mondlane '*Lei de promoção dos direitos da criança: Anotada e comentada*', Ministério da Justiça e Centro de Formação Jurídica e Judiciária (2011), p 17-21.

<sup>14</sup> See Preamble to the Decree No. 8/2009.

through the creation of a multi-sectoral mechanism furnished with the necessary powers to that effect. It is against this background that the CNDC was created.

Further details about the composition, the mandates and the nature of decisions of the above institutions are provided in the next section. As indicated at the outset of the discussion, the standards enshrined in General Comment No. 5 will serve as a guide for establishing whether or not these institutions meet the aims for which they were created.<sup>15</sup>

The study starts by assessing the influence of coordination mechanisms of Angola and Mozambique across government sectors. This will be achieved by exploring the position in which these mechanisms are placed in relation to other authorities and by taking into account the level of authority of holders of positions in these bodies. The discussion alternates between the two countries in the course of following a sequential investigation of one theme (mandate, composition, and nature of decisions) after another, but the reader should be cautioned that the mandate of these institutions intersect with the nature of their decisions, as does their composition. As a result, the analysis of decisions made by the coordination mechanisms is occasionally diverted into subsections exploring the mandates and composition of these mechanisms.

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<sup>15</sup> See sections 5.1 and 5.2.1 above.

### 5.2.2.1 Mandate

As previously stated, the *Conselho Nacional da Criança (CNAC)*<sup>16</sup> is the main body responsible for coordinating actions to do with the implementation of all policies and initiatives affecting children in Angola.<sup>17</sup> The CNAC is further tasked with advisory functions in relation to matters pertaining to children. To this end, it assists the government with opinions or advice on matters concerning the subject under consideration.<sup>18</sup> Its mandates have a national dimension covering all regions in the country and the wide extent of these mandates makes the CNAC a key body for coordinating children's rights implementation functions across all government levels, from top to bottom and vice versa.

Like the CNAC, the Mozambican National Council for Child Rights (CNDC) coordinates all actions envisaging the implementation of the Children's Act of 2008 as well as the CRC; this is so mainly because all rights contained in the Act are covered in the Convention.<sup>19</sup> In essence, the CNDC was tasked to coordinate and strengthen the interaction between public authorities and civil society organisations working on areas relating to children.<sup>20</sup> To that end, the CNDC is responsible for assisting public and private institutions in strengthening their actions. It also remains responsible for monitoring and evaluating strategies regarding the assistance given to

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<sup>16</sup> See Decree No. 20/07. See also Ministério de Assistência e Reinserção Social (note 11 above), p 12.

<sup>17</sup> Silva Enid, Aquino Luseni (2005) '*Os abrogos para crianças e adolescentes e o direito à convivência familiar e comunitária*', available at [http://www.ipea.gov.br/sites/000/2/publicacoes/bpsociais/bps\\_11/ENSAIO3\\_Enid.pdf](http://www.ipea.gov.br/sites/000/2/publicacoes/bpsociais/bps_11/ENSAIO3_Enid.pdf) (accessed 17 October 2012).

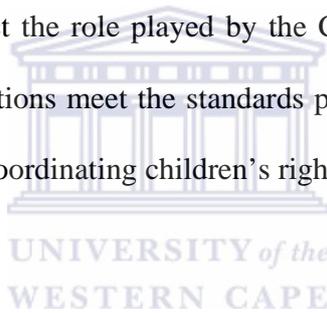
<sup>18</sup> See generally Article 3 of Decree No. 20/07.

<sup>19</sup> Article 71 of Act No. 7/2008 and Decree No. 8/2009.

<sup>20</sup> Article 3(c) of Decree No. 8/2009.

children. In addition, the CNDC is tasked with preparing proposals concerning the adoption of measures for strengthening the promotion and protection of children's rights.<sup>21</sup>

In theory, the mandates of the above mechanisms are the same but in practice they differ in certain respects. For instance, although it is not stated in the law, the Angolan CNAC has often developed or assisted in the preparation of plans, which become binding.<sup>22</sup> By contrast, the mandates of the Mozambican CNDC are restricted inasmuch as the CNDC coordinates the implementation of existing (government) plans but without the power to make plans that are in turn binding on the government. Provided that there are good laws and policies to co-ordinate this, it should not negatively affect the role played by the CNDC. I submit, therefore, that the mandates accorded to these institutions meet the standards prescribed in General Comment No. 5, hence making them capable of coordinating children's rights effectively.



#### **5.2.2.2 Composition**

The Angolan CNAC comprises of 33 members selected from government (civil servants), civil society and faith-based or religious organisations.<sup>23</sup> Its members are appointed for a two-year term of office which is renewable. Civil servants are selected from seven departments, namely, (1) the Ministry of Assistance and Social Integration, (2) Ministry of Planning, (3) Ministry of Health, (4) Ministry of Education, (5) Ministry of Home Affairs, (6) Ministry of Family and for Promotion of Women, and (7) Ministry of Justice. These officials are appointed to office by their

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<sup>21</sup> See Article 26 of Decree No. 20/07.

<sup>22</sup> These plans are often developed and/or reviewed at intervals of two years. Thus, they are commonly known as biennial plans for children, or *Planos bienal da Criança*.

<sup>23</sup> See Article 4 of Decree No. 20/07.

respective ministers. By contrast, however, members of civil society organisations and faith-based or religious institutions represented in the CNAC are elected to their positions. Their election takes place in a general assembly meeting under the supervision of the Minister of the Department of Assistance and Social Integration and the Minister of Justice.<sup>24</sup> The inclusion of civil society organisations in the structural composition of the CNAC is highly commendable, given that it is based on the idea that civil society organisations themselves also take part in actions envisaging the implementation of children's rights.<sup>25</sup>

However, a note of caution should be sounded. The civil servants appointed to positions in CNAC may not necessarily be from top-ranking positions in government, a situation which could negatively affect the role the institution plays in discharging its duties. (This issue will be considered further in the next section). By contrast, the Mozambican coordinating mechanism (CNDC) is composed of ministers from five departments: the Department of Women and Social Welfare, the Department of Justice, the Ministry of Education, and the Departments of Health as well as the Department of Youth and Sports.<sup>26</sup> The presence of ministers in the composition of the CNDC affirms its potential to promote children's rights in government structures. This is mainly so because ministers occupy the highest-ranking positions within the departmental hierarchy, making it very likely that their decisions will be obeyed by junior staff.

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<sup>24</sup> See generally Articles 3, 5, 6 and 7 of Decree No. 06/07 on the establishment of the National Council for Children (CNAC) and the specific regulations (Decree No. 06/07).

<sup>25</sup> See Tara Collins (2011) 'The role and Impact of civil society upon child rights in Canada', *The Philanthropist Journal*, Vol. 23, No. 4, pp 451-461.

<sup>26</sup> See Article 4 of Decree No. 8/2009.

The CNDC also has representation from civil society and faith-based institutions, with each of these groupings being accorded five seats.<sup>27</sup> Arguably, this brings these organisations closer to the overall coordination functions of the CNDC and confers desirable influence upon them over the activities of these institutions in relation to children's matters. In addition, public and private institutions without representation in the CNAC or in the CNDC are allowed to participate in meetings provided they are invited by the respective chairpersons of these bodies. This provides further opportunities for these mechanisms to reach out to other institutions in discharging their coordination functions.

It was mentioned that General Comment No. 5 reiterates the importance of placing coordination mechanisms as close as possible to the highest level of authority.<sup>28</sup> In this regard, it appears that the presence of ministers in the CNDC enables it to meet that requirement; however, not all of the ministers are represented. Likewise, the CNAC also seems close to high-level authority, given that it has representation of ministers in its composition, at the same time that it was placed directly under the Office of the President. Even though the specificities in the structure of these bodies have many and varied implications, at base it would be a correct assessment to say that, in terms of their composition, both institutions partially meet the requirements of General Comment No. 5. This will become more evident when the pitfalls are highlighted in the next section.

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<sup>27</sup> See details on CRIN website at <http://www.crin.org/resources/infodetail.asp?id=23877> (accessed 20 June 2012).

<sup>28</sup> See section 5.2.1 above. See also Para. 39 of General Comment No. 5.

### 5.2.2.3 Nature of decisions

Both the CNAC and CNDC have a nationwide mandate.<sup>29</sup> This makes them key bodies to coordinate the implementation of children's rights across all spheres of government, starting from the centre and extending through to the district and provincial levels and so forth.<sup>30</sup> Notably, however, their decisions are internally binding only upon their members and not other public and private authorities.<sup>31</sup> This is regrettable to some extent, as not all public and private institutions whose activities affect children are represented in these bodies. Moreover, in the light of the fact that ministers are not necessarily on the CNAC, it is open to question what impact its decisions have on other authorities. As already discussed, this shows that the role that the CNAC can play may be substantively limited. In practice, however, deputy ministers indeed have been appointed to positions in the CNAC, and this has helped the institution retain the central role of coordinating children's rights in Angola.

Another positive feature is the fact that the CNAC responds directly to the country's President, which gives it a considerable advantage in playing a more meaningful role if the President endorses CNAC's decisions, especially when they are favourable to children.<sup>32</sup> By contrast, the CNDC is not placed under the Presidency. Although it has representation from five ministries, its role can, therefore, be undermined by departments without representation which choose to ignore

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<sup>29</sup> Articles 2 of Decree No. 20/07. See also Article of Decree No. 8/2009.

<sup>30</sup> See Para. 37 of General Comment No. 5.

<sup>31</sup> See Articles 15 and 16 of Decree No. 20/07. See also Article 12(3) of Decree No. 8/2009.

<sup>32</sup> As it was pointed out earlier, this reflects the CRC Committee's belief that coordination mechanisms must be placed closer to the high-level authority. See Para. 39 of General Comment No. 5. See also Article 3 of Decree No. 20/07.

CNDC decisions. Consequently, from the perspective of the nature of their decisions, it may be necessary to strengthen the position of these institutions to meet the standards of General Comment No. 5.

### **5.2.3 Some lessons that can be shared**

The two countries under examination can learn various lessons from one another about the positive aspects of their respective coordination mechanisms. On the one hand, Angola can learn that children's coordination mechanisms must comprise of members occupying top positions in government (ministers and or deputy-ministers) as they are the ones endowed with the decision-making power that can ultimately bring about changes in the lives of children.

On the other hand, Mozambique can learn that institutions tasked with coordination must be attributed powers to initiate their own plans, which subsequently must be adopted or mainstreamed into government policies pertaining to children. Mozambique should also appreciate the importance of placing its coordination mechanism at a much higher level by making it report directly to the President.

By sharing such lessons these countries can enjoy mutual benefits and make a giant leap forward in the advancement of children's rights.

### **5.3 Monitoring children's rights in the countries under the study**

One relevant factor in the implementation of treaty law, and by extension the CRC, is the practice of monitoring which is ascribed to these instruments. Monitoring the implementation of

human rights in general and children's rights in particular is regarded as an important step in helping to determine whether or not children enjoy full protection of their rights.<sup>33</sup> It is, in other words, a key means of ensuring compliance with international obligations.<sup>34</sup>

In general, monitoring is an activity that requires the existence of sound monitoring mechanisms supported by the skills and capacity necessary for them to play an effective role. It involves following-up on the activities of government and private actors in order to ensure effective implementation of treaties. In essence, monitoring children's rights entails auditing or taking stock of the work done for children by governments and the private sector,<sup>35</sup> and can be defined as a process of tracking how the implementation of these rights progresses (or regresses). It involves the collection and analysis of data on the implementation processes; the analysis of strategies and results; and issuing recommendations for the adoption of corrective measures in line with child rights.<sup>36</sup> At the international level the implementation of child-right treaties such as the CRC is monitored by mechanisms like the CRC Committee; at the domestic level, complementary national mechanisms can also be established to further the monitoring process.

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<sup>33</sup> See Children's Institute, '*Monitoring the implementation of the new child care legislation*', Children's Institute, University of Cape Town (date was not available), p 1229, available at <http://mena.savethechildren.se/PageFiles/2867/monitoring%20implementation%20of%20CRC-civil%20society%20follow%20up.pdf>. (accessed 23 November 2012).

<sup>34</sup> Ursula Kilkelly, Laura Lundy (2006) 'Children's rights in action: Using the UN Convention on the Rights of the Child as an auditing tool', *Child and Family Law Quarterly*, Vol. 18, No. 3, pp 331-350.

<sup>35</sup> Eva Clarhall (2011) '*Monitoring the implementation of the UN Convention on the Rights of the Child: To strengthen follow up by civil society on Concluding Observations and recommendations made by the UN Committee on the Rights of the Child*', Save the Children, p 6. See also Archana Mehendale (2004) 'Children's rights: Lessons on monitoring', *Economic and Political Weekly*, p 1.

<sup>36</sup> Edzia Carvalho (2008) 'Measuring children's rights: An alternative approach', *The International Journal of Children's Rights*, No. 16, p 547.

This section discusses the domestic mechanisms which are involved in, or have the potential to assist in, monitoring the implementation of children's rights in Angola and Mozambique. To that end, the section will, first, establish if monitoring mechanisms are available in these countries, and, second, examine such mechanisms in terms of their mandates, composition and the nature of their decisions in order to assess if they are adequate to safeguard the objectives of the CRC. The discussion begins by providing an overview of what is expected of monitoring institutions in relation to their competencies, composition and structure.

### **5.3.1 International law standards regulating monitoring mechanisms**

According to Dinokopila, the rules regulating the competences, structure and the composition of human rights institutions are catalogued in various documents, including the Paris Principles Relating to the Status of National Institutions for the Promotion and Protection of Human Rights (Paris Principles),<sup>37</sup> the Handbook on the Establishment and Strengthening of National Human Rights Institutions for the Promotion and Protection of Human Rights,<sup>38</sup> and the UN Fact Sheet 19: National Institutions for the Promotion and Protection of Human Rights.<sup>39</sup> These rules are also found in the 1978 Guidelines on the Structure of National Institutions for the Promotion and Protection of Human Rights.<sup>40</sup> In a way, all of these complement the Paris Principles document,

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<sup>37</sup> Paris Principles Relating to the Status of National Institutions for the Promotion and Protection of Human Rights (Paris Principles), adopted by the UN General Assembly resolution 48/134, December 1993.

<sup>38</sup> Centre for Human Rights 'Handbook on the Establishment and Strengthening of National Human Rights Institutions for the Promotion and Protection of Human Rights', United Nations (1995), pp 1-55.

<sup>39</sup> Bonolo Dinokopila (2010) 'Beyond paper-based affiliate status: National human rights institutions and the African Commission on Human and Peoples' Rights', *African Human Rights Law Journal*, Vol. 10, No. 1, p 30.

<sup>40</sup> As above.

which is the key instrument regulating the status of national human rights monitoring institutions.

With regards to their competences, the Paris Principles provide that the role of human rights monitoring institutions must include the competence for them to promote and protect human rights in the domestic jurisdiction of the states concerned.<sup>41</sup> The Paris Principles are inspired by the conviction that national human rights institutions must have as broad a mandate as possible and they should be capable:

(...) to submit to the Government, parliament or any other competent body, on an advisory basis either at the request of the authorities concerned or through the exercise of its power (...) opinions, recommendations, proposals and reports on any matters concerning the protection of human rights (...)<sup>42</sup>

That being said, it is widely accepted that the design and the scope of monitoring structures may vary widely according to the situation of each country.<sup>43</sup> Some institutions may be restricted to only lobbying government to promote and protect rights, while others may provide assistance and advocacy services to promote and protect such rights or even investigate complaints submitted to them by or on behalf of victims of rights violations.<sup>44</sup> Moreover, certain institutions

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<sup>41</sup> Paris Principles (note 37 above), Para 1.

<sup>42</sup> See Paris Principles Note 37 above), Para 2.

<sup>43</sup> A number of factors – including the availability of resources, the political options, and the varying legal traditions in different countries – may take precedence in deciding the structure and type of monitoring mechanism established in the different territories. See Osian Rees (2010) ‘Dealing with individual cases: An Essential Role for National Human Rights Institutions for Children?’, *The International Journal of Children’s Rights* 18, No.3, p 417 and 423. See also Children’s Institute (note 33 above), p 1229.

<sup>44</sup> Rees (note 43 above), p 1.

may deal with the rights of specific groups like children or women's rights,<sup>45</sup> whereas others may be furnished with a far broader mandate to deal with the rights of everyone (children included).<sup>46</sup> In the Paris Principles, national human rights institutions must have a pluralistic representation that covers civil society organisations involved in the promotion and protection of human rights, and by extension, children's rights as well.<sup>47</sup>

In 2003, the CRC Committee adopted General Comment No. 2 on the role of independent national human rights institutions in the promotion and protection of the rights of the child. The aforementioned General Comment is the central instrument designating the expected roles and functions of national human rights institutions in relation to children. It provides that the establishment of national human rights institutions must follow a transparent and consultative process, with these institutions being attributed sufficient resources to carry out their functions.<sup>48</sup> As regards the composition of national human rights institutions, General Comment No. 2 requires that they must have representation of civil society organisations dealing with children.

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<sup>45</sup> Examples of these include the monitoring mechanisms established in Sweden, Norway and Australia. See further details in the 1993 Swedish Act on the establishment of the office of the Ombudsman for Children; the 1981 Norwegian Act on the establishment of an Ombudsman for Children; and the Australian Children, Young Persons and Their Families Act of 1989. See also Rees (note 43 above), p 1.

<sup>46</sup> Examples of these include the monitoring mechanisms established in South Africa and recently (2009) in Mozambique. See further details in the South African Human Rights Commission Act No. 54 of 1994 and Act No. 33/2009 of 22 December 2009 on the establishment of the Mozambican National Human Rights Commission (Act No. 33/2009).

<sup>47</sup> Paris Principles (note 37 above), Para 1.

<sup>48</sup> See Paras. 10 and 11 of , CRC Committee General Comment No. 2 on the Role of Independent National Human Rights Institutions in the Promotion and Protection of the Rights of the Child, CRC/GC/2002/2 (General Comment No. 2).

Other key elements required of national human rights institutions include the fact that they must be easily accessible as well as participatory in discharging their duties.<sup>49</sup>

Human rights monitoring institutions are, in addition, required to have a mandate to address matters relating to children. To this end, they must either be established as an independent mechanism to monitor the implementation of children's rights, or they must have a commissioner or include in their structure a specific section or division responsible for children.<sup>50</sup>

An important point to note is the fact that the rules prescribed in the Paris Principles were widely incorporated in General Comment No. 2, which shows the significance of those principles in the bid to advance children's rights. This was confirmed by the fact that the CRC Committee has called upon state parties to the CRC to establish national human rights institutions compliant with the Paris Principles.<sup>51</sup>

### **5.3.2 Monitoring mechanisms in the countries under the study**

Like other countries in the region that have established mechanisms with a broad human rights monitoring mandate (including, for instance, South Africa and Uganda),<sup>52</sup> Angola and

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<sup>49</sup> See Paras. 15-18 of General Comment No 2.

<sup>50</sup> See Paras. 5 and 6 of General Comment No. 2.

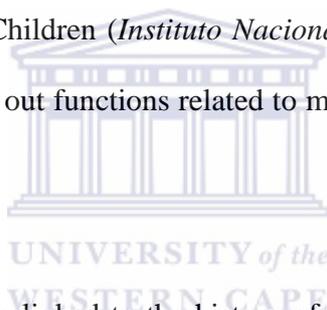
<sup>51</sup> Para. 4 of General Comment No. 2.

<sup>52</sup> The South African Human Rights Commission is established under Chapter 9 of the South African Constitution, Act No. 108 of 1996, as an institution designed to support the constitutional democracy. This means that its functions are geared towards the protection of the rights provided in the Constitution. The protection of children's

Mozambique have established similar institutions in their jurisdiction. Notably, Angola took a step further by creating an institution with a role that is closely linked to the mandate of mechanisms specifically entrusted with monitoring the implementation of children's rights. In the discussion that follows, the composition and mandate of these institutions are weighed against their role in advancing children's rights.

### **5.3.2.1 Institutions with related mandates to monitor children's rights**

As discussed above, Angola is the only country of the two in the study that has created an institution with a related mandate to monitor the implementation of children's rights. In 1991, it created the National Institute for Children (*Instituto Nacional da Criança, INAC*), which is the key institution responsible to carry out functions related to monitoring the implementation of the rights under consideration.<sup>53</sup>



Numerous aspects of the INAC are linked to the history of its creation. First, its establishment came two years after the adoption of the CRC. This made the INAC an indispensable tool for promoting the implementation of the Convention. Second (and as mentioned in Chapter 4), the

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rights therefore, also forms part of the mandate of the Human Rights Commission. Similarly, the Uganda Human Rights Commission is established pursuant to the provision of Article 51 of Uganda's Constitution of 1995. For more details on the Uganda Commission, see Onoria Henry (2010) 'Jurisdiction *ratione materie* of the Uganda Human Rights Commission: Making sense of the ambiguity in the jurisprudence', *African Human Rights Law Journal*, Vol. 10, No. 1, pp 53-77.

<sup>53</sup> It must be pointed out that the INAC is not per se a children's rights monitoring mechanism but bears related mandates that are relevant to monitoring the implementation of the rights in consideration.

creation of the INAC had preceded the Angolan child-law reform.<sup>54</sup> It means that the creation of the INAC brought hope for children even before law reform process had been concluded.

When the INAC was created it was mainly tasked to carry out research pertaining to the situation of Angolan children. This was important at the time, as the country was devastated by the effects the then still-ongoing civil war. Although this conflict occupied most of the government's attention,<sup>55</sup> with the creation of the INAC there was hope that the situation of children would move to the forefront of government agenda. Over time it became apparent that the INAC needed to play a different role as its mandate overlapped with the powers of the CNAC (discussed above). In this regard, for example, both institutions had been granted powers to carry out investigations on matters affecting the situation of children.

Consequently, in 2010, the statute of the INAC was amended and the institution was given new mandates. The INAC is now tasked with assessing the development and protection of children on a permanent basis, as well as with mediating conflicts that involve or affect children. In line with CRC Committee's General Comment No. 2, the INAC can also pursue judicial cases and other

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<sup>54</sup> See also The African Child Policy Forum, '*Harmonisation of children's laws in Angola: Country Brief*', available at <http://www.acerwc.org/wp-content/uploads/2012/05/English-ACERWC-Angola-Harmonisation-of-Laws-on-Children.pdf> (accessed 28 July 2012).

<sup>55</sup> Reno captures well the political context of Angola's war-torn economy of Angola and the concerns that the government had diverted attention from social areas beneficial to children. See William Reno (2000) '*The real (war) economy of Angola*,' in Jakkie Cilliers and Christian Dietrich (eds.) '*Angola's war economy*', Institute for Security Studies, pp 202-234.

civil proceedings affecting children.<sup>56</sup> Arguably, to the extent that the INAC can pursue judicial proceedings and all other types of cases involving children, its mandate is closely related to the mandates of institutions devised to monitor the implementation of children's rights.

The INAC is responsible, furthermore, to undertake research and prepare reports on the country's international commitments for children, including, for example, reports concerning instruments such as the CRC and the African Children's Charter.<sup>57</sup> I contend that, if adequately implemented, these responsibilities can be leveraged to help make the reporting process under the CRC and African Children's Charter more effective and fruitful. As a national authority closer to the situation of children on the ground than the somewhat distant treaty-monitoring bodies, the INAC can, by way of its reports, enable these bodies to make good concluding observations and sound recommendations.<sup>58</sup> Consequently, the INAC's involvement in the reporting procedures under the CRC and African Children's Charter can yield positive effects in terms of advancing domestic implementation of children's rights in Angola.

Nevertheless, the INAC still remains mandated to ensure domestic implementation of policies in the domain of advocacy, research and protection strategies pertaining to children.<sup>59</sup> This entirely contradicts the objective of the reform which sought to remove these powers. Hence, there is

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<sup>56</sup> See generally, Article 5 of Decree No. 8/91 of 16 March 1991 as amended by Decree No. 10/10 of 27 January 2010 on the establishment of the Angolan National Institute for Children (INAC) the specific regulations (Decree No 8//91 as amended by Decree No. 10/10. See also Para. 14 of General Comment No. 2.

<sup>57</sup> See generally, Article 5 of Decree No. 8/91 as amended by Decree No. 10/10.

<sup>58</sup> See Clarhall (note 35 above), p 6. See also Mehendale (note 35 above), p 8.

<sup>59</sup> See Decree No. 8/91 as amended by Decree No. 10/10.

confusion in relation to the role played by the INAC and the responsibilities of the CNAC (discussed above)<sup>60</sup> since they have similar responsibilities.<sup>61</sup> Presently, both institutions have powers to carry out investigations on matters affecting the situation of children, which relates to the mandate of a monitoring mechanism. Moreover, their mandates also overlap in areas concerning their role in promoting studies, programmes and initiatives pertaining to the development and assistance of children. It suffices to say that there has been duplication of institutions with similar mandates.

However, the point remains that the law was very clear in designing the primary responsibilities of each of these institutions, the CNAC being tasked primarily with the coordination of actions envisaging the implementation of children's rights and the INAC conceived of as an independent body responsible for implementing these rights. This means that there must not be any sort of confusion in regards to the tasks accorded to these institutions.

Members of staff of the INAC are appointed by the Minister of Assistance and Social Integration and the Minister of Finance, who select officials from among civil servants within their respective departments.<sup>62</sup> In terms of the law, the Ministry of Youth and Sports as well as the Department of Family and the Promotion of Women must have representation in the technical consultative board of the INAC, which indicates that the INAC is composed mainly of civil

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<sup>60</sup> See section 5.2 above.

<sup>61</sup> See section 5.3.2 below.

<sup>62</sup> The Minister of the Department of Assistance and Social Integration appoints the director general and management council, and he jointly appoints with the Minister of the Department of Finance all staff for the fiscal board. See Articles 8(3), 10(2)(d), and 14(2) of Decree No. 8/91 as amended by Decree No. 10/10.

servants.<sup>63</sup> As it stands, the composition of the INAC breaches the rules established in CRC Committee General Comment No. 2 that enjoin states to ensure that national human rights monitoring institutions have pluralistic representation which includes civil society organisations involved in the promotion and the protection of human rights.<sup>64</sup> Arguably, this limits the role the INAC can play in advancing children's rights in Angola, given that it lacks independence from government.

### **5.3.2.2 Institutions with a broad human rights monitoring mandate**

Angola is the only country of the two considered in this study which created an institution (*Intituto Nacional da Criança*) with powers similar to those of bodies tasked with monitoring the implementation of children's rights. Given the cardinal role that this body can play in promoting children's rights in Angola, its composition and functions will be discussed later in this section.

Angola has also established institutions credited with broad human rights monitoring mandates. These include the State Department for Human Rights (*Secretaria do Estado para os Direitos Humanos*)<sup>65</sup> and the Office of the Ombudsman (*Provedor da Justiça*), which share the human rights oversight function. In the meantime, Mozambique made provisions for a statutory National Human Rights Commission (Human Rights Commission).<sup>66</sup> This body, which is expected to be independent, must also contribute towards the protection of human rights.

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<sup>63</sup> Articles 6-14 of Decree No. 8/91 as amended by Decree No. 10/10.

<sup>64</sup> See Para. 12 of General Comment No. 2.

<sup>65</sup> See African Child Policy Forum (note 54 above), p 4. See also Presidential Decree No. 1/10 of 5 March 2010 on the establishment of the Angolan State Department for Human Rights (Decree No. 1/10).

<sup>66</sup> See Act No. 33/2009.

Moreover, both countries have institutionalised ombudsmen who are also involved in human rights monitoring.<sup>67</sup> As discussed above, the mandates of these institutions will be explored with the intention of assessing how best they are able to further children's rights.

To begin with the Angolan *Secretaria do Estado para os Direitos Humanos*,<sup>68</sup> the establishment of this body came after a devastating civil war that lasted about two decades.<sup>69</sup> In view of the human rights abuses that took place during this armed conflict, the peace agreement which followed it envisaged the need for an institution tasked with matters concerning the violation of human rights.<sup>70</sup> Initially, the 'Ministry without portfolio' was created to exercise this mandate. Placed directly under the Office of the President, it was later converted into a new institution and gave rise to the establishment of the State Department for Human Rights,<sup>71</sup> which remains placed under the Presidency and reports directly to the President and the parliament.<sup>72</sup> The President

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<sup>67</sup> John MacMillan, 'The Ombudsman's role in human rights protection- An Australian perspective', paper presented at the 11<sup>th</sup> Asian Ombudsman Association Conference held in Bangkok, Thailand, 2-5 November 2009; copy on file with the author.

<sup>68</sup> See African Child Policy Forum (note 54 above), p 4.

<sup>69</sup> For more details on the peace agreements signed after the civil war that broke out in Angola after independence in 1975, see Ian Spears (1999) 'Angola's elusive peace: The collapse of the Lusaka Accord', *International Journal*, Vol. 45, No. 4, pp 562-581. See also Miguel Bembe (2011) 'Análise do proceso de paz no enclave do Cabinda', *Caderno de Estudos Africanos*, No. 20, pp 27-54.

<sup>70</sup> It should be noted that the first peace agreement was signed in 1992. However, the political agreement did not stop the armed conflict, which continued until 2002 when the 1992 peace accord was amended to suit the new situation. For the full text of the Angolan Peace Accord as amended in 2002 (document in Portuguese), see [http://www.usip.org/files/file/resources/collections/peace\\_agreements/angola\\_04042002.pdf](http://www.usip.org/files/file/resources/collections/peace_agreements/angola_04042002.pdf) (accessed 15 October 2012).

<sup>71</sup> See Presidential Decree No. 1/10.

<sup>72</sup> See Presidential Decree No. 1/10.

appoints the head of the *Secretaria do Estado para os Direitos Humanos*, who in turn appoints the remaining staff.

Established in 2009, the Mozambican Human Rights Commission is rather more recent than the Angolan *Secretaria do Estado para os Direitos Humanos*, the history of which is tied to the civil war in the 1990s. The available information indicates that all commissioners were appointed in September 2012. At the time of writing, the recruitment of staff to support the work of commissioners and the acquisition of office premises was still under way.<sup>73</sup> The establishment of the Commission has generated a good deal of excitement, and it is expected that it will play an active role in monitoring the state's compliance with human rights and, by implication, its protection of children's rights as well.<sup>74</sup>

According to the law, all Commissioners must be citizens with high moral integrity and have experience in promoting and protecting human rights.<sup>75</sup> However, in the current composition only eight of the eleven Commissioners have human rights training, while the remaining three

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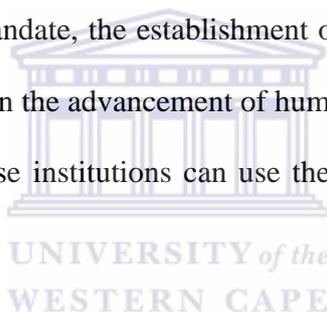
<sup>73</sup> However, at the time of writing (November 2012) other activities relating to the establishment of the commission were still ongoing, including preparation of baseline studies to determine the needs of the commissioners and the budget that the commission will need to carry out its works.

<sup>74</sup> Some scholars have suggested, for example, that the Human Rights Commission will deal with prisoners' rights and conditions of detention. See Tina Lirizzo (2012) '*Progress on human rights monitoring in places of detention in Mozambique*', Newsletter of Civil Society Prison Reform Initiative (CSPRI), Community Law Centre, University of the Western Cape.

<sup>75</sup> Article 4 of Act No. 33/2009.

have not benefited from substantive training on the subject. As will be explained later, this may affect the work of the Commission when it becomes fully operational.<sup>76</sup>

With regards to other human rights institutions, the creation of the Mozambican Office of the Ombudsman is a more recent event attributable to the country's 2004 Constitution. By contrast, the Ombudsman position in Angola was institutionalised much earlier during the constitutional review of 1992.<sup>77</sup> However, in both countries these positions were filled only some time after their date of creation. In Angola the first Ombudsman was elected in 2006 while in Mozambique the first Ombudsman attained the position in 2012. Besides adding to the number of institutions that have a broad human rights mandate, the establishment of Ombudsmen in the two countries represents an important milestone in the advancement of human rights in general<sup>78</sup> and children's rights in particular, given that these institutions can use their broad human rights mandates to further children's rights.



The discussion now turns to analyse the mandates of the above institutions. The *Secretaria do Estado para os Direitos Humanos* and the Human Rights Commission have similar roles inasmuch as they are both responsible for ensuring respect for human rights and promoting

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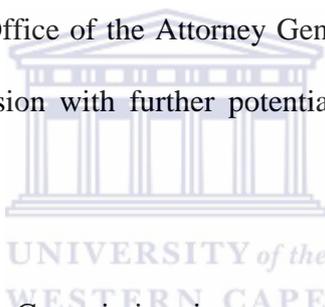
<sup>76</sup> See section 5.3.3 below.

<sup>77</sup> See Preamble Act No. 4/06 of 28 April 2006 on the establishment of the Angolan Ombudsmen (Act No. 4/06).

<sup>78</sup> For a similar viewpoint about the creation of the office of the Ombudsmen in Angola, see Amnesty International's submission on Angola during the 51<sup>st</sup> Ordinary Session of the African Commission on Human and Peoples' Rights, available at [http://www2.ohchr.org/english/bodies/hrc/docs/ngos/AI\\_Angola\\_HRC105.pdf](http://www2.ohchr.org/english/bodies/hrc/docs/ngos/AI_Angola_HRC105.pdf) (accessed 15 October 2012). See also generally Lirizzo (note 74 above).

collaboration among public and private entities working to advance these rights.<sup>79</sup> They are also tasked with proposing the adoption of measures seeking to prevent violation of human rights, and with undertaking studies relating to the advancement of the rights in consideration.<sup>80</sup>

However, unlike the Human Rights Commission, the *Secretaria do Estado para os Direitos Humanos* has no powers to receive individual complaints alleging violation of human rights. This disadvantages the Angolan children as the latter body cannot provide remedies for them. Nevertheless, providing remedies (such as advising victims of violations) is an essential part of the mandate of the Mozambican Human Rights Commission.<sup>81</sup> The Commission can also refer cases of a criminal nature to the Office of the Attorney General for investigation. I submit that this power furnishes the Commission with further potential to ensure effective protection of children.



The Mozambican Human Rights Commission is responsible, furthermore, to monitor the implementation of ratified international human rights instruments.<sup>82</sup> Once again, this does not form part of the responsibilities of the *Secretaria do Estado para os Direitos Humanos*. It is submitted that if similar responsibilities were given to this institution, it would be able to play a

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<sup>79</sup> See generally Article 2 of the Statutes of the *Secretaria do Estado para os Direitos Humanos*, available at <http://www.sedh.gov.ao/Institucionais/Organigrama.aspx>, accessed (19 September 2012). See also Articles 1-4 of Act No. 33/2009.

<sup>80</sup> See, for instance, Article 3 of Act No. 33/2009.

<sup>81</sup> See Article 3 of Act No. 33/2009.

<sup>82</sup> Article 4 of Act No. 33/2009.

more meaningful role in the advancement of children's rights.<sup>83</sup> For example, this would allow the *Secretaria do Estado para os Direitos Humanos* to share its views on matters concerning children's rights contained in instruments such as CRC and the African Children's Charter with treaty monitoring bodies; and if this were done, Angolan children would benefit in many ways. For arguments sake, it would help treaty monitoring bodies like the CRC Committee obtain a clear picture of the situation of children in Angola and produce concluding observations and comments more relevant to them. In addition, it would assist in raising the awareness of the state concerned about areas where it is not fulfilling its international commitments for children and thereby possibly encourage it to adopt measures for remedying these shortcomings.<sup>84</sup>

There are also similarities in the respective mandates of the Ombudsmen of Angola and Mozambique. These bodies are tasked primarily with defending the liberties and freedoms of the citizens against acts of public authorities, and consequently play an important role in public scrutiny of government actions.<sup>85</sup> In terms of their mandates they are required to ensure the legality of acts of public authorities and to issue recommendations for adoption of the measures required to correct violation of human rights committed by these authorities.<sup>86</sup> To this end, they

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<sup>83</sup> My emphasis added.

<sup>84</sup> Danwood Chirwa (2005) *An overview of the impact of the International Covenant on Economic, Social, and Cultural Rights in Africa*, Community Law Centre, University of the Western Cape, p 5.

<sup>85</sup> For details about the role of Ombudsmen in the public scrutiny of government action, see John Walters (2009) *The protection and promotion of human rights in Namibia: The constitutional mandate of the Ombudsmen*, in Anton Bosl and Nico Hom (eds.) *Human rights and the rule of law in Namibia*, Konrad Adenauer Stiftung, Second Edition, p 121.

<sup>86</sup> See Article 256 of the 2004 Constitution of the Republic of Mozambique. See also Act No. 7/2006 on the establishment of the Mozambican Ombudsman (Act No. 7/2006). See generally Lirizzo (note 74 above).

can receive individual complaints alleging violation of the rights in consideration (children's rights included). Furthermore, they can promote activities seeking to enlighten citizens in relation to their rights.<sup>87</sup> The above functions render these institutions capable to promote human rights in general and children's rights in particular.

However, the Ombudsmen in the two countries have no powers to issue remedies for violations of human rights, whereas it is the case that similar institutions in other countries in the region do possess such remedial powers.<sup>88</sup> Their mandates are limited to advising the government and making recommendations on the measures that must be taken to remedy violations. This limits the role of these mechanisms in relation to advancing children's rights since the government concerned is left free to ignore those recommendations if it so decides. Thus, in order for human rights, and particularly children's rights, to flourish, the mandate of these mechanisms needs to be strengthened by giving them remedial powers as well. I submit, therefore, that the laws establishing these institutions must be reviewed to place a binding obligation on governments to implement their recommendations or to permit Ombudsmen to follow up on the governmental implementation of their findings.

### **5.3.3 Obstacles facing their work for children**

The preceding discussion identified the many gaps that stand to affect the work these institutions do with regard to advancing the rights of children protected in the CRC. As Kilkelly correctly notes, for rights to have meaning, it is imperative to ensure the availability of effective remedies

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<sup>87</sup> See, for example, Article 18 of Act No. 4/2006.

<sup>88</sup> See Walters (note 85 above), p 122.

and a complaints mechanism.<sup>89</sup> Certain of these elements are lacking in the human rights mechanisms discussed above and may affect the latter's role in promoting the advancement of children's rights.

To begin with the INAC, it is responsible to monitor the implementation of children's rights in Angola, but there is no clear relationship or linkage between it and the CNAC, which is central in coordinating the implementation of the rights in consideration. In the past, this has meant that there has been little collaboration between the two institutions, a situation that has undermined both of their roles.<sup>90</sup> Over time there have been slight improvements, with INAC being involved in programmes and planning actions at the level of CNAC. Nevertheless, legislative backing is needed to ensure more meaningful interaction between these institutions.

Another point of concern is the wide-scale representation that state officials have in the structure of the INAC. Although it is a known fact that this institution is not a *de facto* child-rights monitoring mechanism, it has, as discussed, responsibilities similar to institutions exercising this mandate. It was previously stated as well that, to ensure independence, the INAC should include civil society representation.<sup>91</sup> To put matters differently, civil society representation is needed to ensure that the INAC discharges its functions without interference by public authorities. The

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<sup>89</sup> Ursula Kilkelly (2006) '*Barriers to the realisation of children's rights in Ireland*', paper based on a baseline research study commissioned by the Ombudsman for Children, p 106; copy on file with the author.

<sup>90</sup> Rede da Criança Angola, '*Supplementary report by NGO's on the implementation of the Convention on the Rights of the Child*' (2004) Rede Criança Angola, pp 8-9; copy on file with the author.

<sup>91</sup> See section 5.3.1 above, and Para. 12 of General Comment No. 2. See also Paris Principles B 1 a) which states that the 'composition of a NHRI and the appointment of its members shall be established by a procedure which ensures representation of all social forces including civil society'.

current structure of the INAC (it is submitted) leaves room for interference of this kind in its activities,<sup>92</sup> which in turn reduces its potential for advancing children's rights.<sup>93</sup>

Although it is too early to make reliable forecasts, it is very likely that the Mozambican Human Rights Commission, which became operational in 2012, will face major setbacks in discharging its duties. This is because the law establishing the Commission makes no provision for a follow-up mechanism or policy enabling the Commission to assess if government has implemented its decisions. The lack of a follow-up mechanism was found to be one of the major weaknesses of the African human rights system, where its absence was said to have tarnished the work of the African Commission on Human and Peoples' Rights (African Commission), which monitors the implementation of the African Charter on Human and Peoples' Rights.<sup>94</sup> This assessment was based on the fact that African states were found to be in a position to disregard the decision of the African Commission. I submit that an identical situation could prevail in the case of decisions

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<sup>92</sup> See Commonwealth Human Rights Initiative (2011) 'Civil Society and National Human Rights Institutions', *The International Journal of Not-for-Profit Law*, Vol. 13, No. 4, p 28.

<sup>93</sup> This situation was brought to the attention of the state party concerned during the first review process of Angola under the CRC Committee pursuant to Article 44 of the CRC, when the Committee noted that independent monitoring mechanisms must comprise of members of civil society organisations. However, until recently Angola has not addressed these concerns, as was evidenced by the fact that during the second review process the Committee reminded the government of Angola to address this situation again. See Para 8, of the concluding observations of the CRC Committee on the report submitted by Mozambique, UN doc. CRC/C/15/Add.246. See also Para. 12 of General Comment No. 2.

<sup>94</sup> See Frans Viljoen, Lurette Louw (2007) 'State Compliance with the recommendations of the African Commission on Human and Peoples' Rights, 1994-2004', *The American Journal of International Law*, Vol. 101, No. 1, p 3. See also Frans Viljoen, '*International Human Rights Law in Africa*', Oxford University Press, Second Edition (2012), p 416.

by the Human Rights Commission, a situation which consequently limits the role that the Commission could play in advancing children's rights.

Lastly, it is regrettable that the laws establishing the above National Human Rights Institutions (NHRIs) have not clearly spelt out their duties in relation to children.<sup>95</sup> Moreover, in the various structures and forms that these institutions take, they have no identifiable commissioner, person or section responsible to deal with children's rights, notwithstanding guidance from the CRC Committee urging state parties to the CRC to create NHRIs with structures that include an identifiable commissioner, person or section dealing with children's matters.<sup>96</sup> In Mozambique, this structural lacuna attracted serious criticism in the second review process of implementation of the CRC, when the CRC Committee urged the government to ensure that its Human Rights Commission is given the necessary powers, and furnished with the necessary human and resource capacity, to monitor children's rights under the Convention.<sup>97</sup> It is hoped that Mozambique will soon comply with this recommendation.

In sum, the weak structure and unclear provisions of the laws establishing human rights (or related) monitoring mechanisms in Angola and Mozambique create daunting challenges for the role that these institutions could play in advancing children's rights. It is therefore important to strengthen them by reviewing the legal provisions on their mandates so that they have clearer

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<sup>95</sup> The only exception is the INAC, which has rather clear mandates devised to that end. However, it should be cautioned that, unlike other entities discussed above, the INAC is not a NHRI.

<sup>96</sup> See Para. 2 of General Comment No. 2.

<sup>97</sup> This concern was also raised in the concluding observation of the CRC Committee on the second States Parties reports submitted by Mozambique. See Para. 15 CRC Committee concluding observations and recommendations on Mozambique second state parties report under Article 44 of the CRC, UN doc CRC/C/MOZ/CO/2 (2009).

powers in relation to the advancement alike of children's rights and the rights of other vulnerable groups.

#### **5.3.4 Comparing the positions of the countries under examination**

It is submitted that there are more similarities than differences in the approaches taken by Angola and Mozambique to monitoring the implementation of human rights, particularly the rights of children.

This is seen, first, in the proliferation of institutions broadly mandated to monitor the implementation of human rights.<sup>98</sup> Angola, however, enjoys a comparative advantage thanks to the creation of the INAC, which is tasked with a monitoring mandate similar to children's rights monitoring mechanisms. Although its many systemic weaknesses are open to challenge, this stand-alone example should be encouraged.

Second, given the challenges encountered in both systems,<sup>99</sup> the two countries can learn a great deal from each other. For instance, Mozambique could consider establishing an institution similar to the Angolan INAC, but this must be done carefully to avoid importing the weaknesses identified in the Angolan system. In turn, Angola can learn from Mozambique by borrowing from the structure of Mozambican Human Rights Commission, which gives wide representation to civil society and ensures pluralism. Doing so could help to create a desirable balance between state authorities and civil society organisations in the composition of the Angolan *Secretaria do*

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<sup>98</sup> See generally section 5.3.2.

<sup>99</sup> See generally section 5.3.3.

*Estado para os Direitos Humanos*. However, in the long run the ideal would be for the two countries to create institutions specifically tasked with monitoring children's rights as envisaged in General Comment No. 2.<sup>100</sup>

#### **5.4 Courts and the administration of justice for children**

Until recently African courts did not have significant weight in dispute-resolution processes.<sup>101</sup> According to Santos, this can be explained by the fact that African courts constitute a tiny part of a far greater dispute-resolution universe which includes local authorities;<sup>102</sup> by implication, this reduces considerably the role that courts can play in administering justice for citizens (children included).<sup>103</sup> Nevertheless, courts continue to play a central role when they are presented with an opportunity to adjudicate over unsettled controversies.<sup>104</sup> Consequently, it remains important to

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<sup>100</sup> This seems to be the most favoured position of the CRC Committee, as explained in General Comment No. 2. However, the CRC Committee also believes that where the establishment of separate institution to deal with children's rights is challenged by resource constrains, a NHRI must include a section, commissioner or a specific person responsible for children's rights. See generally Paras. 6 and 7 of General Comment No. 2.

<sup>101</sup> Boaventura Santos 'Os Tribunais, o Estado e a Democracia' in Boaventura Santos and José Dúnen, 'Sociedade e Estado em construção: Desafios do Direito e da Democracia em Angola', Livraria Almedina, Vol. 1 (2011), p 85.

<sup>102</sup> As above.

<sup>103</sup> Arguably, African formal courts are even aware of the existence of other dispute-resolution mechanism. They tend to recognize the existence of these mechanisms and the huge demand for their services. This makes the dispute-resolution environment highly competitive with the formal justice system, and the latter becomes malleable to influences from the informal system and vice versa. Consequently, to a certain extent the informal and the formal system of administration of justice tend to secure their legitimacy by taking into account the principles and the values rooted in each other. See also Boaventura Santos (2011) 'Os tribunais, o Estado e a Democracia' in Boaventura Santos, José Dúnen, 'Sociedade e Estado em construção: Desafios do Direito e da Democracia em Angola', Livraria Almedina, Luanda, Vol. 1, p 85-86.

<sup>104</sup> See, for example, Nkatha Murungi (2009) 'Revisiting the role of sub-regional courts in the protection of human rights in Africa', unpublished LLM dissertation, Centre for Human Rights, University of Pretoria, p 2.

discuss the role they can play in advancing human rights in general and children's rights in particular.

What follows, then, is a brief overview of the court systems of Angola and Mozambique. The analysis delves into the system of appointment of judges and discusses the composition of courts. Initially, the emphasis is on explaining how judges are appointed to the bench; thereafter the discussion focuses on institutions involved in the administration of justice for children. (The detailed investigation of these institutions follows at a much later stage, given they fall within the broader context of the courts system of these countries.)

#### **5.4.1 Overview of the court system**

##### **5.4.1.1 History revisited: the judiciary during the colonial era**

During the colonial era Angola and Mozambique were regulated by the Portuguese civil law system and customary law.<sup>105</sup> Family law was most relevant for the advancement of children's rights.<sup>106</sup> The legislative framework at the time was premised on the principle of different legal statutes for Portuguese citizens and the native populations of these countries.<sup>107</sup> All Portuguese settlers and natives (*indigenas*) who accepted the Portuguese traditions were subject to written laws emanating from the colonial administration. In essence, customary law applied to 'natives', often many in number, who did not accept the values and tradition of the colonisers.<sup>108</sup>

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<sup>105</sup> Maria Medina '*Direito de Família*', Escolar Editora (2001), p. 46.

<sup>106</sup> As above.

<sup>107</sup> As above.

<sup>108</sup> As above.

As was noted in Chapter 4, specialised courts to administer justice for children, called *Tribunais de Menores*, were introduced in all colonial territories administered by Portuguese rulers.<sup>109</sup> When dealing with children, these courts would adjudicate based on the rules contained in the discriminatory laws described above. Angola and Mozambique gained their independence in the mid-1970s. The colonial system was banned as a consequence of attainment of independence.<sup>110</sup> New constitutions were enacted in Angola and Mozambique, bringing new socio-political orders and recognising all citizens as equal before the law.<sup>111</sup> These changes allowed for the introduction of a system that favoured equal treatment for everyone, including children, who came into contact with the law.

Another crucial development is that, after independence, the national courts of Angola and Mozambique affirmed their independence in relation to Portuguese courts.<sup>112</sup> The national courts became responsible to make their own decisions over national matters without the need for referring to the decisions of Portuguese courts. It is argued that this contributed significantly to the national system of administration of justice for children, in that national courts were in close touch with the local context and hence could base their decisions on children's matters on local socio-economic, cultural and political realities.

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<sup>109</sup> See Chapter 4, section 4.4.2.2. See also Decree No. 417/71 of 29 September 1971 (Decree No. 417/71).

<sup>110</sup> It should be noted that at some point during the colonial era (in 1961) the colonial law was amended to allow 'natives' to make a declaration whereby they consented to the application of Portuguese written laws. At this time, the colonial laws, which were written, were liberated for the benefit of the native population as well. See Articles 1 and 2 of Decree No. 43 897 of 6 September 1961 (Decree No. 43 897).

<sup>111</sup> See 1975 Constitution of Angola and 1975 Constitution of Mozambique.

<sup>112</sup> Previously, national courts were expected to follow the guiding decisions of Portuguese courts which were often completely divorced from the socio-economic and political situation of the countries under examination.

#### **5.4.1.2 Overview of the current hierarchy, composition, and independence of courts**

The civil law system inherited from the Portuguese colonial administration continues, albeit with some variation (discussed later),<sup>113</sup> continue to be the main legal system of the countries under analysis. Apart from the colonial civil law system,<sup>114</sup> which remained relatively intact, independence brought marked changes to several aspects of the socio-political and economic environment of the countries under analysis. The judiciary could not escape these changes, and a portrait of the new judiciary systems of these countries is provided below.

##### *The hierarchy*

Currently the court structures of Angola and Mozambique are based on a two-tier system, with the upper courts serving as judicial bodies of appeal and the lower courts adjudicating at first instance. Independence brought about a new dispensation premised on the equality of everyone before the law,<sup>115</sup> and this entailed a number of key changes to these countries' judicial systems.

In Angola the structure of the new judicial system now includes municipal and provincial courts at the trial level and the Supreme Court and the Constitutional Court at the appellate level.<sup>116</sup>

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<sup>113</sup> See section 5.4.2 below.

<sup>114</sup> See AIDS and Human Rights Research Unit (2007) *'Human rights protected? Nine Southern African countries reports on HIV, AIDS and the Law'*, Pretoria University Law Press, p 138.

<sup>115</sup> See section 5.4.1.1 above.

<sup>116</sup> The Angolan Constitutional Court was introduced by the 1992 Constitution but became operational only in 2008. Between 1992 and 2008, the mandate of the Constitutional Court was been carried out by the Supreme Court, which made decisions as if it were the Constitutional Court in all matters relating to constitutional disputes brought before the court. However, when the Constitutional Court became operational, it seized its role from the Supreme Court and started functioning as an independent institution. These notes are available at <http://www.nationsencyclopedia.com/Africa/Angola-JUDICIAL-SYSTEM.html> (accessed 3 September 2012). For

Arguably, the introduction of a Constitutional Court created hope that children's constitutional matters could be addressed by it. Although Constitutional Courts are mandated primarily to administer justice on constitutional matters,<sup>117</sup> they can also serve as a court of first instance in matters concerning electoral disputes and controversies involving the parliament.<sup>118</sup> The new court structure also includes provincial courts, with children's matters falling within a specialised section of this court; however, civil sections of the provincial courts deal with such child-related disputes where these specialised sections have not been created.<sup>119</sup> On appeal, the matters are adjudicated at the level of the Supreme Court unless constitutional issues are raised in the dispute, at which event the Constitutional Court must then be seized.

Whereas Angola has a Constitutional Court, Mozambique has a Constitutional Council which is responsible to deal with constitutional matters. Although this body was not termed a 'court', its mandate includes powers to exercise judicial activities similar to other institutions that are tasked with the administration of justice.<sup>120</sup> Given the fact that the Council has powers to deal with

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further details, see also Act No. 2/08 of 17 June 2008 on the establishment of the Angolan Constitutional Court (Act No. 2/08).

<sup>117</sup> See, for example, the considerations on European Constitutional Courts in Lee Epstein, *The role of Constitutional Court in the establishment and maintenance of Democratic Systems of Government*, p 10, paper presented at the 2000 annual meeting of the American Political Science Association; copy on file with the author.

<sup>118</sup> See generally Article 3 of Act No. 3/08 of 17 June 2008 on the establishment of procedures for Constitutional disputes (Act No. 3/08).

<sup>119</sup> Maria Meneses, Júlio Lopes (2011) *'Luanda: A caracterização do trabalho de campo'*, in Maria Meneses, Júlio Lopes (eds.) *'O Direito por fora do Direito: As instâncias extra-judiciais de resolução de conflitos em Luanda'*, Vol. III, Almedina, p 47.

<sup>120</sup> See Aquinaldo Mandlate, *'Mozambique needs a Constitutional Court'*, opinion piece at OSISA Blog, available at <http://www.osisa.org/law/blog/mozambique-needs-constitutional-court> (accessed 3 September 2012).

constitutional matters,<sup>121</sup> it is also likely that practitioners can use it to address constitutional matters involving children. Although the Council is mandated to deal with constitutional matters, it should be noted that in practice it has dealt mainly with electoral disputes and a few other cases of a different nature, including ones involving control of the constitutionality of the laws. As explained elsewhere, the reason for this is that, in constitutional matters, standing before the Constitutional Council is limited to certain persons holding public office, for example, the President, the chairperson of Parliament and one third of the members of Parliament (*Deputados da Assembleia da República*).<sup>122</sup>

Like the Angolan Supreme Court, the counterpart Supreme Court of Mozambique serves as the higher appellate body and the court of last resort on appeal of decisions of the lower courts.<sup>123</sup> Mozambique also established regional appellate courts called *Tribunais Superiores de Recurso*<sup>124</sup> as intermediary judicial bodies between the provincial courts (*tribunais de província*) and the

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<sup>121</sup> It should be noted that the Mozambican Constitutional Council has other mandates. These include, for instance, powers to exercise preventive and successive control of the constitutionality of the laws, as well as powers to exert the control over the legality of the acts of public authorities. The Constitutional Council is further responsible to resolve electorate disputes and settle controversies involving sovereign bodies of the state when such cases relate to their mandates or competencies. See generally Article 6 of Act No. 06/2006 of 2006 on the establishment of the Mozambican Constitutional Council (Act No. 06/2006).

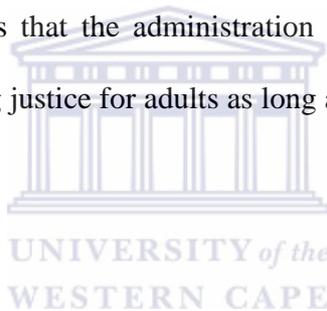
<sup>122</sup> In part this is because the general public has no access to the court. See Aquinaldo Mandlate, Serge Kamga (2011) '*Exploring the possibilities for impact litigation to promote children's rights in Portuguese and French speaking African countries*', research report submitted to the Centre for Child Law of the University of Pretoria, p 7. See also Article 245 of the 2004 Constitution of Mozambique.

<sup>123</sup> Article 50 subsection (a) of Act No. 24/2007 of 20 August 2007 on the organisation of the Mozambican court system (Act No. 24/2007).

<sup>124</sup> See Article 29(1) subsection (b) of Act No. 24/2007.

Supreme Court.<sup>125</sup> These courts can deal with matters affecting children on appeal when they are instituted against the decisions of the Provincial courts. Below the *Tribunais Superiores de Recurso* and under the provincial courts are the district courts (*tribunais de distrito*), which also play a significant role.<sup>126</sup>

Importantly, in Mozambique the administration of justice for children is entrusted to special courts called the *Tribunal de Menores*, which in terms of hierarchy are equivalent to provincial courts.<sup>127</sup> In provinces where these special courts for children have not been established, the common provincial courts and the district courts can be seized to attend to matters involving children. The underlying notion is that the administration of justice for children can also be carried out by bodies administering justice for adults as long as they observe proceedings that are compliant with children's rights.<sup>128</sup>



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<sup>125</sup> Tomás Timbane, 'Reforms of the Mozambican civil procedures and Law on the organisations of the court system', paper presented at a seminar on the reform of the Civil Procedure organised by the Law Faculty of the Eduardo Mondlane University (2008). This is the author's translation. Original text 'A reforma do processo civil Moçambicano e a Lei da Organização Judiciária', available at <http://www.fd.ul.pt/Portals/0/Docs/Institutos/ICJ/LusCommune/TimbaneTomas3.pdf> (accessed 3 September 2012).

<sup>126</sup> However, it should be noted that the role of the district courts is highly limited due to the nature of a particular case and or the amount of money involved in the disputes that are brought before the court. Notably, the district courts are divided into two sections, *primeira classe* and *segunda classe*. The *primeira classe* is competent to adjudicate on cases that do not exceeded twenty-five minimum wages (in 2012 about USD 3.500) and the *segunda classes* have competence to adjudicate on cases of up to ten minimum wages (in 2012 approximately USD 1.400). See Article 38 of Act No. 24/2007.

<sup>127</sup> As was stated in Chapter 4, these are courts of specialised jurisdiction.

<sup>128</sup> Ursula Kilkelly (2005) 'The Children's Court', Research paper supported by the Irish Research Council for the Humanities and Social Sciences, pp 11-12, available at <http://www.ucc.ie/law/faculty/staff/childrenscourt.pdf> (accessed 6 October 2012).

The provincial court deals with appeals coming from the district courts, and the *Tribunais Superiores de Recurso* is responsible to decide appeals from the provinces.<sup>129</sup> Exceptionally, matters firstly decided at the provincial courts and reviewed on appeal at the *Tribunais Superiores de Recurso* may proceed to the Supreme Court when the challenge relates to questions of the law.<sup>130</sup>

#### *Appointment of judges: Composition and independence of courts*

In Angola the Supreme Court has the responsibility to nominate judges in the lower courts; in Mozambique, lower court judges are nominated by the Higher Council of the Judiciary, which is the oversight body exercising disciplinary authority over the judiciary.<sup>131</sup> In principle the Angolan municipal courts comprise mainly of unqualified judges. Apart from professional judges, unqualified judges – also referred to as lay judges or *juízes eleitos*<sup>132</sup> – form part of the

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<sup>129</sup> See Articles 62(a) and 74(a) of Act No. 24/2007.

<sup>130</sup> Timbane clearly explains that the rationale in Mozambican law is that a matter should at least be subjected to a first instance and reviewed once by a higher court before it is deemed unchallengeable. This, he explains, links to the fact that Mozambique adopted the principles of double tiers of judicature, implying that there is at least the chance for the case to be heard twice. Moreover, it should be noted that the law may also allow a review at third instance in exceptional circumstances where an appeal from the first court was reviewed by a second court, but there are questions of the law which must justify proceeding with the matter to a third instance. See Timbane (note 125 above), pp 15- 18.

<sup>131</sup> Article 70 of 2004 Constitution of Mozambique.

<sup>132</sup> These judges are magistrates who are elected to represent the interests of citizens in courts. Their appointment to the court structure is supported by the view that judicial decisions must centre on the principles of common sense and equity. This implies that by acting as juries in the courtroom, their role matches well with their responsibility of representing ordinary members of the society in the court, as these judges are able to inform the decisions of professional judges working with them based on their personal experience and common knowledge. They are able to enlighten the court in aspects of customary law and traditional values, which are integral components of children's lives in the jurisdictions under analysis.

Angolan provincial court structure.<sup>133</sup> In Mozambique, the law provides that all courts of law shall comprise of both professional and lay judges.<sup>134</sup>

In the two jurisdictions under analysis, the top judges of the higher courts are appointed to office by the president of the country concerned with very limited influence by other institutions. In principle all judges in the higher courts are trained professionals. In Angola, the President appoints all judges of the Supreme Court upon recommendation of the association of magistrates. The President further appoints four out of a total of eleven judges of the Constitutional Court.<sup>135</sup> By comparison, the Mozambican President has powers only to appoint the President of the country's Supreme Court and his Deputy, the President of the Constitutional Council and the President of the Administrative Court.<sup>136</sup> Common to both jurisdictions is that top judges are appointed to positions in the higher courts upon consultation with these countries' magistrates' associations, which are called the Higher Council of the Judiciary.

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<sup>133</sup> Information available at <http://www.nationsencyclopedia.com/Africa/Angola-JUDICIAL-SYSTEM.html> (accessed 4 August 2012).

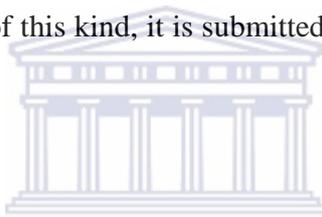
<sup>134</sup> Article 78 of Act No. 10/1992 or Organic Law of Judicial Courts (Act No. 10/1992). See also Act No. 24/2007. See further Open Society Foundation (2006) *Mozambique: Justice Sector and the Rule of Law*, Open Society Initiative for Southern Africa, p 76.

<sup>135</sup> The remaining judges are appointed by the parliament (which appoints four judges), the magistrates' association (which appoints two judges); one judge is selected among professionals who compete on a public tender. Article 119(f) of the Constitution of Angola 2010. See also Article 11 of Act No. 2/02 of 17 June 2008 establishing the statute of the Angolan Constitutional Court (Act No. 2/02). See further Article 119 (g) of the 2010 Constitution of Angola.

<sup>136</sup> Article 159 (g) of 2004 Constitution of Mozambique.

As can be seen (at least from the perspective of the law), in Mozambique there is less executive control of the judiciary than in Angola. In practice, however, in both jurisdictions judges appointed to key positions in the judiciary are chosen through the direct influence of the head of state.<sup>137</sup> As will be discussed later, this can impact on the way the judiciary protects human rights in general and children's rights in particular.

For instance, in the past, the appointment of the President of the Supreme Court of Mozambique fuelled serious debates.<sup>138</sup> Among the issues raised was that the former head of the Supreme Court had chaired it for more than twenty years but no clear consultation process had taken place during his appointment. Practices of this kind, it is submitted, can generate undesirable results in the judiciary.



First, they breach the principle of separation of powers rooted in the philosophy of judicial independence<sup>139</sup> from other branches of the government.<sup>140</sup> When the independence of the judiciary is affected by the executive powers, judges may be forced to take political decisions to

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<sup>137</sup> The President of the Republic wields considerable influence on the appointment of key judges in the system. His position as the head of the ruling party means that party politics play a significant role in the selection of incumbents for positions in the top courts as these decisions are adopted by entities which have a majority composition of party members.

<sup>138</sup> Open Society Foundation (note 134 above), p. 76.

<sup>139</sup> See Oliver Ruppel (2008) *The role of the executive in safeguarding the independence of the judiciary in Namibia*, in Anton Bosl and Nico Horn (eds.) *The independence of the judiciary in Namibia*, Macmillan Publishers, pp 210-211.

<sup>140</sup> Article 134 of the 2004 Constitution of Mozambique. See also Amy Gordon (2007) *Transformation and independency of the judiciary in South Africa*, research report for The Centre for the Study of Violence and Reconciliation, p 22.

the detriment of constitutionally protected rights such as children's rights.<sup>141</sup> Hence, it becomes fundamentally important to maintain judicial independence in order to preserve respect for the rule of law in the entire system.<sup>142</sup>

Second, burdening the President with excessive powers over the appointment of judges can weaken the judiciary by increasing opportunities for nepotism and corruption; this is especially so in a system where there are limited checks on the powers of the President by other authorities in relation to the manner in which key judges are appointed to the bench. An increased risk of nepotism and bias in the judicial system may eventually ruin the work that judges must do. Moreover, this situation opens space for attracting judges who lack the high professional and moral qualifications required for positions in top courts, thereby undermining the very requirements that are needed for them to occupy positions in these courts. In addition, imbalances can be created inasmuch as the appointment of judges who are skilled in limited fields could lead to the neglect of other areas of law that are important as well. For example, judges with expertise in one field, such as labour law, may be the only ones appointed to the Supreme Court, leaving gaps for cases requiring judges with human rights expertise. If this occurs, it may affect the quality of jurisprudence from the Supreme Court, leading to weak human rights decisions, and by implication, weak decisions regarding the interests of children. Ultimately, children's rights may be neglected completely and the aims of the CRC trampled upon. In my view this is worrying, given that higher courts, such as the Supreme Courts and the

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<sup>141</sup> There is evidence that in the past political bodies have approached judges to make orders in their favour. See Open Society Foundation (note 134 above), pp 76-77.

<sup>142</sup> See Sam Amoo, Isabel Skeffer (2009) *'The rule of law in Namibia'*, in Anton Bosl, Nico Horn (eds.) *'Human Rights and the rule of law in Namibia'*, Konrad Adenauer Stiftung, Second edition, p 22-23.

Constitutional Court, are responsible for creating uniform jurisprudence; hence, in instances where courts fail in their duties, the image of the judiciary is tarnished and fundamental rights may be denied.

Recently, however, Mozambique experienced notable improvements, with the appointment of new judges to the Supreme Court being made after consultation with the Higher Council of the Judiciary.<sup>143</sup> It is hoped that in the near future Angola will follow this example. President Dos Santos, whose election was confirmed recently, has the opportunity to form a new government and appoint new judges to top courts<sup>144</sup> as he begins a fresh term of office.<sup>145</sup>

With the preceding overview of the Angolan and Mozambican court systems in place, the next section examines bodies of specialised jurisdiction for children and assesses the extent to which the nature of their proceedings, their jurisprudence and case law comply with CRC standards. Furthermore, it investigates the obstacles they face in delivering justice for children.

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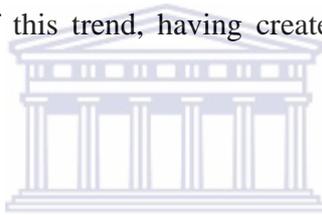
<sup>143</sup> In 2012 the Mozambican President Armando Emilio Guebuza appointed four new judges to the Supreme Court with strict observance of the consultative procedure established in the law. In 2009 President Guebuza also appointed a new President for the Mozambican Supreme Court under similar conditions.

<sup>144</sup> It should be noted that as it stands in the Angolan law, Supreme Court judges are elected for a lifetime, which means that, unless the law is changed, the President cannot appoint new judges. However, with regard to the Constitutional Court, there is a possibility for the President to appoint new judges upon proper consultation and recommendation of the magistrates' association. Unlike Supreme Court Judges, who are appointed for life, Angolan Constitutional Court judges have a five-year mandate – hence the possibility of new appointments with proper consultation with the relevant bodies.

<sup>145</sup> Angola held elections on 31 August 2012, with the *Movimento Popular de Libertação de Angola (MPLA)* and its president, José Eduardo dos Santos, winning the vote.

### 5.4.2 Bodies with a special jurisdiction for children

Although the point may be contested, in general nothing in the CRC indicates that it requires a separate justice system for children. It is clear, nevertheless, that in the case of children in conflict with the law a different system is mandatory.<sup>146</sup> Such a system can be implemented through courts that deal with adults as well; however, in order for them to be appropriate for children, they must ascribe to rules compliant with the standards contained in the Convention and other relevant instruments pertaining to children. Set against this backdrop, an innovative phenomenon is that several countries are moving towards establishing specialised judicial bodies for dealing with children, whether they be in conflict with the law or not. Angola and Mozambique are key instances of this trend, having created specialised bodies to administer justice for children.



In Angola, the body tasked with this function is the *Julgado de Menores*, and its Mozambican counterpart is the *Tribunal de Menores*.<sup>147</sup> Discussing the Angolan context, Medina explains that the former is not a special court<sup>148</sup> but instead a special section within the ordinary provincial court which is assigned to children's matters.<sup>149</sup> By contrast, the Mozambican *Tribunal de*

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<sup>146</sup> Godfrey Odongo (2005) *The domestication of International Law Standards on the Rights of the Child with specific reference to Juvenile Justice in the African Context*, unpublished LLD thesis, University of the Western Cape, p 260.

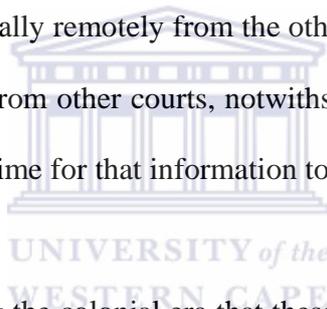
<sup>147</sup> See Act No. 9/96 of 19 April 1996 Angolan Juvenile Justice Act, also known as *Lei do Julgado de Menores* (Angolan Juvenile Justice Act or Act No. 9/96), and Article 2 of Act No. 8/2008 of 15 July 2008 Mozambican Juvenile Justice Act, also known as *Lei de Organização Jurisdiccional de Menores* (Mozambican Juvenile Justice Act or Act No. 8/2008).

<sup>148</sup> Maria Medina *Lei do Julgado de Menores e Código de Processo de Julgado de menores Anotados*, 2 Edição Revista e Atualizada, Faculdade de Direito, Universidade Agostinho Neto (2008), p 10.

<sup>149</sup> As above.

*Menores* is indeed a special court, and operates physically separately from other judicial institutions.

One of the major advantages of placing the *Julgado de Menores* within the ordinary provincial court is that it can easily liaise with other sections within the court to obtain information it might require to settle a matter pending before it. For example, it can request information from the section in the provincial court which deals with family matters to settle disputes involving children of parents who are going through divorce cases, which are dealt with by the sections tasked with family matters.<sup>150</sup> The same cannot be said about the *Tribunal de Menores*, which operates separately and geographically remotely from the other courts. However, the *Tribunal de Menores* can request information from other courts, notwithstanding the fact that, because of its distant location, it can take a long time for that information to arrive.



As mentioned earlier, it was during the colonial era that these countries first established separate courts<sup>151</sup> to administer justice for children in conflict with the law.<sup>152</sup> The colonial foundations were built so that the new institutions administering justice for children have mandates to deal with both criminal and general civil matters affecting the interests of children. For example, in criminal matters they can impose preventive measures (such as placement of children in care-

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<sup>150</sup> As above, p 28.

<sup>151</sup> For information on the establishment of children's courts in Mozambique during the colonial era, see Jacqueline Gallinetti (2007) '*The Tribunale des Minores and the recognition of the need for separate courts for children in Mozambique*', in The African Child Policy Forum, '*Realising rights for children - Good practice: Eastern and Southern Africa*', The African Child Policy Forum, pp 24-25.

<sup>152</sup> See Chapter 4, section 4.4.2.

institutions for rehabilitation and education) as well as community service orders;<sup>153</sup> in the civil domain, they can issue maintenance orders against parents and guardians or other individuals who have responsibility for the child.

Whereas the previous chapter examined the mandates of these institutions and focused on the legal instruments that established them,<sup>154</sup> the current discussion looks at the nature of their proceedings. Prior to doing this, however, it needs to be emphasised that some of the mandates given to these judicial bodies do not coincide with each other. For instance, while the *Julgado de Menores* cannot make adoption orders, which fall under the responsibility of the family matters section of the provincial courts,<sup>155</sup> the *Tribunal de Menores* is the main institution tasked to address adoption, except in situations where the court is not operational and ordinary courts must then adjudicate on them.<sup>156</sup> This might lead to different results depending on how the courts in these jurisdictions operate and the manner in which judges working with children are trained. For instance, in Angola, the results may be negative if judges working in the sections of the ordinary court which deal with family matters lack expertise in children's rights. Lack of expertise may lead to denial of rights.<sup>157</sup> Consequently, judges lacking such expertise should not be allowed to handle adoption cases, which ought to be forwarded instead to the *Julgado de Menores* that

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<sup>153</sup> See Articles 17 of Act No. 9/96 and Article 27 of Act No. 8/2008.

<sup>154</sup> See Chapter 4 section 4.4.2.

<sup>155</sup> Medina (note 148 above), p 34.

<sup>156</sup> See Article 46(e) of Act No. 8/2008.

<sup>157</sup> See Mandlate and Mamade for details on the lack of expertise in judicial system of Mozambique. Aquinaldo Mandlate, Farida Mamade (2012) 'The impact of the African Charter and Women's Protocol in Mozambique' in Centre for Human Rights, 'The impact of the African Charter and Women's protocol in selected African states', University of Pretoria Law Press, pp 109-110.

specialise in children's matters, including adoption proceedings. It is submitted, in other words, that the appropriate principle to follow is that all matters affecting children should fall under the specialised institutions created to deal with them.

#### 5.4.2.1 Nature of proceedings

Any court dealing with children should observe a procedure which is less formal and adversarial than that in a standard court setting.<sup>158</sup> Such procedures must be child-friendly, encourage greater participation by the child and family,<sup>159</sup> and be reflected in the official terminology designating these institutions. In Angola the term *Julgado de Menores* – meaning 'children's judge'<sup>160</sup> – is reasonably child-friendly<sup>161</sup> and differentiates the court from other judicial entities administering justice for adults. Likewise, the *Tribunal de Menores*, the Mozambican court dealing with children's matters and meaning 'children's court', also has a child-friendly designation. More generally, such concepts have gained wide usage in many other jurisdictions.<sup>162</sup>

While it is correct to observe that the direct involvement of children in judicial bodies requires careful consideration,<sup>163</sup> permitting their voices to be heard in matters that affect them is a

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<sup>158</sup> Gallinetti (note 151 above), p 26.

<sup>159</sup> As above.

<sup>160</sup> It should be noted that this is the author's translation as it was not possible to find official translation of the relevant Angolan law establishing the *Julgado de Menores*.

<sup>161</sup> Medina (note 148 above), p 15.

<sup>162</sup> Noel Zaal (2008) 'Court services for the child in need of alternative care: A critical evaluation of selected aspects of the South African system', unpublished LLD thesis, University of the Witwatersrand, p 131.

<sup>163</sup> As above.

requirement under the CRC.<sup>164</sup> However, participation must take place in a manner consistent with the Convention, which stipulates, inter alia, that it must be friendly to the child. In this regard, the CRC Committee observed that:<sup>165</sup>

A child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age. Proceedings must be both accessible and child-appropriate. Particular attention needs to be paid to the provision and delivery of child-friendly information, adequate support for self-advocacy, appropriately trained staff, design of court rooms, clothing of judges and lawyers, sight screens, and separate waiting rooms.

To this end, in the Angolan court system hearings of children must take place in the office of the judge. This has the effect of making the procedure less formal and friendlier to the child.<sup>166</sup> However, it should be noted that the law makes provision for hearings to take place in the courtroom when there are many participants.

Another requirement making the Angolan system compliant with the CRC is that only certain people are allowed to attend hearings, including the advocate for the child, the prosecutor and medical experts like psychologists who assess the child's moral and health condition.<sup>167</sup> The media may also attend hearings provided that this does not affect the interests of the child.<sup>168</sup> To

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<sup>164</sup> See Articles 6 and 12 of the CRC.

<sup>165</sup> See CRC Committee General Comment No. 12 on the Right of the Child to be Heard (General Comment No. 12), UN Doc. CRC/C/GC/12 (2009).

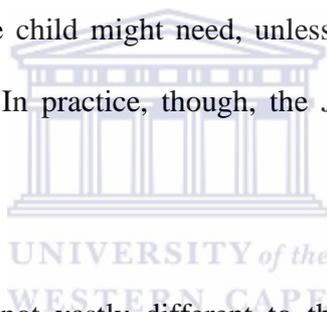
<sup>166</sup> Zaal (note 162 above), pp 221-223.

<sup>167</sup> See Articles 21-24 of Act No. 9/96.

<sup>168</sup> There are many scholarly works emphasising the importance of protecting the child's right to privacy, including their right to privacy when they come into contact with the judicial system. See, for example, Ann Skelton, Morgan Courtenay (2012) 'The impact of children's rights on criminal justice', *South African Journal of Criminal Justice*, Vol. 25, No. 1, pp 180-193; Christine Lorillard (2011) 'When children's rights "collide": Free speech vs. the right to

this effect the law imposes that the identity of the child must always be kept secret and makes media attendance subject to the approval of the judge.<sup>169</sup> It is not clear, though, if the media are allowed to publish any information pertaining to cases involving children; thus far Angolan courts have not been tested with this question.

The restrictions above on the number and status of participants have the effect of protecting the right to privacy of the child, which is accommodated in Article 16 of the CRC. However, the law makes no provision for parents or family members to attend hearings involving their children. This represents a significant gap which needs to be addressed as the family is indispensable to provide the moral support that the child might need, unless its presence in the court conflicts with the interests of the child.<sup>170</sup> In practice, though, the *Julgado de Menores* allows family members to attend hearings.



The situation in Mozambique is not vastly different to that in Angola. Nevertheless, many elements specific to the Mozambican system differentiate it from the Angolan one. This is consistent with the proposition that there is lack of commonality of approach to issues around youth justice; the only apparent point of consensus is that youth is a mitigating factor which

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be let alone in the context of off-campus “cyber-bullying”, *Missisipi Law Journal*, Vol. 189, 81. See also Article 25 of Act No. 9/96.

<sup>169</sup> Article 25 of Act No. 9/96.

<sup>170</sup> Larissa Dunken, Douglas Coatsworth, Mark Greeberg (2009) ‘A model of mindful parenting: Implications for parent-child relationships and prevention research’, *Journal of Child and Family Studies*, Vol. 12, No. 3, p 260. See also Alina Morawska, Matthew Sanders (2011) ‘Parental use of time out revisited: A useful or harmful parenting strategy?’, *Journal of Child and Family Studies*, Vol. 20, No. 1, p 4.

requires that children who commit crimes must be treated differently from adults.<sup>171</sup> One of the differences between the two systems is that in Mozambique, unlike Angola, it is mandatory for all hearings involving children to take place in the office of the judge, which is to say that no child shall be heard in the courtroom. In this respect, the Mozambican system seems friendlier to children than the Angolan, and, in addition, makes provision for parents and legal representatives to attend court hearings, thereby accommodating the CRC principle that families and parents must provide care and support to children.<sup>172</sup>

Despite these differences, the overall assessment is that in both countries the proceedings of judicial bodies tasked with administering justice for children are reasonably friendly for children, an assessment based mainly on the fact that in both systems children are allowed to participate in court proceedings under conditions which safeguard their interests.<sup>173</sup> However, the fact that Mozambique completely outlaws hearings in the courtroom and allows parent or legal guardians to attend proceedings involving their children, places it slightly ahead of Angola, where the laws need further strengthening in these respects.

#### **5.4.2.2 Jurisprudence and case law**

As discussed,<sup>174</sup> Angola and Mozambique subscribe to the civil law system.<sup>175</sup> One of the characteristics of this system is that lower courts are not bound to follow judicial decisions

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<sup>171</sup> Kilkelly (note 128 above), p 1.

<sup>172</sup> Article 75 of Act No. 8/2008. See also Articles 5 and 18 of the CRC.

<sup>173</sup> For example, in the Mozambican system the court must hear the view of a child of twelve in adoption proceedings involving the child.

<sup>174</sup> See section 5.4.1.2 above.

emanating from higher courts.<sup>176</sup> The non-binding nature of higher court decisions in the civil law system distinguishes it from the common law system, where higher courts decisions bind the lower courts.<sup>177</sup> There are many other aspects that distinguish these systems, including the training and role of judges<sup>178</sup> and the relevance of case law<sup>179</sup> and statutes.<sup>180</sup> However, as in most common law countries and other hybrid jurisdictions,<sup>181</sup> many civil law countries have laws which require that the decisions of higher courts must be published.<sup>182</sup>

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<sup>175</sup> See Mandlate et al (note 157 above), p 175.

<sup>176</sup> Joseph Dainow (date not available) 'The Civil Law the Common Law: Some Points of Comparison', *The American Journal of Comparative Law*, Vol. 15, No. 3, p 8.

<sup>177</sup> Vincy Fon, Francesco Parisi (2006) 'Judicial precedents in civil law systems: A dynamic analysis', *International Review of Law and Economics*, Vol. 26, Issue No. 4, 519-535.

<sup>178</sup> Geoffrey Harzard Jr., Angelo Dondi (2006) 'Responsibility of Judges and Advocates in Civil and Common Law: Some lingering misconceptions concerning civil law suits', *Cornell International Law Journal*, Vol. 39, 67, pp 58-70.

<sup>179</sup> As above.

<sup>180</sup> Hadfield argues that in civil law systems statutes are more important for the decision-making process in courts than in common law system. See details in Gillian Hadfield (2006) 'The quality of law in Civil Code and Common Law Regimes: Judicial incentives, legal human capital and evolution of law', *The Berkeley Electronic Press*, p 7.

<sup>181</sup> For a discussion of the role of precedents (case law) in hybrid jurisdiction, see Ryan Mcgonigle (2002) 'The role of precedents in mixed jurisdictions: A comparative analysis of Louisiana and Philippines', *Electronic Journal of Comparative Law*, Vol. 6, No. 2.

<sup>182</sup> Examples of civil law countries where the law requires publication of higher court decisions include Portugal and Cape Verde. Article 191 (g) of the Constitution of the Republic of Portugal provides that the rulings of the Constitutional Court must be published officially, while Article 292 (f) of the Constitution of Cape Verde states that the decisions of the Supreme Court of Justice must be published in the official journal. See generally the 1972 Constitution of the Republic of Portugal as amended in 2005, and the 1992 Constitution of Cape Verde as amended in 1999.

The laws of Angola and Mozambique embrace the approach requiring publication of decisions of higher courts. For instance, in Angola the decisions of the Constitutional Court on appeal must be published in the government gazette, *Diário da República*.<sup>183</sup> Similarly, the decisions of the Supreme Court and the rulings of the Constitutional Council of Mozambique must be published in the official newspaper (known as *Boletim da República*).<sup>184</sup> Notwithstanding the legal obligation for these countries to publish their higher-court decisions, this has not been done consistently and, in fact, there are few instances when these decisions were published; when they are published, they are, at any rate, not easily accessible to the general public.<sup>185</sup> One explanation for this state of affairs is that lower courts are not bound by the decisions of higher courts, which, as discussed earlier, literally means that lower courts act independently of higher courts. More specifically, there are few circumstances where higher courts in Angola and Mozambique can exert influence on lower courts, such as, for instance, when the conflicting parties of a given case decided by lower court institute an appeal at a higher court, or when higher courts issues general instructions, called *assentos*, meant to promote uniform jurisprudence on a particular matter.<sup>186</sup> However, as noted elsewhere, the *assentos* have not been used enough to promote uniform

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<sup>183</sup> See Articles 17 and 18 of Act No. 2/06 approves the statute of the Angolan Constitutional Court (Act No. 2/06).

<sup>184</sup> See Article 144(1)(d) of the 2004 Constitution of Mozambique.

<sup>185</sup> It should be noted, though, that there are sub-regional efforts to publish these decisions in the official gazette and related media sources and distribute them freely online. Such attempts include the publication of decisions from the Supreme Court of Mozambique by the Southern Africa Legal Information Institute (SAFLII), an organization which collects, and provides free online access to, legal materials from Southern and East Africa. However, few professionals from Mozambique and Angola working in the justice system are familiar with the free internet services available. Besides, there are language obstacles for the Portuguese-speaking judges from Angola and Mozambique who are able to access these services, given that the services and materials are available mainly in English. See SAFLII website at <http://www.saflii.org/content/about-saflii-0>, accessed on 8 November 2011.

<sup>186</sup> Aquinaldo Mandlate, Serge Kamga (note 122 above), p 12.

jurisprudence.<sup>187</sup> Consequently, the lower courts of these countries continue to disregard higher courts decisions, except in circumstances where they fear their decisions may be overturned on appeal. I contend that this has the potential to defeat the purpose of publishing the decisions of higher courts since lower courts take little notice of them or none at all.

A further reason why the decisions of higher courts are not published is because there is a general lack of a culture of law reporting in these countries' civil law systems, systems which relegate case law to the rank of a secondary legal source.<sup>188</sup> Both jurisdictions are unfamiliar with this practice, a practice which is rather common in common law countries. Nevertheless, this lack of publication of higher court decisions (whether caused by the civil law system inherited by these countries or due to the lack of a law-reporting culture) affects the quality of jurisprudence in lower courts, including courts dealing with children. The example below highlights some of the issues arising from the lack of publication of higher court decisions in Mozambique.

As already pointed out, the *Tribunal de Menores* is responsible for administering justice for children in Mozambique. In several instances, the court took conflicting positions on similar matters affecting children. For instance, when adjudicating in *Tribunal de Menores* case No.74/09 and in *Tribunal de Menores* case No. 233/08, the court came to different decisions

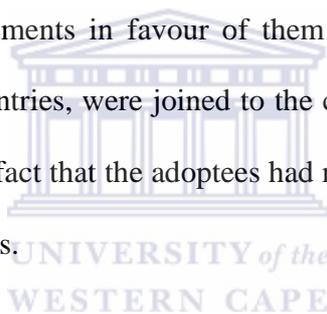
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<sup>187</sup> As above.

<sup>188</sup> In Mozambique, for example, studies have shown that it is difficult to access judicial decisions even from lower courts. For further details, see Open Society Foundation (note 134 above), p 58-61. See also Fon et al (note 177 above), pp 519-535.

even though the cases were built on similar issues.<sup>189</sup> This was, to some extent, due to the lack of available jurisprudence of the Supreme Court and other courts; other challenges, including the lack of appropriate training for judges (to be discussed later), may also have influenced the outcomes and led to the conflicting views of the court.<sup>190</sup>

The cases concerned applications by foreign nationals to adopt Mozambican children who had been living in an orphanage with inadequate living conditions. The prospective adoptive parents had been living and working in Mozambique for at least four years prior to the applications. All relevant information, including letters from diplomatic institutions of the applicants' countries of origin as well as supporting documents in favour of them obtained from bodies tasked with children's matters in the latter countries, were joined to the cases. There were factors that made the cases similar, for example, the fact that the adoptees had managed to integrate into the family environment of the adopting parents.



In the first case, *Tribunal de Menores* case No.74/09, the court found it favorable to grant the adoption, but in the second case, *Tribunal de Menores* case No. 233/08, it rejected the application.<sup>191</sup> The results were different partly because the court was not given the chance to refer to previous decisions of higher courts or to decisions from similar courts with the same hierarchical position, for the good reason that these decisions were not published. For example,

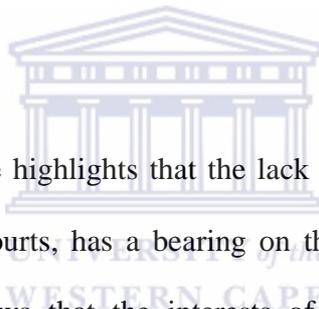
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<sup>189</sup> See *Tribunal de Menores* case No.74/09 of 2009 and *Tribunal de Menores* case No. 233/08; copies on file with the author.

<sup>190</sup> See section 5.4.3 below.

<sup>191</sup> See *Tribunal de Menores* case No.74/09 of 2009 and *Tribunal de Menores* case No. 233/08; copies on file with the author.

the 1981 decision of Judge Abdul Carimo Mahomed Issa, then presiding Judge of the Maputo High Court, had earlier approved the adoption of Irandina (now an adult) in favour of an American couple.<sup>192</sup> This 1981 case could have been used by the *Tribunal de Menores* as guidance to address the two cases discussed above. However, the judgment in Irandina's case was not published, which partly explains why the *Tribunal de Menores* did not cite it as an example of a source of guidance to its decisions. This is despite the fact that even in the presence of such jurisprudence, the lower court still retains the discretionary power to adopt its own views on a specific matter unless an *assento* instructs otherwise. The position in Angola is no different from that of Mozambique, and lower courts are found making different decisions on similar matters as well.<sup>193</sup>



Nevertheless, the discussion above highlights that the lack of publication of judicial decisions, particularly decisions of higher courts, has a bearing on the jurisprudence of lower courts of Angola and Mozambique. It shows that the interests of children are placed at risk when favourable higher court decisions are simply unavailable for lower courts. This is despite the fact that lower courts may be unwilling to implement them. It also shows that, whilst the discretionary powers given to lower courts to adopt their own views creates space for widening judicial interpretation of legal precepts, it may trample upon the aim of justice to ensure legal certainty and consistency.<sup>194</sup> These problems need to be addressed immediately if the aims of justice for children premised in CRC principles are to be satisfied in the countries under study. In

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<sup>192</sup> This was the first case of adoption involving foreign nationals in Mozambique.

<sup>193</sup> Santos (note 101 above), p 88.

<sup>194</sup> Ofer Raban (2010) 'The fallacy of legal certainty: Why vague legal standards may be better for capitalism and liberalism', *Public Interest Law Journal*, Vol. 19, pp 175-191.

the absence of such reform, current practice in the civil law system administering justice for children defeats the objectives of the CRC and threatens its implementation, as is borne out by the fact that children are receiving different treatment in similar matters from the same judicial body.

The judicial bodies involved in the administration of justice for children are open to further criticism: they miss the opportunity to capitalise on the jurisprudence or judgments from courts elsewhere in the region.<sup>195</sup> For example, they seldom make reference to judgments by their South African peers, whose celebrated child-rights jurisprudence is likely to be highly relevant to them in view of the fact that the South African courts address problems of a kind that are widespread among children in the Southern African region and the continent at large.<sup>196</sup> Instead, they prefer to use examples drawn from Portugal and hence far removed from the lived reality of children in their own countries.<sup>197</sup> Language barriers would certainly contribute to the problem (South African judgments are in English rather than Portuguese), as would differences in the relevant legal systems: common law systems, unlike the civil law systems in Angola and Mozambique,

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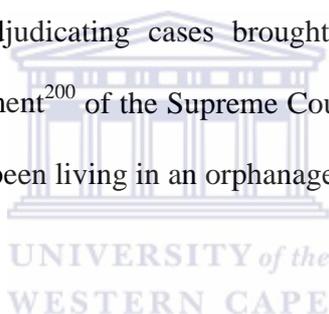
<sup>195</sup> The lack of use of jurisprudence from other courts seems to be a problem that affects courts within the entire continent. In this regard, Skelton rightly observes that courts in the Southern African region as well as those in East Africa hardly look at each other's judgments. In her view this has limited the development of child law in the region. See Ann Skelton (2009) 'The development of fledgling child rights jurisprudence in Eastern and Southern Africa based on international and regional instruments', *African Human Rights Law Journal*, Vol. 9, No. 2, p 500.

<sup>196</sup> See Ronaldah Ngidi (2010) 'The role of international law in the development of children's rights in South Africa: A children's rights litigator's perspective', in Magnus Kilander (ed.), 'International law and domestic human rights litigation in Africa', Pretoria University Law Press, pp 173-191.

<sup>197</sup> This is understandable to some extent, given that these countries inherited the Portuguese civil law system and that many officials involved in the training of judges were themselves trained during the colonial period or are being trained in Portugal.

see court judgments as the primary source of law.<sup>198</sup> Nevertheless, making use of regional judgments would help Angolan and Mozambican domestic courts, particularly courts involved in the administration of justice for children, develop their views in respect of matters, such as intercountry adoption and questions around parenting, that affect children similarly across the continent.<sup>199</sup>

In summary, it is no exaggeration to state that the jurisprudence of courts involved in the administration of justice for children in Angola and Mozambique has been extremely poor, save for certain examples where these courts have adopted a uniform approach compliant with international law standards in adjudicating cases brought before them. One such positive example is found in a recent judgment<sup>200</sup> of the Supreme Court of Mozambique which approved the adoption of an infant who had been living in an orphanage with inadequate conditions.<sup>201</sup>



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<sup>198</sup> Harzard Jr. et al (note 178 above), pp 58-70.

<sup>199</sup> Benyam Mezmur (2009) 'From Angelina (to Madonna) to Zoe's Ark: What are the A-Z lessons for intercountry adoption in Africa?', *International Journal of Law and the Family*, No. 23, pp 145-173.

<sup>200</sup> Supreme Court case No. 65/09. More details on this judgment are provided in the discussion focusing on the limited use of international law instruments by court. See section 5.4.3.2 below.

<sup>201</sup> See also Aquinaldo Mandlate, 'Adoption by foreign nationals: Exploring the law and the practice in the face of the recent judgment of the Supreme Court of Mozambique', pp 1-10, paper presented at the 15th Annual Family Law Conference organised by Miller du Toit Cloete Incorporated and the Law Faculty of the University of the Western Cape, 15-16 March 2012.

### 5.4.2.3 Enforcement of judicial decisions

The enforcement of judicial decisions relating to children is one of the critical areas impacting on the implementation of children's rights.<sup>202</sup> Viewed from a broad perspective, domestic implementation and enforcement of international human right treaties such as the CRC is problematic and raises serious concern in international law debates.<sup>203</sup>

A key challenge in achieving implementation is the fact that at international level there are no adequate sanctioning mechanisms, such as referral to national police or specialised bodies tasked with enforcing the provisions of treaties and other commitments pledged by states.<sup>204</sup> However, at domestic level, courts are designed to protect the fundamental human rights contained in treaties such as the CRC and to ensure reparation for victims of abuses and those under threat of rights violations. What this means is that the enforcement of judicial decisions, especially those pertaining to children, is vital for making sure that children's fundamental rights are given effect when violations, or threats of violations, of these rights occur.

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<sup>202</sup> There are many examples of situations where the intervention of a court through a judicial decision is necessary to ensure that a child is able enjoy his or her rights protected under the CRC. For instance, a court may need to issue an order in the interest of protecting the rights of a child to have contact with both parents. Nonetheless, unless such court order is enforced, the child's rights may be at stake. See Marguerite Walter (2004) 'Toward the recognition and enforcement of decisions concerning transnational parent-child contact', *New York University Law Review*, Vol. 79, pp 2381-2416.

<sup>203</sup> Morris Mbondenyi (2008) '*Investigating the challenges in enforcing International Human Rights Law in Africa: Towards and effective regional system*', unpublished LLD thesis, Department of Constitutional and International Law, University of South Africa, p 1-533.

<sup>204</sup> John Dugard, '*International Law: A South African perspective*', Third edition, (2007) pp 6-8.

But enforcement is not a stand-alone act; it is, instead, a coercive act that depends on the capacitation and organisation of the enforcement organ and its staff.<sup>205</sup> In essence, it requires the availability of adequate human as well as financial resources. The appalling lack of skilled staff for courts administering justice for children in Angola and in Mozambique leaves much to be desired, and contradicts international law standards that require trained staff to administer justice for children.<sup>206</sup> Apart from problems to do with the limited numbers of skilled professionals (a theme discussed later, in section 5.4.3), the judicial bodies also lack the financial resources needed for them to execute their duties.

While the law of these countries may provide adequate sanctioning mechanisms, such as imposing fines and making provisions for the imprisonment of perpetrators who do not abide with court orders, in most cases practical implementation is hampered by lack of resources and other obstacles. For instance, a study revealed that the role of Mozambican courts is significantly curtailed by the constraints they experience in delivering judicial summons,<sup>207</sup> chief of which are problems in establishing the physical address of parties involved in judicial proceedings.<sup>208</sup> Arguably, the situation is worse in district areas where conditions are poor and bailiffs (*official de diligências*) travel on foot, often failing to locate the address of the parties concerned.<sup>209</sup> As a

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<sup>205</sup> See Burkhard Hess, 'Making more efficient the enforcement of judicial decisions within the European Union: Transparency of debtors' assets, attachment of bank accounts, provisional enforcement and protective measures', p 8, available at [http://ec.europa.eu/civiljustice/publications/docs/enforcement\\_judicial\\_decisions\\_180204\\_en.pdf](http://ec.europa.eu/civiljustice/publications/docs/enforcement_judicial_decisions_180204_en.pdf) (accessed 9 November 2011).

<sup>206</sup> See Para 34 of General Comment No. 12.

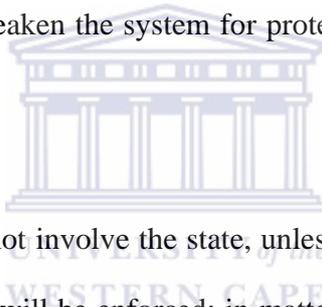
<sup>207</sup> Open Society Foundation (note 134 above), p 56.

<sup>208</sup> As above.

<sup>209</sup> The author observed this in several instances when working as a lawyer in Mozambique.

result, it often happens that parties concerned help to locate their counterparties in a dispute or initiate proceedings to seek enforcement of judicial decisions, with the courts themselves tending to play a less significant role in these respects.

A further problem of enforcement is that in situations where the state is involved in disputes relating to children (for example, a dispute about the provision of education), it is impossible in practice to enforce the decision of the court unless there is goodwill by the state. No legal option exists to imprison the state (which would be absurd), nor can state assets be attached in favour of victims whose rights were violated by the state.<sup>210</sup> In essence, these hurdles defeat the purpose of enforcing judicial decisions and weaken the system for protecting fundamental rights in general and children's rights in particular.



In summary, in matters which do not involve the state, unless courts adopt a progressive stance, it is less likely that their decisions will be enforced; in matters where the state is concerned, the political will of the government is a pivotal factor. It can be concluded, then, that in the countries under analysis, the enforcement of judicial decisions affecting children is still very weak.

#### **5.4.3 Obstacles in the administration of justice**

The preceding section outlined a number of challenges that the countries under examination face in terms of the administration of justice for children; with that overview in place, the present

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<sup>210</sup> See Article 823 of the Mozambican Civil Procedural Code (*Código de Processo Civil*). Studies have also shown that even state officials are notorious for not complying with court rulings and for interfering with investigations. For further details, see Open Society Foundation (note 134 above), p 9.

section builds on the previous sections by considering other more pressing obstacles in greater analytical depth.

#### **5.4.3.1 Infrastructure, staff, and training in programmes covering children's rights**

Despite the enactment of legislation providing for specialised institutions to administer justice for children,<sup>211</sup> children continue to face immense difficulties in accessing justice in Angola and Mozambique. Several reasons account for this situation, among them being the fact that these countries lack infrastructure and sufficiently skilled professionals in the justice sector at large and, more specifically, within institutions responsible for administering justice for children. For instance, Medina points out that in Angola the only specialised section (*Sala do Julgado de Menores*) for dealing with children is based at the high court of Luanda (*Tribunal Provincial de Luanda*), the capital city.<sup>212</sup> The situation is no different in Mozambique, where the only children's court (*Tribunal de Menores*) in existence operates in the capital city of Maputo.<sup>213</sup> This means that children living outside the capitals have limited access to these institutions and are instead forced to rely on ordinary courts, which are in themselves not specialised to deal with children's matters. This increases the risk of children losing their legally protected rights, a risk compounded by the fact that, for children resident outside the capitals, there is no guarantee that they can access even these ordinary, non-specialist courts, which are limited in numerical availability and themselves often geographically remote from most citizens.

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<sup>211</sup> These laws are discussed in Chapter 4, section 4.4.2.2.

<sup>212</sup> Medina (note 148 above), p 38.

<sup>213</sup> Gallinetti (note 151 above), p 24. See also Organizações da Sociedade Civil de Moçambique (2009) '*Relatório da Revisão Periódica Universal de Moçambique – Conselho de Direitos Humanos ONU*', Organizações da Sociedade Civil de Moçambique, p 4; copy on file with the author.

In addition, the legal profession in Angola and Mozambique grapples with an acute shortage of qualified professionals.<sup>214</sup> Despite the existence of established systems for training judges and professionals working in the justice system, the two countries have very small numbers of such professionals relative to their fast-growing populations.<sup>215</sup> As at 2005, for example, there were only 184 professional judges out of approximately over twenty million people (about 1 judge per 100 000 inhabitants) in Mozambique.<sup>216</sup> In the same period, the estimates in Angola were much lower in view of the country's long-term civil war, which had ended only in 2002.<sup>217</sup> The shortage is even more pronounced in the case of judges qualified to deal with matters affecting children. For example, in 2005 there were only two such judges in the sole Mozambican Children's Court.<sup>218</sup> This is partly explained by the fact that the institutions involved in training magistrates offer hardly any courses in children's rights. In fact, these institutions have no

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<sup>214</sup> Mandlate et al (note 157 above), p 113.

<sup>215</sup> Before they are appointed, judges have to complete a process of specialised training provided for law graduates willing to join the judiciary. To this end, institutions for training judges and other professionals working within the justice sectors of the countries under analysis have been established. In Mozambique, for example, the Centre for Legal and Judicial Training (*Centro de Formação Jurídica e Judiciária (CFJJ)*), established in 1999, is the central body responsible for training these professionals. Prior to the establishment of *CFJJ* training for professionals working in the justice sector was uncoordinated and organised in an *ad hoc* manner by individual institutions within the sector. For example, in the past the Supreme Court took the responsibility for training judges and prosecutors. The systems of these countries deviate from common law systems and other mixed systems such as Botswana and South Africa, before the enactment of the Judicial Education Institute Act 14 of 2008, where specialised training is not available for persons aspiring to become judges. See Open Society Foundation (note 134 above), p 75-84. See also the South African Judicial Education Institute Act 14 of 2008 (Act 14 of 2008).

<sup>216</sup> Open Society Foundation (note 134 above), p 78.

<sup>217</sup> Aquinaldo Mandlate, 'Implementing the Convention on the Rights of the Child in Angola and Mozambique: Opportunities and challenges', paper presented at Children's Rights Conference held in Belfast, Northern Ireland, 1 and 2 June 2011; copy on file with the author.

<sup>218</sup> Open Society Foundation (note 134 above), p 78. See also Organizações da Sociedade Civil de Moçambique (note 213 above), p 3.

specific programmes or courses covering children's rights substantively during the formal training process, which takes about nine to twelve months. However, in Mozambique *ad hoc* refresher courses are provided after the formal training for magistrates but have limited detail on the subject of children.<sup>219</sup> These problems still persist in both countries, with little progress having been recorded. For the aims of justice for children premised in the CRC to be achieved, these issues need to be addressed immediately.

#### **5.4.3.2 Limited use of international law instruments**

In other jurisdictions, courts have been celebrated for taking note of international law instruments. This is particularly true in relation to how courts have increasingly begun to use international law instruments to advance children's rights. For instance, Mezmur points out that a Malawian court gave due weight to the CRC and the ACRWC when considering an application concerning the inter-country adoption of a Malawian child by a foreign national.<sup>220</sup> He indicates that the court had used these instruments to advance children's rights by repeatedly referring to them to show that the law permits inter-country adoption as a measure of alternative care for children deprived of a family environment.<sup>221</sup> Likewise, Ngidi notes that courts in South Africa are using a wide range of international law instruments, including treaties, guidelines and general

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<sup>219</sup> Open Society Foundation (note 134 above), p 79.

<sup>220</sup> Benyam Mezmur (2008) 'As painful as giving birth: A reflection on the Madonna adoption saga', *Comparative and International Law Journal of Southern Africa*, Vol. XLI, No. 3, p 391.

<sup>221</sup> As above, p 403.

comments, and applying them in children's rights matters.<sup>222</sup> Skelton echoes this, writing that judgments in Eastern and Southern Africa are beginning to make reference to the CRC, the ACRWC, and other less prominent instruments such as the Hague Convention on Inter-country Adoption<sup>223</sup> and the Hague Convention on Civil Aspects of International Child Abduction (Hague Convention on Child Abduction).<sup>224</sup>

As encouraging as these trends are, they are in evidence mainly in the courts of Anglophone countries; by contrast, the situation is different in the Portuguese-speaking countries, where the civil law system is in operation. In these jurisdictions the courts are rather reluctant to use international law instruments to resolve disputes brought before them.<sup>225</sup> According to Killander and Adjolohoun, this could be due to the extensive bills of rights contained in the constitutions of most civil law jurisdictions: in view of the fact that courts can draw on the latter to settle cases, the question of applying international law in these matters is not of overriding importance to them.<sup>226</sup> The situation is no different in Angola and Mozambique, with courts in these countries avoiding applying international law norms to advance human rights, even in matters pertaining to

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<sup>222</sup> In order jurisdictions, courts have also been commended for handing down decisions which build upon the existing jurisprudence on children's rights. The trend is that, albeit slowly, courts in the region are becoming amenable to applying international law instruments. See Ngidi (note 196 above), p 174.

<sup>223</sup> Hague Convention on the Protection of Children and Co-operation in Respect of Inter-country Adoption (Hague Convention on Inter-country Adoption), concluded in 1993 and entered into force in 1995.

<sup>224</sup> Hague Convention on Civil Aspects of International Child Abduction (Hague Convention on Child Abduction), concluded in 1980 and entered into force in 1983.

<sup>225</sup> Mandlate, Mamade (note 157 above), p 108.

<sup>226</sup> Magnus Killander, Horace Adjolohoun (2010) 'Introduction', in Magnus Killander (ed.), *International law and domestic human rights litigation in Africa*, Pretoria University Law Press, p 10.

children.<sup>227</sup> This is despite the sound constitutional provisions in these countries stating that ratified international norms form part of their domestic legal order.<sup>228</sup> Moreover, in Angola courts are constitutionally required to employ international instruments when considering disputes brought before them, whether or not the parties concerned invoke these instruments.<sup>229</sup>

Often, in cases where courts in these countries have used international law norms to resolve disputes brought before them, they have either failed to engage substantively with the provisions of these instruments or have used them incorrectly and concluded wrongly. This is illustrated by the examples below, which serve to demonstrate that the judicial body dealing with children in Mozambique failed to use the CRC appropriately.

In the *Tribunal de Menores* case No.74/09, mentioned above, the court referred to Article 21(e) of the CRC concerning the need for countries to enter into bilateral or multilateral agreements envisaging safe placement of children abroad.<sup>230</sup> This arose in the light of the fact that the applicants were foreign nationals seeking to adopt a Mozambican child. The court held that Mozambique had not entered into a bilateral or multilateral agreement with applicants' country of origin, which the court said was required for it to grant the adoption order sought by the applicants. Although the court cited Article 21(e) of the CRC, it forgot to interpret this provision

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<sup>227</sup> The Mozambican Constitution has 60 provisions making its Bill of Rights; the Angolan counterpart law has 66 provisions in the Bill of Rights. See Article Title III Articles 35-95 of the 2004 Constitution of Mozambique, and Title II Articles 22-88 of the 2010 Constitution of Angola.

<sup>228</sup> See Article 13 of the 2010 Constitution of Angola and Article 18 of 2004 Constitution of Mozambique.

<sup>229</sup> Article 26(3) of 2010 Constitution of Angola.

<sup>230</sup> See *Tribunal de Menores* case No.74/09; copy on file with the author.

in accordance with other provisions of the Convention relevant to the case.<sup>231</sup> To this end, Article 4 of the CRC requiring state parties to adopt all appropriate legislative, administrative and other measures to implement the rights enshrined in the Convention was central to the case.<sup>232</sup> Had the court looked at Article 4, it would have concluded that, despite the absence of a legislative agreement between Mozambique and the country of origin of the applicants, it was possible to rely on administrative channels such as diplomatic relations to meet the requirements of Article 21(e), thus ensuring that the possibility for follow-up of the child entailed in Article 21(e) was met. However, having neglected to make appropriate use of the provisions of the CRC, the court then concluded wrongly and decided to reject the application on the grounds that there were no legal mechanisms to ensure the follow-up of the child until he reached majority.<sup>233</sup>

A similar case, *Tribunal de Menores* case No. 712/08,<sup>234</sup> concerned an application brought by two foreign nationals who intended to adopt a Mozambican child that had been living with the applicants after the child was taken from an orphanage. Here, the court committed the same error and rejected the application on similar grounds to this in the case discussed above. Again, there is no doubt that the court would have come to different decision had it interpreted Article 21(e) in the light of other relevant provisions of the CRC. This is confirmed by the fact that in the Supreme Court of Mozambique case No. 65/09, deciding on appeal of the decision in the *Tribunal de Menores* case No. 74/09, the Supreme Court overturned the first court's decision on

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<sup>231</sup> Mandate (note 201 above), pp 7-8.

<sup>232</sup> See Article 4 of the CRC.

<sup>233</sup> See *Tribunal de Menores* case No.74/09; copy on file with the author.

<sup>234</sup> *Tribunal de Menores processo No. 712/08*; copy on file with the author.

the grounds<sup>235</sup> that the lower court failed to interpret Article 21(e) in the light of other provisions of the CRC relating to administrative measures for ensuring the realisation of rights contained in the CRC.<sup>236</sup>

Disregarding international law norms or using them incorrectly has many dangers. First, it can lead to poor jurisprudence, as illustrated by the examples above. Second, these dangers become apparent either when international law instruments incorporate standards that afford better protection to human rights than domestic laws or when the latter are not consistent with the former. For instance, while the laws of Angola and Mozambique do not regulate inter-country adoption, the CRC and other instruments like the Hague Convention on Inter-country Adoption have provisions speaking to this practice. As shown above, it becomes very difficult for courts which do not often use international law instruments to address such matters when they are faced with them. However, the point remains that when international law norms are disregarded or used incorrectly, there is a risk that the right-bearers may be deprived of the protection envisaged for them,<sup>237</sup> a risk that is particularly strong when the right-bearers are children, a vulnerable group needing protection. In short, ignoring international law norms is not in the best interest of the child.

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<sup>235</sup> It is unfortunate that this judgment did not develop other important principles such as the best interest of the child, which was certainly at stake considering the negative decision of the first court. The best-interest principle must be seen as one of the chief guidelines to making decisions that affect children. In this regard the CRC imposes the best interest of the child principle to be regarded as ‘the’ paramount consideration for decisions involving adoption of children. See Article 21 of the CRC.

<sup>236</sup> See Supreme Court case No. 65/09; copy on file with the author.

<sup>237</sup> Elsewhere, I have attempted to outline the options that courts in Mozambique could pursue. See generally Mandlate (note 201 above).

I argue, consequently, that courts in the countries under analysis must seek to ensure that international law norms are given effect in domestic jurisdiction in accordance with fundamental standards. As demonstrated above, this has particular significance for courts dealing with children. By neglecting international law standards pertaining to children (such as Article 3 of the CRC on the best interest of the child), these courts will contribute to a culture of disrespect for, and disregard of, the rights enshrined in international law instruments and thereby trample on the rights that children are legally afforded.

#### **5.4.3.3 Corruption**

Elsewhere, I emphasised that corruption and mismanagement of public funds undermine the extent to which courts can play a meaningful role in the administration of justice.<sup>238</sup> These practices impact negatively on the protection of fundamental rights such as the right to education and health care, which are fundamental for children. It is submitted that the protection of these rights is placed at risk in systems where the judiciary is affected by corrupt practices.

A 2006 study revealed that more than 50% of Mozambican judges felt that court staff were affected by corruption.<sup>239</sup> According to the study, 12% of the judges who were interviewed said district judges were most affected by corrupt practices.<sup>240</sup> In addition, it noted that others believed that corruption also occurred at the level of provincial courts but at lower rates than

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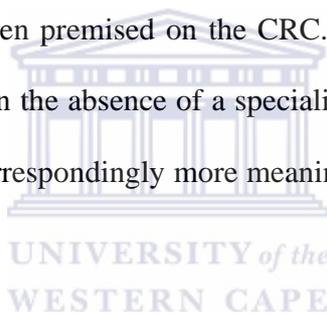
<sup>238</sup> Aquinaldo Mandlate (2010) *The protection and enforcement of socio-economic rights in Lusophone countries in Africa: Challenges in Angola, Cape Verde and Mozambique*, ESR Review, Community Law Center (2010), Vol. 11, No. 3, p 24.

<sup>239</sup> Centro de Formação Jurídica e Judicial (CFJJ) (2005) *Inquérito aos Magistrados Judiciais*, Centro de Formação Jurídica e Judicial, p. 63.

<sup>240</sup> As above.

district courts: the study maintained that corruption is greater in the district courts mainly because conditions in districts tend to be considerably poorer than in provinces.<sup>241</sup> This, I submit, indicates that judges allocated to courts functioning in poorer environments are more susceptible to falling between the cracks and becoming party to corruption than those working in better-resourced places.<sup>242</sup>

Considering that the majority of Mozambican population are children living in poor rural areas, there are obvious risks that their legitimate interests may be affected by corrupt judicial officers dealing with their legal matters. As it was noted above, this defeats the purposes of a system of administration of justice for children premised on the CRC. The situation is aggravated by the fact that while the district courts, in the absence of a specialised judicial institution dealing with children, are expected to play a correspondingly more meaningful role, they are at the same time the most prone to corruption.<sup>243</sup>



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<sup>241</sup> As above.

<sup>242</sup> It should be noted that in past years there has been considerable debate in Mozambique about corruption in the judiciary. For example, there are indications that in 1999 more than 49 articles on the subject appeared in the national press, while in the first semester of 2005, more than 50 opinion pieces addressed corruption in the judiciary. In addition, matters concerning access to information, fair trial and corruption within the system are increasingly gaining momentum and stimulating debate in the public domain. This is of particular significance for countries like Mozambique which have ratified instruments fighting corruption. At the international level, the country has ratified the UN Convention against Corruption (2006) and the AU Convention on Preventing and Combating Corruption (2006). At regional level it is a member state to the African Union (former Organisation of African Unity). The Constitutive Act of the African Union and other ratified instruments compel the state to promote human rights, democratic principles and institutions, popular participation and good governance. See João Trindade, João Pedroso, Andre José, Boaventura Santos (eds.), *'Characteristics of the courts' performance in conflict and social transformation*, Afrontamento, (2003), Vol. 1, p 533.

<sup>243</sup> CFJJ (note 239 above), p 63.

The high levels of poverty affecting most of the rural population in Angola place the country in a similar situation to Mozambique's. Although concrete data about the Angolan judiciary could not be obtained, there is a general awareness that corrupt practices affect the country's entire public administration system and, by implication, the courts as well. Angolan state officials have reportedly misappropriated state funds generated by rich natural resources (including oil and diamonds) and spent it on personal interests rather than on social welfare.<sup>244</sup> In general, corruption has a disruptive effect on the judiciary and can lead to unlawful judgments that discredit the judiciary, create mistrust and prompt a search for alternative dispute-resolution mechanisms that have unforeseeable consequences. In short, corruption stands to impact negatively on the quest to promote and protect children's rights via the court system.

By implication, then, for the children's rights protected in the CRC to be able to flourish in Angola and Mozambique, these countries have to address corruption at all levels of public administration and particularly within the judicial system. This, I contend, can be achieved by collaborative efforts between the respective governments and their magistrates' associations, the key bodies responsible for ensuring the discipline for judges.<sup>245</sup> Such efforts would conceivably include sanctioning corrupt judicial officers with fines, demotion and naming-and-shaming.<sup>246</sup>

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<sup>244</sup> See Conflict Risk Assessment Report: Angola and Diamond Works 2005, available at <http://www.carleton.ca/cifp/app/serve.php/1055.pdf> (accessed 6 September 2012). See also Mandlate (note 238 above), p 24.

<sup>245</sup> Other stakeholders must be involved as well, including the ministries of justice of the countries under analysis, as they, too, are involved in the administration of justice.

<sup>246</sup> It should be noted that in extreme circumstances officials must be removed from the bench, notwithstanding that the number of qualified professionals is limited.

#### **5.4.4 Comparing the systems of the two countries**

Under analysis, the two countries reveal more similarities than differences in their institutions for administering justice for children. This is largely attributable to the commonalities in their colonial histories, but the CRC undoubtedly has also made an impact and contributed towards the development of judicial systems that are alike in being reasonably friendly for children even if the notable difference between them is that, where Mozambique has a specialised court to deal with children, Angola created a separate section administering justice for children within the provincial court. Moreover, the Angolan and Mozambican institutions face similar challenges. Both of them have shortages of trained, professional specialists in children's matters, both lack the resources and infrastructure to implement their decisions adequately, and both tend to neglect international law instruments pertaining to children and, in some cases, employ them incorrectly.

The clear implication of this synopsis is that governments in these countries need to take further steps to improve the judicial systems and, in particular, strengthen the mechanisms responsible for delivering justice for children. Only in this way will the latter be able to perform their functions successfully and advance the children's rights protected in the CRC.

#### **5.5 Conclusion**

The chapter discussed the implementation of the CRC in Angola and Mozambique, detailing the administrative and institutional measures that have been adopted to give effect to the Convention. As in the previous chapter, this chapter relied on the premises of Article 4 of the CRC, which requires states to adopt legislative, administrative and other measures to ensure the

implementation of the rights contained in the Convention.<sup>247</sup> The discussion touched on three key areas for the implementation of the rights protected in the CRC. These were an analysis of (1) children's rights coordination mechanisms, an examination of (2) children's rights monitoring mechanisms, and a deep investigation of the role of (3) judicial institutions tasked with mandates to advance the rights under consideration.

It was found that there are many similarities between these countries in relation to children's rights coordination mechanisms. First and foremost, the chapter revealed that these institutions were established in both countries. It then proceeded to show that they have similar mandates but different structures in terms of their composition. With regard to the second area (children's rights monitoring mechanism), it was demonstrated that Angola has taken a rather more progressive approach than Mozambique. Although both countries have institutionalised monitoring mechanisms with broad human rights mandates, Angola has an additional monitoring body dealing specifically with children. Third, a court system comprising of bodies that administer justice for children has been institutionalised in both jurisdiction. All of the above represent major advancements for the implementation of CRC standards.

Against this encouraging backdrop, the chapter revealed that the two countries are nevertheless confronted by major setbacks that limit the extent to which the CRC and children's rights can flourish. Evidence was adduced in respect of systemic problems relating to all of the three of the topic areas covered in this chapter. For instance, with regard to coordination and monitoring mechanisms, it was found that implementation gaps related mainly to the composition of these

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<sup>247</sup> See Article 4 of the CRC.

mechanisms. In the context of the judiciary, however, the problems that came to light under analysis were seen to extend beyond questions of composition and to encompass the very mandates of these institutions. Moreover, corruption and the lack of skilled professionals to deal with children's rights issues continue to affect the two countries. It is imperative that these challenges be addressed, and, as noted, this could entail a need for legislation clearly setting out the type of training that judges involved in administering justice for children must undertake.<sup>248</sup>

In summary, much remains to be done to advance children's rights in the two countries, and the following chapter examines what they are doing in particular to implement children's rights to free and compulsory primary school education.



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<sup>248</sup> Kil Kelly (note 128 above), p 14.

## CHAPTER 6

### IMPLEMENTING THE RIGHT TO PRIMARY EDUCATION IN THE COUNTRIES UNDER THE STUDY

#### 6.1 Introduction and background

The right to education is one of the major gifts that the United Nations Convention on the Rights of the Child (CRC) brought to all children.<sup>1</sup> This right alludes to all activities by which knowledge and skills and a moral code, however, elementary, are transmitted to recipients with the aim of enabling them to subsist in a particular situation.<sup>2</sup> The right to education is also given protection in other international law instruments applicable to children, including the Universal Declaration of Human Rights (UDHR)<sup>3</sup> and the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>4</sup> Recently the protection of the right to education was included in the Convention on the Rights of Persons with Disabilities (CRPD).<sup>5</sup> The inclusion of education in the CRPD, described as the latest addition to the list of human rights conventions relative to persons with disabilities, makes it an indispensable tool for the promotion of educational rights

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<sup>1</sup>Maud de Boer-Buquicchio Fomer Deputy Secretary General of the Council of Europe.

<sup>2</sup> Nyadzanga Netshitahame (2008) *'An analysis of learners' knowledge and understanding of human rights in South Africa'*, unpublished PhD thesis, University of Pretoria, p 32.

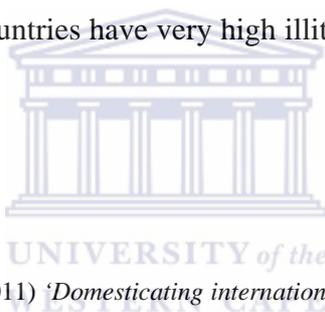
<sup>3</sup> See Article 26 of the Universal Declaration of Human Rights (UDHR), GA Resolution 217/A, UN Doc. A/810.

<sup>4</sup> See Article 13 of International Covenant on Economic, Social and Cultural Rights (ICESCR), GA Resolution 2200A (XXI), adopted 1966 and entered into force in 1976.

<sup>5</sup> Convention on the Rights of Persons with Disabilities (CRPD), GA Resolution adopted 2006 and entered into force in 2008, UN. Doc. A/AC.265/2006/L.6.

for children with disabilities.<sup>6</sup> The proliferation of instruments with standards speaking to the right to education shows that education is a fundamental human right inherent to all human beings.<sup>7</sup> This has particular significance in the bid for the advancement of human rights, especially the right to education, in African countries like Angola and Mozambique, which have ratified most of the key instruments protecting the right to education, including the CRC and the African Children's Charter.<sup>8</sup>

About half of the population in Angola and Mozambique is made up of children, most living in the rural areas.<sup>9</sup> In the case of Angola, children below 15 years comprise more than half of the country's population.<sup>10</sup> The two countries have very high illiteracy rates, children being the most



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<sup>6</sup> Lorenzo Wakefield, Nkatha Murungi (2011) *'Domesticating international standards of education for children with intellectual disabilities: a case study of Kenya and South Africa'* in Ilze Plessis, Tobias van Reneen (eds.) *'Aspects of disability law in Africa'*, Pretoria University Law Press, p 133.

<sup>7</sup> Netshitahame (note 2 above), p 29.

<sup>8</sup> African Charter on the Rights and Welfare of the Child (African Children's Charter), adopted in 1990 and entered into force in 1999, OAU Doc. CAB/LEG 24.9/49 (1990). See also Chitupila for a detailed account of the right to education as a basis for human rights education. Chongo Chitupila (2012) *'The right to education as a basis for human rights education: An interface between human rights and education'* in Frans Viljoen (ed.) *'Beyond the Law: Multi-disciplinary perspectives on human rights'*, Pretoria University Law Press, pp 163-188.

<sup>9</sup> See Para. 14 of República de Moçambique, *'Relatório do governo da República de Moçambique nos termos do Artigo 40 do Pacto Internacional dos Direitos Civis e Políticos'*, apresentado ao Comité de Direitos Humanos (2012), available at <http://www2.ohchr.org/english/bodies/hrc/hrcs108.htm> (accessed 5 March 2012). See also generally Enni Panizzo et al, *'Iniciativa de género para raparigas vulneráveis'*, available at <http://archive.k4health.org/system/files/Mozambique%20mapping.pdf> (accessed 19 June 2012).

<sup>10</sup> Further details at <http://www.iss.co.za/af/profiles/Angola/Population.html> (accessed 21 March 2012).

affected given their population size.<sup>11</sup> Moreover, the fact that many children live in the rural areas, which are generally poorer than urban centres, sheds light on the fact that children in rural areas are the most affected. In Angola, about 70% of children between 6 and 15 years are at the risk of becoming illiterate due to high levels of poverty and the lack of documents needed to register them in primary schools. This problem is caused partly by the enormous difficulties faced by parents attempting to register the birth of their children.<sup>12</sup> The civil war that affected Angola for almost two decades also kept many children out of the school environment. Although the number of children enrolled in primary schools in Angola jumped to 4.2 million in 2010 from 3.6 million in 2007, many children still remain outside the school system.<sup>13</sup> The available information indicates that more than 40% of the total population of Angolan children that are of primary-school-going age still remain outside these schools.<sup>14</sup>

Similarly, Mozambique has more than 2.8 million children of primary-school-going age, but close to half this figure are not enrolled in primary schools.<sup>15</sup> Both countries have high levels of

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<sup>11</sup> See further details at <http://www.savethechildren.org/site/c.8rKLIXMGIpI4E/b.6149703/> (accessed 21 March 2012). See also [http://www.iiz-dvv.de/index.php?article\\_id=201&clang=1](http://www.iiz-dvv.de/index.php?article_id=201&clang=1) (accessed 5 March 2012).

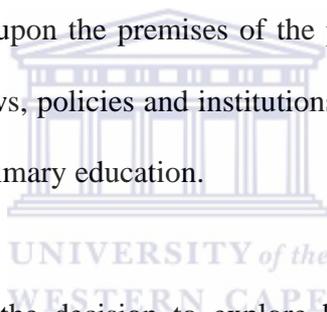
<sup>12</sup> For example, in 2003, more than one million Angolan children had no access to education due to lack of birth certificates required for school enrolment. See details at <http://www.iss.co.za/af/profiles/Angola/Population.html> (accessed 21 March 2012).

<sup>13</sup> See generally Governo da República de Angola, *'Balanço de Implementação da Segunda Reforma Educativa'*, available at <http://www.med.gov.ao/TodasPublicacoes.aspx> (accessed 12 June 2012).

<sup>14</sup> See Conselho Nacional da Criança (2009) *'Quarto Forum Nacional da Criança: Relatório do grau de cumprimento dos 11 compromissos para a criança'*, preparado pelo Conselho Nacional da Criança (CNAC), República de Angola, p 70.

<sup>15</sup> It should be pointed out, however, that the two countries are making efforts to improve the situation of children, particularly in the area of education. See more details at UNESCO website at

drop-outs, especially in primary schools. Statistics shows that the overall drop-out rate in the education system of Angola stands at 15%, while less than 50% of children complete primary education in Mozambique. It has been argued that, among other difficulties, the root causes of these problems include the poor quality of educational services offered and the challenges faced with introducing retention strategies to motivate young children to remain in school.<sup>16</sup> These educational challenges render these countries comparable, with many areas of overlap from which they could learn lessons from one another in order to improve their systems. It is against this backdrop that this chapter focuses on the efforts that Angola and Mozambique have applied to ensure the realisation of children's right to free and compulsory primary education enshrined in the CRC.<sup>17</sup> The chapter builds upon the premises of the previous chapters by restricting the discussion to an analysis of the laws, policies and institutions involved in the implementation of the right to free and compulsory primary education.



There are two main reasons for the decision to explore how Angola and Mozambique are implementing the right to primary education. First, the right to education is a fundamental human

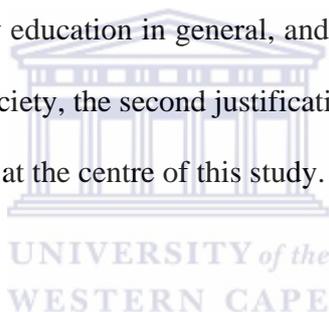
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<sup>16</sup> Information is available on UNICEF website, at [http://www.unicef.org/infobycountry/mozambique\\_56620.html](http://www.unicef.org/infobycountry/mozambique_56620.html) (accessed 5 March 2012). See Instituto Internazionale Maria Ausiliatrice (IIMA) (2010) '*Statement on the situation of the rights of the child in Mozambique*', Instituto Internazionale Maria Ausiliatrice (IIMA), pp 3-4, at [http://lib.ohchr.org/HRBodies/UPR/Documents/Session10/MZ/IIMA\\_IstitutoInternazionaleMariaAusiliatrice\\_eng.pdf](http://lib.ohchr.org/HRBodies/UPR/Documents/Session10/MZ/IIMA_IstitutoInternazionaleMariaAusiliatrice_eng.pdf) (accessed 5 March 2012).

<sup>17</sup> See Article 28 of the CRC.

right accorded to everyone (children included) by virtue of their being human beings,<sup>18</sup> and the protection of human rights is, in turn, central to the advancement of human dignity and of societies; more specifically, primary education is a basic requirement on which the sustainable development of the community rests.<sup>19</sup> Second, education is an enabling<sup>20</sup> right which allows everyone (including children) to enjoy all other fundamental rights.<sup>21</sup> Ssenyonjo thus notes that the right to education is a facilitative right central to empowering individuals with abilities and skills necessary to realise, enforce and enhance other rights.<sup>22</sup> Hence, in providing children with education, especially primary education, they are prepared for a better future in which they can enjoy all other rights free from poverty and other ills affecting illiterate people. While the first reason relates to the role played by education in general, and primary education in particular, by ensuring the development of the society, the second justification focuses on the individual human being, particularly the child who is at the centre of this study.



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<sup>18</sup> Para. 1 of the Committee on Economic, Social and Cultural Rights General Comment No. 13 on the Right to Education, UN Doc. E/C.12/1999/10 (CESCR General Comment No. 13).

<sup>19</sup> Matthew Clare, Simon Feny (eds.) *Education for the end of poverty: Implementing all the Millennium Development Goals*, Nova Science Publisher (2007), p 3. See also Louise Fox et al (2012) *Education reforms in Mozambique: Lessons and challenges*, The World Bank, p 53.

<sup>20</sup> Maurice Kibel et al (eds.) *South African child gauge 2009/2010*, Children's Institute (2010), p 21.

<sup>21</sup> Julia Sloth-Nielsen et al (2009) *Child-friendly laws in Africa*, The African Child Policy Forum (ACPF), p 34.

<sup>22</sup> Manisuli Ssenyonjo *Economic social and cultural rights in international law*, Hart Publishing (2009), p 356.

Referring to the values underpinning the right to education, Prince Hassan of Jordan said:

[e]ducation can and should be made to implant human values that should manifest themselves in the endeavours of groups of individuals, and in the struggle to improve the quality of life.<sup>23</sup>

These notions can be expanded to encompass the importance of protecting children's educational rights as follows: Children are part and parcel of the society, and through education it is possible to instil in them sound moral values and equip them with the necessary tools to advance the struggle against poverty and other evils which affect societies.<sup>24</sup>

The importance of exploring the implementation of the right to education cannot be overstated, given the key role that education can play in enhancing economic growth of developing African countries like Angola and Mozambique.<sup>25</sup> In addition, what underlies this inquiry into how Angola and Mozambique have implemented the right to education is the fact that they have subscribed to major international commitments in relation to this right. For example, they are

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<sup>23</sup> As quoted in Joel Spring (2000) *The universal right to education: justification, definition and guidelines* Lawrence Erlbaum Associates, p 5.

<sup>24</sup> Oriahi (first name not available), Aitufe (first name not available) (2010) 'Education for eradication of poverty', *Current Research Journal of Social Sciences*, Vol. 2, No. 6, pp 306-310.

<sup>25</sup> Many studies show that education enhances economic growth in poor countries. For example, see generally Sebhuzi Gisanabagabo (2006) *Investing in secondary and tertiary education for economic growth: Lessons for Rwanda from less developed countries*, unpublished Magister Commercii thesis, Department of Economics, University of the Western Cape. See also Dauda Oladoyin (2010) 'Investment in education and economic growth in Nigeria: An empirical evidence', *International Research Journal of Finance and Economics*, No. 55, p 158.

signatories to the United Nations Millennium Development Goals (MDG's) and other international developmental initiatives that bind states to promote universal primary education.<sup>26</sup>

Furthermore, more than a sixth of the world population is illiterate, with many such people being children in developing countries. As it was pointed out in Chapter 2, Angola and Mozambique are developing countries that were afflicted by civil war, and are hence no exception to these educational problems.<sup>27</sup> In addition, Mozambique is often affected by natural disasters such as floods, which destroy educational infrastructure.<sup>28</sup> Consequently, it is important to establish how well these countries are faring in providing primary education for their children.

The chapter discusses six major themes. First, it contextualises the protection of the right to primary education within the broader framework of international law. It then briefly discusses the CRC and the African Children's Charter provisions on the right to primary education, highlighting similarities and differences between these standards; other instruments are also invoked, chiefly the UDHR and ICESCR. Thereafter, the chapter examines the domestic legal instruments relevant to protecting the right under consideration. The discussion includes an assessment of the constitutional recognition and statutory protection of the right to primary education in the two countries under study. In addition, policies relating to this right are also examined. A further section explores various aspects of the right to primary education with a

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<sup>26</sup> See United Nations Millennium Development Goal No. 2 (MDG No. 2).

<sup>27</sup> See Chapter 2, section 2.7.1.

<sup>28</sup> See Para. 7 of the concluding observations of the Committee on the Rights of the Child (CRC Committee) to the state parties' report submitted by Mozambique, UN doc. CRC/C/MOZ/2 (2009).

view to clarifying issues around the minimum age for primary school enrolment and the cost thereof. Finally, the chapter investigates barriers to the realisation of the right to free and compulsory primary education for Angolan and Mozambican children.

## **6.2 International law and the protection of the right to primary education**

The right to primary education is an integral part of other categories of instruction encompassed under the right to education.<sup>29</sup> The international legal foundations of this right can be traced back to times when the right to education<sup>30</sup> was incorporated in instruments such as the Geneva Declaration of the Rights of the Child<sup>31</sup> and the UDHR. It can also be traced back to the time when this right was included in the United Nations Declaration on the Rights of the Child<sup>32</sup> as well as in the ICESCR and the CRC. The right to education is also protected in the CRPD<sup>33</sup> and

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<sup>29</sup> Besides primary education, other categories of education can be identified, including university education, tertiary education, secondary education and education for infants. In the same vein, primary education can be related to other forms of education such as elementary and basic education. The distinction between primary education and basic education is discussed in the context of analysis of the protection of the right to free and compulsory primary education under the CRC and the African Children's Charter. See Section 6.2.1 below.

<sup>30</sup> According to Nyadzanga, the right to education gained international law recognition when the liberal and socialist ideologies emerged. These ideologies propounded the concept that parents had a duty to provide for the education of their children and the freedom to choose, within the limits established by law, the type of education given to them. Liberalism and socialism also advocate that the state bears the responsibility to ensure that every child receives education by means of compulsory school attendance and legal regulation of school curricula. For detailed discussion on the historical developments of the right to education, see Netshitahame (note 2 above), p 30.

<sup>31</sup> 1924 Declaration of the Rights of the Child (1924 Declaration), adopted by the League of Nations in 1924, League of Nations Official Journal, Supplement No. 23.

<sup>32</sup> Declaration on the Rights of the Child (1959 Declaration), adopted by the United Nations General in 1959, UN Doc. A/4354 (1959).

<sup>33</sup> Lorenzo Wakefield et al (note 6 above), p 133.

the UNESCO Convention against Discrimination in Education (1960), which prohibits different treatment for learners.<sup>34</sup> Moreover, numerous other international and regional initiatives protect this right, for example, the Millennium Development Goals (MDG) No. 2 and No. 3. Education is also protected in the 1990 World Declaration on Education for All.<sup>35</sup> The UDHR states:<sup>36</sup>

Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

Although the Declaration is not recognised as legally binding,<sup>37</sup> it provides the necessary foundations for the protection of the right to primary education. Accordingly, the principles of the UDHR were incorporated in several binding instruments expanding on the content of the Declaration, such as the CRC and the ICESCR which all have provisions applicable to children.<sup>38</sup> The ICESCR makes it a requirement that the right to primary education be provided for free and that it be compulsory. Article 13(2) subsection (a) of the ICESCR states that primary education shall be compulsory and available freely to all (children included).<sup>39</sup> The recognition of free and compulsory primary education is reiterated in Article 14 of the Covenant, which

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<sup>34</sup> Sloth-Nielsen et al (note 21 above), p 35.

<sup>35</sup> As above.

<sup>36</sup> See Article 26(1) of the UDHR.

<sup>37</sup> Netshitahame (note 2 above), p 32.

<sup>38</sup> Other instruments expanding on UDHR standards include the International Covenant on Civil and Political Rights (ICCPR) GA Resolution 2200A (XXI), adopted in 1966 and entered into force in 1976, and the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) adopted in 1979 and entered into force in 1981, GA Resolution 34/180, UN Doc. A/34/46.

<sup>39</sup> My emphasis added.

enjoins states upon becoming parties to the ICESCR to prepare and adopt a plan of action for progressive implementation of primary education free of charge if they have not done so.<sup>40</sup>

Of the countries under examination, only Angola ratified the ICESCR.<sup>41</sup> However, as was pointed out previously, both countries have ratified, and are bound to, the CRC.<sup>42</sup> They are also parties to the African Children's Charter, which has provisions relating to the CRC standards pertaining to the right to primary education.<sup>43</sup> The next section discusses the protection afforded to the right to primary education under the CRC and the African Children's Charter. This is done based on the fact that the CRC is the main instrument considered in this study and because the African Children's Charter is the continent's most prominent instrument dealing with children's rights which the two countries under examination ratified.<sup>44</sup>

### **6.2.1 Brief remarks on the CRC and ACRWC provisions on primary education**

It is submitted that Article 28 of the CRC is the central provision dealing with the right to primary education.<sup>45</sup> It compels states to recognise educational rights for children and ensure

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<sup>40</sup> See Article 14 of the ICESCR.

<sup>41</sup> Angola ratified the Covenant in 1992.

<sup>42</sup> See Chapter 4 Section 4.3.

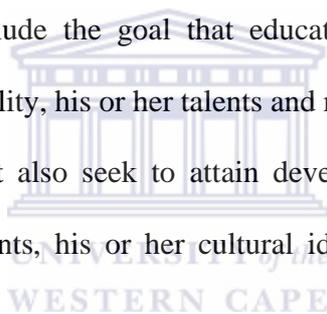
<sup>43</sup> See Article 11 of the African Children's Charter and Article 28 of the CRC.

<sup>44</sup> See Sheila Keetharuth (2009) 'Major African legal instruments' in Anton Bosl, Joseph Diescho (eds.) *Human rights in Africa: Legal perspectives on their protection and promotion*, Konrad Adenauer-Stiftung, pp 201-206.

<sup>45</sup> See Hakan Hyden (2006) *Implementation of International Conventions as a socio-legal enterprise: Examples from the Convention on the Rights of the Child*, in Jonas Grimheden, Rolf Ring (eds) *Human rights law: From Dissemination to application*, Martinus Nijhoff Publishers, p. 380. See also Mieke Verheyde, *A commentary on the*

their realisation progressively on the basis of equal opportunities. The obligation to fulfil socio-economic rights, including the right to education, progressively, has been interpreted to include an immediate duty to take steps to achieve them. This duty takes into account that immediate realisation of these rights may be difficult, but disallows states from taking retrogressive steps that, unless fully justified, may affect the realisation of these rights.<sup>46</sup> The CRC provision under analysis also compels states to take measures encouraging regular attendance at schools and reducing drop-outs rates.<sup>47</sup>

The Convention enumerates the goals that all forms of education, including primary education, must seek to achieve. These include the goal that education must be directed towards the development of the child's personality, his or her talents and mental and physical abilities to their fullest potential.<sup>48</sup> Education must also seek to attain development of the child's respect for human rights, for his or her parents, his or her cultural identity, and the various other aims



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*United Nations Convention on the Rights of the Child: Article 28 the right to education*, Martinus Nijhoff Publishers (2006), pp 11-12.

<sup>46</sup> See Paras. 1-2, and 9 of the Committee on Economic, Social and Cultural Rights General Comment No. 3 on the Nature of state Parties Obligations, UN Doc. 12/14/1990 (CESCR General Comment No. 3). See also Julia Sloth-Nielsen, Benyam Mezmur, 'Free education is a right for me: A report on free and compulsory primary education', Save the Children Sweden (2007), p 11.

<sup>47</sup> See Article 28(1) of the CRC.

<sup>48</sup> Societies educate learners for different needs depending on the roles the latter are expected to play. For example, education can be used to develop religious morals of the individual and the society, or it can be used to prepare citizens to make full use of their freedoms and faculties. For more detail, see Netshitahame (note 2 above), pp 28-29.

described in Article 29 of the CRC.<sup>49</sup> On interpreting the Convention's standards on education, the CRC Committee asserted that the realisation of children's educational rights requires the provision of an education programme which is firmly rooted in these values.<sup>50</sup> This shows that there are limits on the discretion of state to determine the content of the right to primary education.

At the regional level, the African Children's Charter compels African states (Angola and Mozambique included) to the full realisation of the right to education, and especially the right to free and compulsory basic education.<sup>51</sup> The Charter's provisions reinforce the standards of the CRC.<sup>52</sup> In this regard, Article 11 of the Charter is the key provision governing the right to education, stating that basic education must be free and compulsory. This provision is unequivocal in imposing the duty of states to take all appropriate measures with view to achieving the right to education and particularly to providing free and compulsory basic education for children.

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<sup>49</sup> This includes respect for the child's language and the national values of his or her country of origin as well the country where he or she lives. Education must also be directed towards developing the child to live a responsible life and to respect the environment. See Article 29 of the CRC.

<sup>50</sup> See Para. 3, CRC General Comment No. 1 on the Aims of Education, UN Doc. CRC/GC/2001/1 (General Comment No. 1).

<sup>51</sup> Article 11(3) subsection (a) of the African Children's Charter.

<sup>52</sup> It has been contended in previous chapters that the African Children's Charter reinforces the CRC. In this regard, Olowu rightly observed that the African Children's Charter complements the CRC in that it provides a legal framework within which to protect the interests of children, a subject that lies at the core of the Convention. See Dejo Olowu (2002) 'Protecting children's rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child', *The International Journal of Children's Rights*, No. 10, p 128.

Notably, however, Article 11 of the African Children's Charter has a stronger stance than the corresponding CRC provision on the right to education (Article 28). Whereas the provision in the Convention deals with children's rights from a general perspective, the Charter's provision is centred on the realities of the African continent and hence emphasises factors specific to the continent. For instance, it enjoins states to promote an educational system directed at the preservation and strengthening of positive African morals as well as the promotion of an educational system based on respect for ethnic, tribal and religious groups.<sup>53</sup> It also favours an educational system protective of children who fall pregnant within the educational cycle.

Despite these particularities, there are also similarities between the CRC and the Charter's provisions on education. Notwithstanding a slight difference in wording, both provisions compel states to provide free and compulsory primary (CRC) and basic education (African Children's Charter). Questions may arise with regard to the differences in these instruments in using the terms 'basic education' (African Children's Charter) and 'primary education' (under the CRC). A 2007 study by Save the Children explains that basic education is understood to cover the basic learning needs of learners.<sup>54</sup> According to the study, this can be seen as a very wide and an

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<sup>53</sup> This is in the light of the acclaimed traditional and cultural differences that exist amongst African societies. In this regard, the Preamble to the African Children's Charter recognizes the cultural heritage of African societies and its impact on the lives of many children. See Para 6, Preamble to the African Children's Charter. Some of these themes, including the promotion of educational rights directed to ensure understanding amongst ethnic and religious groups, are also included in the standards underpinning the ICESCR, as interpreted in the CESCR Committee General Comment No. 13. See Para. 4 of the CESCR Committee General Comment No. 13.

<sup>54</sup> Sloth-Nielsen et al (note 46 above), p 8.

overarching concept encompassing primary education as well.<sup>55</sup> In this way, it can be argued, the African Children's Charter also enjoins states to ensure that children enjoy primary education.

### **6.2.2 Understanding free and compulsory 'primary' and 'basic' education**

As was pointed out above, 'primary education' and 'basic education' are not synonymous concepts even though they correspond closely to each other.<sup>56</sup> Traditionally a distinction is made between formal (state-regulated) and informal education (non-regulated). Taiwo notes that 'basic education' relates to the content of education and not the form (whether formal or informal) in which it is presented.<sup>57</sup> In his view, the notion of 'basic education' incorporates the core contents of the right to education, including the development of basic skills such as hygiene, health, personal care as well as social skills such as oral expression and problem-solving.<sup>58</sup> He further contends that basic education is usually aimed at primary school children but is also relevant for adults lacking basic skills.<sup>59</sup> As pointed out earlier, this indicates that 'basic education' can be viewed as an important component of lifelong learning and skill development.<sup>60</sup> It can be argued,

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<sup>55</sup> As above. See also Verheyde (note 45 above), pp 12-15.

<sup>56</sup> See section 6.2.2 above.

<sup>57</sup> Elijah Taiwo (2011) *The Implementation of the right to education in South Africa and Nigeria*, unpublished LLD thesis, Faculty of Law, Nelson Mandela Metropolitan University, p 104.

<sup>58</sup> As above.

<sup>59</sup> As above.

<sup>60</sup> See Section 6.2.1.

then, that Taiwo was correct to suggest that ‘basic education’ is not transmitted in the school setting alone but also in less formal environments such as community and village settings.<sup>61</sup>

Put differently, the notion of ‘primary education’ usually relates to compliance with standards that are established by the government of a given country. This does not necessarily mean that only public schools can provide ‘primary education.’ Instead, it indicates that institutions providing this form of education must comply with a set of rules or standards. Often the state has discretion to determine when primary school begins and ends. States also have the discretion to prescribe the curriculum or syllabus taught at primary school levels. As a result, public and private primary schools are bound to implement these programmes. Although, in some instances, private institutions can design their own curricula or programmes, it is often the case that these need to obtain state’s approval before they can implement them. Either way, ‘primary education’ remains an important tool to transmit basic skills. Therefore, ‘primary education’ is a strong component of ‘basic education.’<sup>62</sup> The international-law dimensions of both forms of education entails that either ‘primary education’ or ‘basic education’ must be provided freely to all and made compulsory for all.<sup>63</sup>

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<sup>61</sup> See generally Elizabeth Westaway et al (2009) ‘Educational attainment and literacy in Ugandan fishing communities: Access for All?’, *MAST*, Vol. 8, No. 2, pp 73-97.

<sup>62</sup> Taiwo (note 57 above), p 104.

<sup>63</sup> See Articles 28 of the CRC and Article 11 of the African Children’s Charter. See also Article 13 of the ICESCR and Article 26 of the UDHR.

Let us explore these dimensions in more detail. The elements comprising a system of compulsory primary education are well captured in the CESCR Committee's General Comment No. 11, which provides the following:<sup>64</sup>

The element of compulsion serves to highlight the fact that neither parents, not guardians, nor the state are entitled to treat as optional the decision as to whether the child should have access to primary education.

Beiter believes that the duty to provide compulsory primary education entails a two-level obligation.<sup>65</sup> At the first level, states are required to provide enough educational institutions for children to attend primary education. In his view, this duty also entails that states must enact laws and policies which make primary education compulsory. In addition, parents or guardians and all those responsible for children have a duty to send them to school rather than keep them away from educational facilities.<sup>66</sup> The principle of compulsory primary education thus ensures that the child's right to education is not hampered by parental neglect, abuse or ignorance, cultural resistance or impediments.<sup>67</sup>

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<sup>64</sup> See Para. 6, CESCR General Comment No. 11.

<sup>65</sup> Klaus Beiter, *The protection of the right to education by International Law*, Martinus Nijhoff Publisher (2006), p 511.

<sup>66</sup> As above.

<sup>67</sup> Taiwo (note 57 above), p 106.

To achieve this right, the state must encourage school attendance by means other than imposing penalties for absenteeism.<sup>68</sup> Moreover, primary education must be made available free of charge, which means primary schools may not charge study fees to primary school children or their parents or guardians. Arguably, the requirement of making primary school education compulsory is contingent upon making it free; where education is compulsory but not free, the attendant financial burdens would make it difficult for parents or guardian to send children to school. As the CESCR Committee noted:<sup>69</sup>

[f]ees imposed by the Government, the local authorities or schools and other direct costs constitute disincentives to the enjoyment of the rights and may jeopardise their realisation.

Moreover, the CESCR Committee categorically stated that indirect costs, including compulsory levies and the obligation to wear relatively expensive uniforms, can also be seen as barriers to the realisation to the right in consideration. This implies that primary school learners must be provided free of charge items required for them to enjoy this right,<sup>70</sup> an implication with special relevance for those unable to provide for themselves in that it holds the potential for making children's increased school attendance possible. Supporting this view, the Special Rapporteur on the Right to Education argued that certain costs relating to primary education, including charges levied for the use of educational facilities and materials such as laboratories and sports

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<sup>68</sup> See the 1999 Special Rapporteur preliminary report on the right to education submitted to the UN Human Rights Council, Report by Katarina Tomasevski, former Special Rapporteur on the Right to Education, on Economic, Social and Cultural Rights: The Right to Education (UN Doc. E/CN.4/1999/49).

<sup>69</sup> Para. 7 of the CESCR Committee General Comment No. 11 on Plans of Action for Primary Education, UN Doc. E/C.12/1999/4 (CESCR General Comment No. 11).

<sup>70</sup> Jandhyala Tilak (1996) 'How free is "Free" primary education in India?', *Economic and Political Weekly*, p 357.

equipment, must be deemed unacceptable.<sup>71</sup> This applies as well to the so-called indirect costs such as those relating to transportation of learners, school meals and uniforms.<sup>72</sup>

Having examined the differences between free and compulsory primary education and basic education, we now turn to consider the basic requirements for the realisation of the right to free and compulsory primary education.

### **6.2.3 Basic requirements for free and compulsory primary education**

As pointed out above, the right to free and compulsory primary education is a sub-category of other forms of education known to exist. Therefore, although there may be other particularities, the realisation of this right is subject to similar requirements as needed for the fulfilment of other forms of education.<sup>73</sup> This is the interpretation one gleans from close reading of the position adopted by the Committee on Economic, Social and Cultural Rights (CESCR Committee) in relation to the right to education protected under the ICESCR.<sup>74</sup> With regard to requirements for the realisation of the right to education under the ICESCR, which is concurrent with the right to

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<sup>71</sup> See Tomasevski (note 68 above).

<sup>72</sup> The distinction is made in relation to three types of costs associated with primary education. The first group of costs, called direct costs, relate to expenditures on items without which educational services cannot be delivered, for example, textbooks and learning materials. The second group of costs, termed indirect costs, do not directly cover expenditures with educational services but are important to ensure school attendance. These include transport fees and uniforms. The third group, called opportunity costs, involves the loss of certain benefits due to the choice one makes to go to school. Examples of opportunity costs include the loss of the benefit of staying at home that one incurs in order to attend school. For further details see Sloth-Nielsen et al (note 46 above), pp 8-9.

<sup>73</sup> Taiwo (note 57 above), p 100.

<sup>74</sup> See Para. 6 of CESCR General Comment No. 13.

education under the CRC, four interrelated and essential features have been identified. The CESCR Committee has stated that the realisation of this right is subject to ensuring its availability, accessibility, acceptability and adaptability.<sup>75</sup> These features are often described as the 4-A scheme or 4-A typology to education, and they are used to assess the level of implementation of the right to education in any given country.<sup>76</sup>

To look at these individually, the ‘availability’ requirement entails an obligation placed upon the state to provide and make education, including free and compulsory primary education, available to all children.<sup>77</sup> This element compels the state to ensure that, within its jurisdiction, there are enough educational institutions available with the necessary conditions for them to function. These conditions include, for example, availability of teachers and text books, toilets for learners and staff, as well as the materials required for teaching, and school buildings. Scholars have identified three ways of fulfilling the availability obligation: through either (1) the establishment by government of a network of public schools or (2) funding non-state actors, and by (3) adopting a mixed system comprising public and private institutions.<sup>78</sup> It will be shown later that although some of these elements are present in Mozambique, it still needs to strengthen them, especially given the fact that it has insufficient primary schools at the same time that it does not provide funding support for private-sector educational services.

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<sup>75</sup> Para. 6 of CESCR General Comment No. 13.

<sup>76</sup> See Sloth-Nielsen et al (note 46 above), p 21.

<sup>77</sup> Para. 6(a) of CESCR General Comment No. 13.

<sup>78</sup> See Taiwo (note 57 above), p 100.

Next, 'accessibility' implies that states must adopt a system of provision of educational rights that meets other three fundamental elements. First, the system must not be discriminatory on any grounds (gender, sex, race and so forth). Second, education, including primary education, must be available within accessible reach, whether in terms of the geographical location of schools in relation to learners or through the implementation of electronic programmes and the provision of the equipment necessary for people to access them.<sup>79</sup> Third, the provision of education must be economically feasible for learners (and parents who pay school fees). It means that everyone, including the most vulnerable people, must be able to get access to educational institutions; where required, the state should and must take measures to assist those who cannot access education themselves, for example, through transport provision.<sup>80</sup> However, in relation to the economic component, primary education must be made available free of charge, especially for children. Again, the state bears the responsibility to ensure that indigent people, especially children, are given the opportunity to attend primary schools by providing them with the necessary assistance. In this regard, it is argued that reducing the distance between population and schools helps to ensure that more children have access to learning.<sup>81</sup>

The 'acceptability' requirement relates to the form and substance, or content, of any type of education being administered. It entails that the curricula, the teaching programmes as well as the methods employed in teaching, are socially and culturally acceptable for learners and their

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<sup>79</sup> Lee Basser, Melinda Jones (2002) 'Fostering inclusive societal values through laws', *International Journal of Children's Rights*, Vol.10, No. 4, p 230.

<sup>80</sup> See Katarina Tomasevski (2002) '*Right to education premier No. 3: Human Rights obligations: making education available, accessible, and adaptable*', pp 12 and 14.

<sup>81</sup> See generally Sloth-Nielsen et al (note 46 above).

parents. This implies that school curricula and the methods of teaching must be relevant and appropriate for beneficiaries and must be of good quality. It has been suggested that, in order to satisfy this requirement, the provision of education must meet human rights standards set out in instruments such as the ICESCR and the CRC.<sup>82</sup> These include, for example, ensuring that the education is compliant with the four cardinal principles of the CRC: the principles of non-discrimination; the best interest of the child; respect for the view of the child; and the child's right to life, survival and development.<sup>83</sup>

The last requirement, 'adaptability', entails that all forms of education, including free and compulsory primary education, must be flexible so as to be able to keep up with changes in society and the different needs of learners.<sup>84</sup> The laws on education, the educational policies and programmes as well as school curricula must be adaptable to changes in diverse social and cultural settings.<sup>85</sup> They must also be able to accommodate the diverse needs of learners, which includes taking account of the needs of learners with disabilities and those facing other types of social challenges (for example, stigma and depression).<sup>86</sup>

The following sections assess the protection of the right to free and compulsory primary education under the domestic laws of Angola and Mozambique. The provisions of the CRC will

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<sup>82</sup> Taiwo (note 57 above), p 102.

<sup>83</sup> See generally Articles 2 of the CRC (non-discrimination), 3 of the CRC (best interest), 6 of the CRC (right to life, survival and development), and 12 of the CRC (respect of the views of the child).

<sup>84</sup> Para. 6(d) of CESCR General Comment No. 13.

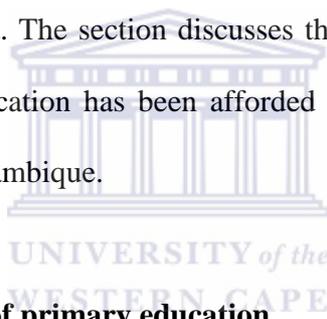
<sup>85</sup> Basser et al (note 79 above), p 234.

<sup>86</sup> Tomasevski (note 80 above), pp 12 and 14.

take precedence in the analysis, given that implementation of the CRC in these jurisdictions is central to this study; however, attention is also given to the African Children's Charter since it informs the domestic legal and policy framework of both of these countries.

### **6.3 The right to primary education under domestic laws of Angola and Mozambique**

The right to free and compulsory primary education for children has gained legal recognition in many countries. For example, the constitutions of South Africa and Kenya have singled out provisions relevant to it.<sup>87</sup> The constitutional recognition accorded to this right underlines the importance of guaranteeing children's education in a continent where illiteracy remains a major obstacle to economic development. The section discusses the context within which the right to free and compulsory primary education has been afforded recognition in the constitution and domestic laws of Angola and Mozambique.



#### **6.3.1 Constitutional recognition of primary education**

As discussed in Chapter 4, the Angolan and Mozambican constitutions incorporate provisions speaking to civil and political rights (including the right to life<sup>88</sup> and the right to freedom of expression)<sup>89</sup> as well as socio-economic rights (such as the right to health<sup>90</sup> and the right to

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<sup>87</sup> See Section 29 of the South African Constitution and Article 53(b) of the Constitution of Kenya. See also Godfrey Odongo (2012) 'Caught between progress, stagnation and reversal of some gains: Reflections of Kenya's record in implementing children's rights norms', *African Human Rights Law Journal*, Vol. 12, No. 1, p 116, and Eric Berger (2003) 'The right to education under the South African Constitution', *College of Law, Faculty Publications*, p 623.

<sup>88</sup> See Article 30 of the Constitution of Angola and Article 40 of the Constitution of Mozambique.

<sup>89</sup> See Article 40 of the Constitution of Angola and Article 48 of the Constitution of Mozambique.

<sup>90</sup> Article 77 of the Constitution of Angola and Article 89 of the Constitution of Mozambique

work).<sup>91</sup> Children's rights are also protected in the constitutions of the two countries under analysis.<sup>92</sup>

As previously explained, constitutional incorporation of children's rights, including children's educational rights, brings significant gains to this vulnerable group<sup>93</sup> because the constitution is the supreme law of any given country and is binding upon everyone, including the state and private entities.<sup>94</sup> Consequently, besides making these rights part and parcel of the supreme law of the state, constitutional incorporation of children's educational rights makes them binding on all institutions.

The Preamble to the Angolan Constitution defines the objectives of the mother law, stating that it aims to build a society based on equal opportunities, commitment, fraternity and unity in the diversity of Angolan cultural and traditional values. It also states its purpose, which is to build a just and progressive society that respects life, equality, diversity and human dignity. The Constitution further affirms that the goal of achieving development is among the paramount aspirations of the Angolan people,<sup>95</sup> and, as stated above, it also embodies fundamental human rights applicable to everyone, including children.

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<sup>91</sup> See Chapter 4, section 4.4.1.

<sup>92</sup> It was explained that the incorporation of children's rights standards in these constitutions was largely influenced by the obligation of the countries in respect to international instruments such as the CRC and the African Children's Charter. See Chapter 4, section 4.4.1.

<sup>93</sup> See Chapter 4, section 4.4.1.

<sup>94</sup> Taiwo (note 57 above), p 65.

<sup>95</sup> See Paras. 9-10, and 16 of the Preamble to the Constitution of Angola.

Article 79 is the umbrella provision capturing the right to education for everyone. While it is formulated in terms of duties of the state, it also reflects the existence of certain corresponding rights for the beneficiaries and provides that '[t]he state shall promote access to (...) education for all.'<sup>96</sup> Although this provision does not specifically single out protection for children's educational rights, it is applicable to these and affords children the basic educational rights that are afforded to everyone. In essence, Article 79 compels the state to ensure that everyone, including children, has access to the enjoyment of the right to education. Article 35 of the Angolan Constitution posits that the family, the state, and the society have instrumental roles in ensuring the upbringing and education of children. The importance of this provision cannot be overstated in the light of international law standards protecting parental rights to decide upon the type and quality of education their children receive.<sup>97</sup>

The provisions above must be read and interpreted with other constitutional provisions capturing the duty of the state in relation to the right to education, including Article 21(g) and (i). As part of the legislative measures to promote the implementation of the right to education covered in the CRC, Article 21(g) compels the state to '*promote policies that will ensure universal access to free and compulsory education (...)*'.<sup>98</sup> As can be seen, this provision creates an open-ended duty and a binding obligation for the state to promote policies covering all levels of education, whether or not formal, including pre-school and primary education right up until higher

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<sup>96</sup> See Article 79 of the Angolan Constitution.

<sup>97</sup> See Articles 5 of the CRC (respect for parental responsibilities for children) and Article 18 of the CRC (state duty to assist parents in the exercise of responsibilities towards their children).

<sup>98</sup> See Article 21(g) of the Constitution of Angola.

education. Both, Articles 79 and 21 are consonant with international norms dealing with the right to education to the extent that they compel the State to promote access to education. In this regard, the accessibility component of the right under analysis, discussed previously, as contained in the ICESCR and the CRC are captured in these provisions. It, therefore, means that in the two provisions under analysis the Angolan State is compelled to provide educational facilities which meet the non-discrimination principle and which operate within the reach of learners. Also, in order to fulfil the duty under these provisions dealing with accessible education, the State must ensure that no charges are raised to the effect that they impede learners from accessing educational institutions and, where needed, the government must provide for those who cannot pay school fees for themselves. Although Article 21(g) asserts a constitutional and legally binding obligation on the state to promote free and compulsory education at all levels, the enforcement of this provision remains to be tested. As explained in Chapter 4, this is mainly because constitutional litigation is not common in Angola.<sup>99</sup>

Article 21(i) of the law under analysis takes a further step and compels the state to make large-scale and permanent investments in human capital, especially in terms of developing children and young persons. It also enjoins the government to strengthen the system of education to achieve sustainable development.<sup>100</sup> This provision shows not only that the state has a duty to invest in the education of children but that there is a link between investments seeking to strengthen the educational system for children and the development of the country as a whole. To

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<sup>99</sup> See Chapter 4, section 4.4.1. See also Aquinaldo Mandlate (2010) *'The protection and enforcement of socio-economic rights in Lusophone countries in Africa: Challenges in Angola, Cape Verde and Mozambique'*, ESR Review, Community Law Center, Vol. 11, No. 3, p 23.

<sup>100</sup> See Article 21(i) of the Constitution of Angola.

the extent that the above provisions are compliant with the CRC, they can be utilised to advance the right to free and compulsory primary education for children. The tension, however, relates to the fact that, according to Article 21, the Angolan state is required to implement this right only progressively. This lack of an immediate constitutional obligation carries the potential to obstruct effective implementation of the standards contained in the CRC.

Like the Angolan Constitution, the preamble to the Mozambican Constitution defines its basic objectives and purposes. These emanate from the need to strengthen the rule of law and national unity<sup>101</sup> as well as to develop a democratic society based on political pluralism and respect for, and the guarantee of, the fundamental rights and civil liberties of citizens.<sup>102</sup>

Similarly, as in the Angolan Constitution the right to education is protected in the Mozambican Constitution. It is observed that the main provision of the Mozambican Constitution speaking to the right to education is similar to the provision in the Angolan Constitution. In this regard, Article 88 of the Mozambican Constitution provides broadly that '*(...) education shall be a right and a duty of all citizens.*'<sup>103</sup> The constitutional recognition of parental duties in the context of education ties well with the notion that the enjoyment of children's educational rights implies the

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<sup>101</sup> See Para. 6 of the Preamble to Constitution of Mozambique.

<sup>102</sup> See Para. 5 of the Preamble to Constitution of Mozambique.

<sup>103</sup> See Article 88 of the Constitution of Mozambique. The provision states that:

(...) [i]n the Republic of Mozambique, education shall be a right and a duty of all citizens (...)

performance of responsibilities by those who have to ensure that children attend school.<sup>104</sup> Additionally, and as will be explained further below, the reference made to the ‘duty’ of everyone to attend to education must also be seen as an indicative of the compulsory nature of the right to education protected under the Mozambican Constitution.

Importantly, the Constitution furthermore compels the state to promote the extension and access to enjoyment of the right to education for all citizens.<sup>105</sup> Although it is not explicitly mentioned, the promotion of primary education for children is also envisaged, given that primary education is a sub-category of the right to education protected in the Constitution and that children form a significant part of the country’s population.

The right to education is justiciable, as with other rights protected in the Bill of Rights of the constitutions of Angola and Mozambique.<sup>106</sup> Therefore, these countries can be held accountable through the court system in the event of violation of the rights protected in the Bill of Rights.<sup>107</sup>

However, the fact that neither Angola nor Mozambique has a culture of constitutional litigation

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<sup>104</sup> The link between rights and duties can also be seen in the context of the provisions of the African Children’s Charter. For further detail, see Danwood Chirwa (2002) ‘The merits and demerits of the African Charter on the Rights and Welfare of the Child’, *International Journal of Children’s Rights*, Vol. 10, p 169.

<sup>105</sup> Article 88(2).

<sup>106</sup> Mandlate (note 99 above), p 23. See also AIDS and Human Rights Research Unit, ‘*Human rights protected? Nine Southern African countries reports on HIV, AIDS and the Law*’, Pretoria University Press Law (2007), p 142.

<sup>107</sup> The provisions of the Constitution of Angola (Article 29(1)) and Mozambican (Article 70) speaking to the justiciability of fundamental rights are crafted in the same manner. These provisions allow victims of violation of constitutionally protected rights to have recourse to courts for redress for violation or threats of violation of their rights. See Article 29(1) of the Constitution of Angola, and Article 70 of the Constitution of Mozambique.

hampers the extent to which their courts involve themselves in the interpretation of constitutional norms, especially norms protecting the right to education. In Article 113 of the Constitution of Mozambique, the state is required to:

1. (...) promote an education strategy that aims towards national unity, eradication of illiteracy, (...) and providing citizens with moral and civic values;
2. (...) organise and develop education through a national system of education (...)

Despite the similarities in the provisions covering the right to education under the constitutions of the countries under analysis, certain differences can be found. For example, whereas the Angolan Constitution has a provision incorporating the notion of free and compulsory primary education, this concept is not reflected in the Mozambican constitutional provision. However, the lack of such standard in the Mozambican Constitution must not be seen as a setback. This is mainly because Mozambique ratified the CRC and the African Children's Charter, which contain clauses on free and compulsory primary education.<sup>108</sup> As pointed out in Chapter 4, the ratification of these instruments means that the country is bound to them and it is therefore obliged to implement the duties they contain, including making primary education compulsory and free for children.<sup>109</sup> In addition, it must be deduced that the incorporation in the Mozambican Constitution of a clause that covers the right to education in broad terms and places a 'duty' on everyone to attend to education, needs to be interpreted in a sense that includes the protection envisaged for the right to free and compulsory primary education. This would require judicial

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<sup>108</sup> For example, see Article 28(1)(a) of the CRC, and Article 11(3) subsection (a) of the African Children's Charter.

<sup>109</sup> See Chapter 4, section 4.3.

interpretation of the constitutional norm on the right to education in light of international law instruments (such as the CRC and the African Children's Charter) ratified by Mozambique.

However, the right to education is also incorporated in subordinate legislation of the two countries under consideration.<sup>110</sup> This connects well to the point made in Chapter 4 that in countries such as Angola and Mozambique which have a civil law system, the rights protected in the constitution must be incorporated into subordinate legislation to make them more easily enforceable. The section that follows discusses the protection given to this right under the statutory norms of the two countries under analysis.

### **6.3.2 Statutory protection of primary education**

It was mentioned above that the right to primary education is incorporated in subordinate legislation of the two countries under study.<sup>111</sup> In civil law jurisdictions, statutory recognition of fundamental rights has the particular effect of fostering the necessary platform for implementation of rights.<sup>112</sup> Angola and Mozambique ascribe to the civil law tradition.<sup>113</sup> It

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<sup>110</sup> Statutes can be used to domesticate international law standards. They can be used to fill the gaps and to elaborate upon silent constitutional precepts and values contained in international law instruments, such as the right to education, which is embedded in the CRC. Statutes can also be used to elaborate on the content of the specific international law standards reflected in constitutional provisions. See Julia Sloth-Nielsen (2012) 'Modern African childhoods: Does law matter?' in Michael Freeman (ed.) 'Law and childhood studies: Current legal issues', Oxford University Press, pp 123-124.

<sup>111</sup> See section 6.3.1.

<sup>112</sup> Aquinaldo Mandlate, 'Implementing the Convention on the Rights of the Child in Angola and Mozambique: Opportunities and challenges', paper presented at Children's Rights Conference held in Belfast, Northern Ireland, 1 and 2 June 2011; copy on file with the author.

means that the recognition of the right to primary education in the domestic laws of these countries has the practical effect of rendering this right easily enforceable. Thus, statutory incorporation of the right under consideration creates a perfect channel through which standards relating to the right to education protected in international norms such as the CRC and the African Children's Charter flow into the domestic jurisdiction of the countries being profiled. In addition to permitting the flow of these international standards into the domestic jurisdiction, statutory incorporation of the right to education also has the advantage of developing constitutional standards pertaining to this right. This means that statutes can be used to domesticate international law standards, fill gaps and elaborate upon constitutional norms entrenching fundamental values such as the right to education.

In the Angolan context, the National System of Education Act<sup>114</sup> is the main instrument regulating the right to education, over and above other instruments, such as the Law on the Protection and Holistic Development of Children, which contain provisions speaking to this right.<sup>115</sup> The National System of Education Act replaced the old regulations on the National System of Education, which dated back to 1978. The reforms introduced under the new National System of Education Act were based on the fact that the old system of education reflected poor

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<sup>113</sup> Mandate (note 99 above), pp 22-24.

<sup>114</sup> Act No.13/01 of 31 May 2001 (Angolan National System of Education Act).

<sup>115</sup> Articles 11 to 13 of the Law on the Protection and Holistic Development of Children protect children's right to education and place the duty on the state to take measures, including establishing the necessary institutions needed to implement this right. The inclusion of children's educational rights in this statute not only shows that Angola gives importance to these rights, but also reaffirms the country's efforts to implement the CRC. See Articles 11-13 of Act No. 25/12 of 22 August 2012 (Angolan Law on the Protection and Holistic Development of Children).

standards of education for learners and that staff lacked adequate training for teaching.<sup>116</sup> The reforms were also motivated by the poor quality of basic education, which had suffered as a result of civil war and mistakes made in the transition from the colonial system of education to a new one based on values of the independent state of Angola.<sup>117</sup>

The new National System of Education Act introduced corrective measures to address the problems that had affected the educational system in the past. The law defines the objectives of the Angolan system of education. These include ensuring the development of children and young person's physical, intellectual, moral, and civic abilities with view to ensuring progressive and systematic development of their technologic and scientific knowledge required for them to support the development of the country. The Act also seeks to stimulate the development of persons who are capable of critically understanding the national, regional and international challenges, with a view to enabling them to participate actively and constructively in a democratic society. Other objectives are the promotion of respect for human beings and solidarity amongst people.<sup>118</sup>

The Angolan National System of Education Act divides the country's educational system into three categories, namely, Pre-school Education, Basic Education, and Higher Education. It was observed that unlike the previous educational system inherited from the Portuguese colonial

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<sup>116</sup> Alberto Nguluve (2006) '*Angolan educational policy: Organisation, development and perspectives (1976-2005)*', unpublished LLM thesis, Faculty of Education, Universidade de São Paulo, p 114.

<sup>117</sup> As above.

<sup>118</sup> See Article 4 of Act No.13/01 of 31 May 2001 (Angolan National System of Education Act).

administration, the new system includes a further year for Basic Education. The Act also added new components to the educational system, including the master and doctorate levels which were placed at Higher Education subsystem.<sup>119</sup> In terms of the law, Basic Education includes primary and secondary school education.

The law defines the fundamental aim of Basic Education as preparing learners for higher levels of education. The objectives of Basic Education are closely related to objectives of the National System of Education Act. In summary, these include stimulating development of the intellectual capacity of children and young persons, including the critical understanding of national, regional and international problems, and the promotion of respect for human beings and solidarity amongst people. The law makes primary education free and compulsory until the sixth grade or up to the age of 14, when the child can be involved in paid employment.<sup>120</sup> In this regard, the state has the duty to ensure full support of learners for the six years' duration of primary education.<sup>121</sup> Arguably, this includes providing free textbooks, paying school fees and covering uniform and other costs related to this form of education.<sup>122</sup> However, no corresponding duty is placed upon parents, guardians or other persons who are responsible for children to send them to school.

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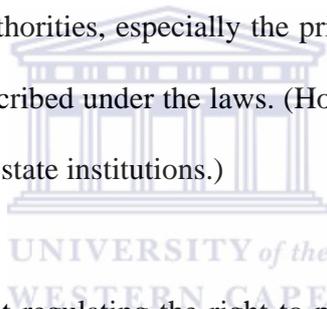
<sup>119</sup> Nguluve (note 116 above), p 126.

<sup>120</sup> Articles 7 and 17 of Law 13/01 of 31 May 2001 (Angolan Law on the National System of Education). See also Rede da Criança Angola (2004) '*Supplementary report by NGO's on the implementation of the Convention on the Rights of the Child*', Rede da Criança Angola, p 8, available at [http://www.crin.org/docs/resources/treaties/crc.37/Angola\\_ngo\\_report.pdf](http://www.crin.org/docs/resources/treaties/crc.37/Angola_ngo_report.pdf) (accessed 9 August 2012).

<sup>121</sup> Ministério de Educação da República de Angola (note 13 above), p 19.

<sup>122</sup> Sloth-Nielsen et al (note 46 above), p 10.

It should be noted that the Angolan National System of Education Act is being implemented gradually, with some schools still remaining in the old system of education until the end of 2012, at which point the entire system will be regulated by the new law.<sup>123</sup> This means that, starting from the time that primary education was made compulsory and free and ending at the close of 2012, certain schools would still implement study fees.<sup>124</sup> In the past, this has had the effect of keeping many children of primary-school-going age outside the school system, especially so in the case of children whose parents or guardians could not afford to pay school fees. As will be discussed later, this caused a gross implementation gap in Angola's obligations under the CRC and other instruments covering children's right to free primary education.<sup>125</sup> In addition, provision is made for non-state authorities, especially the private sector, to provide all forms of education subject to the terms prescribed under the laws. (However, this will not be discussed as the focus of the present study is on state institutions.)



In Mozambique the key instrument regulating the right to primary education<sup>126</sup> is the National System of Education Act of 1992, which was amended in 2001<sup>127</sup> and is based on the principle

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<sup>123</sup> Ministério de Educação de Angola (2001) *Indicadores da eficácia da reforma educativa em Angola*, Ministério de Educação de Angola, p 5; copy on file with the author.

<sup>124</sup> Nguluve (note 116 above), pp 127-129.

<sup>125</sup> See section 6.5.2.

<sup>126</sup> Other instruments regulating this right exist, including the Mozambican Law on Promotion and Protection of Children's Rights or Act No. 7/2008 of 9 July 2008. Article 38 of this Act states that:

(...) The child has the right to education aiming to achieve his or her full development, its capabilities, abilities and potentialities, with a purpose of preparing the child to work and to exercise his or her citizenship (...)

<sup>127</sup> See Act No. 6/92, of 6 May 1992 as amended in 2001 (Mozambique regulations on the National System of Education).

that education is a right for, and a duty of, every citizen.<sup>128</sup> The law regulating the Mozambican National System of Education divides the educational system into three major subsystems: Pre-School Education, Formal School Education and Extra School Education. While Pre-School Education targets children who are under six years old, Formal School Education concerns persons of six and above. The Extra School Education subsystem contemplates cultural and scientific literacy activities seeking to expand the level of knowledge of individuals outside the formal education system independently of their age. The formal School Education subsystem is in turn itself divided into other three subsystems, namely, the basic education subsystem, tertiary education subsystem and higher education subsystem. The law defines the formal basic education subsystem as the central pivot of the National System of Education. This subsystem of education encompasses primary and secondary school education.<sup>129</sup>

According to the law, the objective of primary education is to provide learners with basic preparation in the domain of communication, maths, social science and natural science, as well as in physical, civic and cultural aspects of their lives.<sup>130</sup> Primary education is also directed towards transmitting basic knowledge and developing abilities required for learners to take part

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<sup>128</sup> Article 1(a) of Act No. 6/92 of 6 May 1992 as amended in 2001 (Mozambique regulations on the National System of Education).

<sup>129</sup> Article 9(3) of Act No. 6/92 of 6 May 1992 as amended in 2001 (Mozambique regulations on the National System of Education).

<sup>130</sup> See as cited in UNESCO (2011) '*World data on Education 2010/11: Mozambique*', UNESCO, VII Edition, (page numbering not available).

in productive life and to develop their personalities.<sup>131</sup> At the primary school level, the focus is on teaching learners to read and to write. Attention is also devoted to developing learners' basic notions of hygiene as well as their relationships with other people and the surrounding environment. The primary school curriculum includes teaching subjects covering the local context and relevant to the socio-cultural and economic development of communities and the promotion of self-employment.<sup>132</sup> The law further states that primary school begins at the age of six.<sup>133</sup> Moreover, in terms of the law, primary education is compulsory.<sup>134</sup> However, no duty is placed upon parents or guardians and other persons responsible for the upbringing of children that instructs them to send their children to schools. This places parents in the position of determining whether or not to send their children to school, and thereby contradicts the principle that neither parents or guardians nor the state are entitled to treat children's access to primary school as optional.<sup>135</sup> It can be argued, therefore, that the current system to some extent defeats the aims envisaged in CRC standards protecting the right to free and compulsory primary education. As in Angola, the private sector is also allowed to participate in the provision of all

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<sup>131</sup> See generally Article 11(2) of Act No. 6/92 of 6 May 1992 as amended in 2001 (Mozambique regulations on the National System of Education).

<sup>132</sup> UNESCO (note 130 above).

<sup>133</sup> Article 5(1) of Act No. 6/92 of 6 May 1992 as amended in 2001 (Mozambique regulations on the National System of Education).

<sup>134</sup> See Article 5(3) of Act No. 6/92 of 6 May 1992 as amended in 2001 (Mozambique regulations on the National System of Education).

<sup>135</sup> This view was expressed by the CESCR Committee and seconded by the CRC Committee. See Para. 6 of the CESCR Committee General Comment No. 11 on Plans of Action for Primary Education, UN Doc. E/C.12/1999/4 (CESCR General Comment No. 11).

forms of education.<sup>136</sup> (However, for reasons that were explained earlier, this will not be analysed further.)

According to UNESCO, the government is planning to make primary education compulsory gradually by investing more resources and organisational capacity to ensure effective implementation.<sup>137</sup> Nevertheless, as will be discussed later, this plan remains far from being achieved because of funding challenges that affect the entire educational system.<sup>138</sup> Also, there is no mandatory age for completion of primary school. Melchiorre explains that in Mozambique the lack of a mandatory age for completion of primary school is linked to the impact of the civil war, which destroyed the school network and general structure of the education system<sup>139</sup> and left many children outside schools. Therefore, if a mandatory age for completion of primary school were imposed, it would deny those older than such age the opportunity of enrolling in school.

While the CRC does not explicitly mention any specific age for completion of compulsory education, the Guidelines for Periodic Reports under the Convention make it compulsory for states to indicate the measures they have adopted to make primary education compulsory and available free for all children.<sup>140</sup> Melchiorre notes that in the light of the Guidelines, states are

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<sup>136</sup> See Decree No. 11/90 of 1 June 1990 authorises private entities to provide educational services in Mozambique

<sup>137</sup> UNESCO (note 130 above).

<sup>138</sup> See section 6.6.1.

<sup>139</sup> Angela Melchiorre (2004) *'At what age? ... are school children employed, married and taken to court?'*, Right to Education Project, 2nd Edition, UNESCO, p 102.

<sup>140</sup> See CRC Committee guidelines for state parties reporting under the CRC, available at <http://www2.ohchr.org/english/bodies/crc/crcs48.htm> (accessed 2 October 2012).

required to indicate the minimum age for enrolment in primary school as well as the minimum and maximum ages for compulsory education.<sup>141</sup> In her view, it means that the absence of clear indication of a minimum and maximum age at which primary school education is compulsory deviates from the aims of the CRC as prescribed in Article 28 requiring states to make primary education compulsory. I submit, therefore, that if children's educational rights are to be advanced, Mozambique needs to adopt a clear age of mandatory attendance of primary school. It should be noted, however, that this does not mean children older than the mandatory age of completion of primary schools should be denied entry to the educational system; instead, they must be protected and enabled to enjoy fully their educational rights protected under the CRC for as long as they remain in the category of persons below 18 years.

It should also be noted that the Mozambican National System of Education Act has no provision making primary education free of charge.<sup>142</sup> This contradicts Article 4 of the CRC, which compels states to adopt all appropriate legislative measures necessary for the implementation of the rights recognised in the Convention.<sup>143</sup> In other jurisdictions, primary education has not been made free in order to preclude the state from acquiring the responsibility of covering the associated costs.<sup>144</sup> However, in the Mozambican context there are no clear explanations as to

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<sup>141</sup> Melchiorre (note 139 above), p 4.

<sup>142</sup> World Bank (2005) *'Mozambique poverty and social impact analysis: Primary school enrollment and retention – The impact of school fees'*, The World Bank, p 1.

<sup>143</sup> See Article 4 of the CRC. See also Sloth-Nielsen (noted 110 above).

<sup>144</sup> Ursula Kilkelly, *'Religion and education: A children's rights perspective'*, paper presented on at the TCD /IHRC Conference on Religion and Education, 10 November 2010, Trinity College, Dublin, available at

why primary education has not been made free of charge in legislation. Clarification of this would be a significant development, in that the country is a civil law jurisdiction where it is difficult to claim constitutionally protected rights unless they are provided for in subordinate legislation that enables easy application of constitutional norms. Further to this, it is the CRC Committee's view that in the absence of legislation endorsing educational principles contained in the CRC, these principles will be unlikely to inform educational policies.<sup>145</sup> In this respect, then, Mozambique has not yet met fully its duty to enact legislation protecting the right in question.

### **6.3.3 Towards converging systems of protection of primary education**

The discussion above shows that Angola and Mozambique are progressing towards systems which are compliant with CRC standards pertaining to the right to primary education.<sup>146</sup> The Angolan experience indicates that the country has widely incorporated these standards in its constitutional provisions: significantly, its Constitution and statutes refer to the entrenchment of the principles of free and compulsory primary education. Mozambique seems to have done the same, and has enacted legislative instruments protecting the right to education, including primary education, even though it is not explicit that it is free.

However, notwithstanding the constitutional and statutory incorporation of the right to primary education, the notion of free primary education still remains foreign to the entire Mozambican normative system. This does not mean that free primary education is not provided for in other

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[http://www.ihrc.ie/download/pdf/kilkelly\\_religion\\_and\\_education\\_a\\_childrens\\_rights\\_perspective.pdf](http://www.ihrc.ie/download/pdf/kilkelly_religion_and_education_a_childrens_rights_perspective.pdf) (accessed 20 October 2012).

<sup>145</sup> See Para. 17 of General Comment No. 1.

<sup>146</sup> See generally section 6.3.

administrative instruments or policy documents; these, nevertheless, must not be seen as legislative instruments. Both countries face challenges in implementing the right to primary education provided in the CRC, given the fact that their domestic laws remain silent about the need to impose duties upon parents to ensure school attendance.<sup>147</sup> In this regard, further legislative review may be needed to advance their educational systems.

#### **6.4 Primary education in policy documents**

The right to education, especially the right to primary education, has been incorporated in several plans and policies focusing on the educational sectors of Angola and Mozambique.<sup>148</sup> The impetus to incorporate the right into domestic policies and government plans began after their independence. To a large extent, this had been motivated due to the pressing need to stimulate domestic growth and reduce the incidence of poverty affecting the majority of these populations. In Angola, for instance, the first years following independence saw the government define the need to promote the educational sectors as one of its main priorities with view to ensure

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<sup>147</sup> See the discussion in section 6.3.2 above.

<sup>148</sup> In the Angolan context these include the Program on National Education for All, the Integrated Strategy for Improving the Education System and the Strategic Plan on HIV/AIDS. In the Mozambican context, examples include the 2012-2016 Plano Estratégico do Ministério de Educação e Cultura, and the 2011-2014 Plano de Acção Para Redução da Pobreza.

sustainable development of the country.<sup>149</sup> Mozambique also adhered to this principle upon the institution of a socialist Marxist system based on educational opportunities for all.<sup>150</sup>

At the birth of independence, both countries were affected by political unrest, with civil wars breaking out in Angola<sup>151</sup> and in Mozambique.<sup>152</sup> Given the conflict situation in these countries, resources (both human and natural) were allocated mainly to the military, with very little attention being given to social sectors such as education, health and culture.<sup>153</sup> Apart from ravaging the economies of these countries,<sup>154</sup> the civil wars had the effect of destroying certain



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<sup>149</sup> Ministério de Educação da República de Angola (2008) '*Evolução da educação e ensino em Angola (2002-2008)*', Ministério de Educação da República de Angola, pp 4-6.

<sup>150</sup> Anna Passos (2009) '*A comparative analysis of teacher competence and its effect on pupil performance in upper primary schools in Mozambique and other SACMEQ countries*', unpublished PHD thesis, Department of Education Management and Policy Studies, University of Pretoria, p 15.

<sup>151</sup> The Angolan war started in 1974-1975. See Assis Malaquias (2000) '*Ethnicity and conflict in Angola: Prospects for reconciliation*', in Jakkie Cilliers, Christian Dietrich (eds.) '*Angola's war economy*', Institute for Security Studies, pp 104-106.

<sup>152</sup> It is believed that in Mozambique the conflict began between 1977 and 1978. See Carrie Manning, Monica Malbrough (2009) '*Learning the right lessons from Mozambique's transition to peace*', *Taiwan Journal of Democracy*, Vol. 5, No. 1, p 78.

<sup>153</sup> Fernando Bilale (2007) '*Educational performance in Mozambique: An economic perspective*', unpublished Master of Economics dissertation, Department of Economics, University of Stellenbosch, p 12.

<sup>154</sup> See for example Tilman Bruck (1997) '*Macroeconomic effect of war in Mozambique*', QEH Working paper series, pp 3-5; copy on file with the author.

basic infrastructure needed for socio-economic development, including educational facilities and hospitals.<sup>155</sup> The wars also impoverished the people of these countries.

The Angolan war ended in 2002 and the conflict in Mozambique in 1992. With the end of the political strife, both countries saw the need to rebuild their economies to improve peoples' lives. As mentioned earlier, education was seen as one of the important tools to improve quality of life and address poverty. Hence, after the wars, government attention was drawn to addressing these issues through educational strategies. These continue to remain a priority, and sustainable policies focusing on education have been adopted and implemented.

One of Angola's<sup>156</sup> prominent policies focusing on education is the National Education for All Programme (NEA) detailing the pathways that the 2001 educational reform must follow until its full implementation in 2015.<sup>157</sup> The country also enacted an Integrated Strategy for Improving the Education System with a view to eliminate gender disparity in the education system by 2015,<sup>158</sup> and a Strategic Plan on HIV/AIDS. Although the latter instrument is related to the health sector, its importance cannot be overstated in a context where a significant number of the

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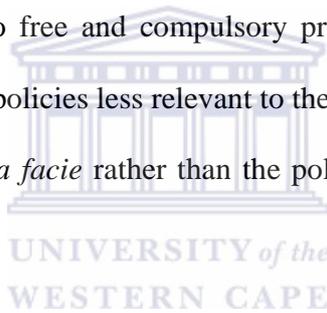
<sup>155</sup> See Jenny Clover (2002) 'Angola's children bearing the greatest cost of war', *African Security Review*, Vol. 11, No. 3, pp 2-5. See also 2012-2016 Strategic Plan for the Ministry of Education and Culture (*Plano Estratégico do Ministério de Educação e Cultura 2012-2016*), Strategic Plan for Education and Culture 2012-2016, pp 3-5.

<sup>156</sup> It should be noted that the educational policies of Angola are complemented by the eleven commitments for children discussed in Chapter 4.

<sup>157</sup> See Para. 212 of Angola's 2010 state party report submitted to the African Commission on Human and People's Rights on the implementation of the ACHPR, p 53 (Angola report to ACHRP), available at [http://www.achpr.org/english/state\\_reports/Angola/Angola\\_report.pdf](http://www.achpr.org/english/state_reports/Angola/Angola_report.pdf) (accessed 23 March 2012).

<sup>158</sup> As above.

population, including professionals in the education sector such as primary teachers, are being affected by the disease.<sup>159</sup> Additionally, Angola approved an ambitious programme, called the Return to School Campaign, which basically seeks to retain children in schools.<sup>160</sup> These policies are together instrumental in advancing education, with the NEA being the main instrument encompassing primary education. However, most of these instruments could not be accessed, except for a few reports submitted to treaty bodies and the country's Strategic Plan on HIV/AIDS, which are available online.<sup>161</sup> Despite their importance, the available reports also lack detail on the content of the policies under consideration, adding further constraints to the extent to which they could be analysed. Of utmost importance, though, is that the right to education, particularly the right to free and compulsory primary education, is covered in the Angolan statutes, thus making the policies less relevant to the current discussion. It is the binding laws that must protect rights *prima facie* rather than the policies, which are mere guidance for state action.



For its part, Mozambique also has various policies relating to education.<sup>162</sup> The main ones focusing on the right to education, especially primary education, are the Action Plan for the

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<sup>159</sup> See Chapter 2, section 2.8 for more details on the problem of HIV/AIDS in Angola.

<sup>160</sup> See Para. 213 of Angola report to ACHRP (note 157 above).

<sup>161</sup> This is despite the author's attempt to obtain the relevant information from the government body responsible for the education sector during a visit to Angola in July 2012.

<sup>162</sup> Amongst others, these include the National Education Policy which establishes the framework for the national education system. This policy document defines the relevant policies for other subsector within the educational system. See Passos for detailed discussion of these instruments in Anna Passos et al (2005) '*The SACMEQ II Project in Mozambique - A study of the conditions of schooling and the quality of education: Mozambique working report*', joint SACMEQ and Ministry of Education of Mozambique, p 7.

Reduction of Poverty (*Plano de Acção para Redução da Pobreza*)<sup>163</sup> and the Strategic Plan for Education and Culture (*Plano Estratégico para a Educação e Cultura*).<sup>164</sup>

The Action Plan for the Reduction of Poverty was subjected to scrutiny in Chapter 4, which discussed policies that affect the rights of children in the two countries, and will hence not be analysed in detail here.<sup>165</sup> However, to recap key points, the Action Plan for the Reduction of Poverty is an ambitious policy tool that seeks to reduce the level of poverty among the Mozambican population to 42% by 2014.<sup>166</sup> The Plan aims to promote employment through provision of training and teaching programmes for the citizens, including children, in order to prepare them for the employment market.<sup>167</sup> In addition, it seeks to ensure human and social development,<sup>168</sup> and with regard to education, makes provision to ensure universal access to primary education, which lasts for a period of seven years. In particular, the Plan envisions the need to rehabilitate and construct new schools, the need to train primary school teachers as well as the need to implement retention strategies for reducing drop-out rates in primary schools. As part of its specific objectives, the Action Plan for the Reduction of Poverty captures the need to extend the supply of electricity to rural areas, especially for primary schools in these areas. It

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<sup>163</sup> 2011-2014 Action Plan for the Reduction of Poverty (*Plano de Acção para Redução da Pobreza 2011-2014*), adopted on 3 May 2011, at the 15th Ordinary Session, Council of Ministers (Action Plan for the Reduction of Poverty 2011-2014).

<sup>164</sup> See Strategic Plan for Education and Culture 2012-2016.

<sup>165</sup> See Chapter 4, section 4.5.2.

<sup>166</sup> See Chapter 4, section 4.5.2.

<sup>167</sup> See Chapter 4, section 4.5.2. See also the Action Plan for the Reduction of Poverty 2011-2014.

<sup>168</sup> Other general objectives of the Action Plan for the Reduction of Poverty 2011-2014 include promoting good governance and ensuring increased productivity in Agriculture and Fishery industries.

further commits the government to ensure distribution of text books free of charge and increase the amount of direct investment to schools.<sup>169</sup> Thus, the Action Plan for the Reduction of Poverty constitutes an important tool to advance the right to education, and renders itself consistent with the CRC to the extent that it embodies the principle of universal access to primary education.

The Strategic Plan for Education and Culture is a rather specific tool focusing on the country's educational strategies, and comprises three main objectives. First, it seeks to expand access to basic education. This includes expansion of primary education services. Second, it envisions the improvement of quality of education services. This seems to imply improving the quality of services provided in all educational institutions, whether public or private, and includes primary schools. Lastly, the Strategic Plan for Education and Culture seeks to strengthen educational institutions, including primary schools, as well as the administrative framework for education in order to ensure effective and sustainable service delivery.<sup>170</sup>

There are close links between the Strategic Plan for Education and Culture and the Action Plan for the Reduction of Poverty of Mozambique discussed above. Both tools promise to strengthen the system of education in the country. Moreover, the two instruments cover, with substantive details, certain cross-cutting issues such as the HIV/AIDS pandemic and gender-related matters.<sup>171</sup> For instance, the Strategic Plan for Education and Culture makes provisions to ensure

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<sup>169</sup> See Action Plan for the Reduction of Poverty 2011-2014, Objective No. 3.

<sup>170</sup> See the Strategic Plan for Education and Culture 2012-2016.

<sup>171</sup> See generally the Strategic Plan for Education 2012-2016 and Culture and the Action Plan for the Reduction of Poverty 2011-2014.

that young girls are able to access and to complete primary education.<sup>172</sup> At the same time, the Action Plan for the Reduction of Poverty commits the government to improve the situation of women in the country.<sup>173</sup> The link between these instruments must be lauded for showing evidence that the values contained in national policies like Action Plan for the Reduction of Poverty are reflected in departmental policies such as the Strategic Plan for Education and Culture (belonging to the Ministry of Education). These show compliance with the principle that national development plans adopted by high level authorities confer higher level authority to policies pertaining to children's rights.<sup>174</sup>

The Strategic Plan for Education and Culture unequivocally adds children with special educational needs to the list of items that it seeks to address.<sup>175</sup> This has the practical effect of creating a platform for implementation of the Convention on the Rights of Person with Disabilities,<sup>176</sup> to which Mozambique is a state party.<sup>177</sup> It will contribute to ensuring that children with disabilities enjoy their educational rights. Therefore, it can be argued that the

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<sup>172</sup> See the Strategic Plan for Education and Culture 2012-2016.

<sup>173</sup> See the Action Plan for the Reduction of Poverty 2011-2014.

<sup>174</sup> This view was expressed by the CRC Committee, which noted that for a national strategy or national plan for children to have authority it must be endorsed at the highest level of government. See Para. 13 of the CRC Committee General Comment No. 5 on General Measures of Implementation of the Convention on the Rights of the Child, UN Doc. CRC/GC/2003/5 (General Comment No. 5).

<sup>175</sup> See generally the Strategic Plan for Education and Culture 2012-2016.

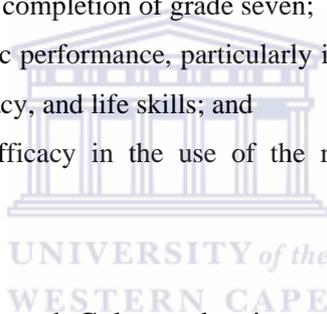
<sup>176</sup> The role of national plans to address challenges caused by disability is emphasised in many studies. For example, see generally Rebecca Yeo, *'Disability, poverty and the new development agenda'*, Disability Knowledge and Research Programme, available at [http://www.dfid.gov.uk/r4d/PDF/Outputs/Disability/RedPov\\_agenda.pdf](http://www.dfid.gov.uk/r4d/PDF/Outputs/Disability/RedPov_agenda.pdf) (accessed 22 November 2012).

<sup>177</sup> Mozambique ratified the Convention in 2012.

Strategic Plan for Education and Culture shows itself as the country's most important policy document covering the formal education subsystem, including pre-school, primary and secondary education, as well as higher education, and education for those with disabilities.

The main objective of the formal education subsystem as defined in the Strategic Plan for Education and Culture, and particular in the domain of primary education, is to guarantee that all children have the opportunity to complete quality basic education of seven grades (1 to 7).<sup>178</sup> To this end, three specific objectives are identified as follows:<sup>179</sup>

- [g]uarantee that every child is enrolled at school at the appropriate age (6 or 7 years) and that the child remains in school until completion of grade seven;
- [i]mprove students' academic performance, particularly in areas concerning the development of key skills in literacy, numeracy, and life skills; and
- [i]mprove efficiency and efficacy in the use of the resources made available for primary education.



The Strategic Plan for Education and Culture also incorporates the notion of free primary education and places on the government the primary responsibility to incur costs related to enrolment of children in primary schools.<sup>180</sup> At least on paper, the objectives of the Strategic

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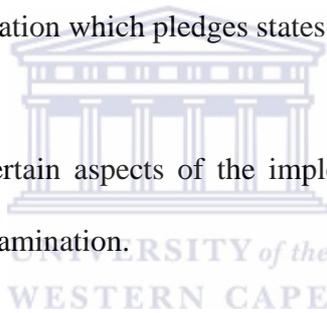
<sup>178</sup> Strategic Plan for Education and Culture 2012-2016, p 57.

<sup>179</sup> As above.

<sup>180</sup> The introduction of a free-of-charge primary educational policy in Mozambique is owed to Ministerial Decree 288/2004 which explicitly introduced a free-of-charge primary school education system. In the previous instrument governing school fees (Ministerial Decree 6/68, of 22 January 1986), fees were compulsory for all pupils. The system then barred attendance of classes without payment of school fees, unless in the event of exceptional situation when learners could be exempted partially or fully from paying school fees for good academic achievement, or if they came from families having more than four children enrolled in schools. Learners who repeated classes were

Plan for Education and Culture and the concept of free primary education clearly commit the Mozambican government to the aims proposed by the CRC standards protecting the right to primary education. However, in practical terms, the current policy framework of Mozambique fails to outlaw the levying of fees, with study costs remaining applicable to cover matters such as extra pay for teachers or broken windows or salaries for guards.<sup>181</sup> This contradicts the objectives the Strategic Plan for Education and Culture discussed above and may need a strong legislative backing to cover the gap. Nevertheless, in most other respects the current policy on primary education is in line with Mozambique's international obligations to the CRC and the African Children's Charter. It is also in alignment with the UNESCO Declaration on Education for All and the Dakar Declaration on Education which pledges states to fulfil this right.

The following section explores certain aspects of the implementation of the right to primary education in the countries under examination.



### **6.5 Some thematic aspects of the right to primary education**

The broader discourse on the right to education covers many issues,<sup>182</sup> but certain of these are more prominent than others. These include, the expenses related to enrolment in primary schools,

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forced to pay an additional 50% of the fees charged for studying. See Bilale for more details in Fernando Bilale (note 153 above), pp 70-71. See also World Bank (note 142 above), p 26.

<sup>181</sup> Fox et al (note 19 above), p 19.

<sup>182</sup> It is observed that there is a general interrelatedness and the imperative classification of the right to education into three categories, namely, the right to education, educational rights, and the right through education. Citing Catrijsse, Taiwo explains that the 'right to education' relates to normative framework on the organisation and the content of education. He further explains that the 'rights in education' (also described as educational rights) refer to those other fundamental rights which impact on the right to education. These include, for example, participation

the minimum age for primary school enrolment and the manner in which primary school discipline is administered. Since a large body of literature focuses on these themes, attention will be devoted to explaining how each of these subjects relates to the right to primary education as protected under the laws and the policies of the two countries under analysis.

Exploring these themes necessitates thorough investigation and *in loco* research,<sup>183</sup> but given that this study is based on desktop research, the dearth of written sources relevant to the two countries restricts the scope of such investigation.<sup>184</sup> As a result, limited information on actual practice can be provided. The information that is indeed contained herein is drawn from materials such as legislation and policy documents, reports from the UN Agencies and other international institutions, concluding observations and recommendations of treaty monitoring bodies, as well as reports from national entities working in the field of education.<sup>185</sup> In addition, subsidiary materials such as media sources have also been consulted where appropriate.

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rights and language rights. Lastly, he argues that the ‘rights through education’ speak to indirect implementation of human rights standards in education. See Taiwo (note 57 above), p 103. See also Catrijsse (first name unavailable) (2000) ‘*Children’s Rights and Education - The Right TO, IN and THROUGH Education: Three Interrelated Imperatives*’, in Eugene Verhellen, ‘*Convention on the Rights of the Child*’, pp 105-111. See further Chitupila (note 8 above), p 163-188.

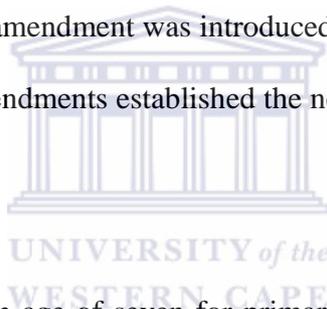
<sup>183</sup> Interviews and on-site analysis could be required, for example.

<sup>184</sup> See Chapter 1 for an account of the methodology used in the study.

<sup>185</sup> The idea of framing the study in these terms is based on a previous study focusing on child trafficking. See Benyam Mezmur, ‘*The sins of the ‘saviours’: Child trafficking in the context of intercountry adoption in Africa*’, Information Document No. 2 for the attention of the Special Commission of June 2010 on the practical operation of the Hague Convention of 29 May 1993 on the Protection of Children and Co-operation in Respect of Intercountry Adoption, p 5, available at <http://www.hcch.net/upload/wop/adop2010id02e.pdf> (accessed 18 October 2012).

### 6.5.1 Minimum age for primary school enrolment

As pointed out above, the rules governing the education systems of Angola and Mozambique set the minimum age for enrolment in primary schools at six years.<sup>186</sup> This represents a significant shift from the four years prescribed in the old law of Angola and the seven years under the old Mozambican laws.<sup>187</sup> Arguably, these changes were motivated by reforms implemented in the educational systems of the two countries. As discussed, the first reform on the educational system of Angola took place in 1978. At that time the old colonial system was outlawed,<sup>188</sup> and the 1978 reform modified numerous elements associated with the colonial system.<sup>189</sup> However, the minimum age for primary school enrolment remained the same (four years), and was changed only much later when an amendment was introduced to the Angolan National System of Education Act. Thus, the 1992 amendments established the new minimum age requirement at six years, and this remains in force.



Likewise, Mozambique's minimum age of seven for primary school enrolment (inherited from the Portuguese colonial administration) was not changed until the 1990's. For most of the period between independence<sup>190</sup> and the early 1990, the minimum age requirement for primary

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<sup>186</sup> Article 5(1) Act No. 6/92 of 6 May 1992 (Amendment of National System of Education Act). See also Para. 306 of Angola's state party consolidated second, third and fourth report submitted to the CRC Committee under Article 44 of the CRC, UN Doc. CRC/C/AGO/2-4.

<sup>187</sup> See Articles 7, 11(5) and 14 (1) of Act No 4/83 of 23 March 1983 (former Mozambican Act on the National System of Education). See also Ministério de Educação de Angola (note 123 above), p 7.

<sup>188</sup> Ministério da Educação, *'Evolução da educação e ensino em Angola (2002-2008)'*, Ministério da Educação, p 4.

<sup>189</sup> See more details in section 6.3.2 above.

<sup>190</sup> Mozambique became independent in 1975.

education remained at seven. Although the educational system underwent its first reform in 1983, it was only in 1991, when the new National System of Education Act was enacted, that the country established the minimum age for primary school enrolment at six years.<sup>191</sup>

The reluctance to change the minimum age requirement during the early stages of reform of the educational systems of these countries was linked mainly to the objectives of these reforms, which were primarily to create educational systems based on equality and opposed to any form of discrimination and oppression. The new socio-economic and political context of these countries mandated the creation of educational systems that allowed everyone to enrol in schools irrespective of their age. I contend that this was partly because the discriminatory colonial administration system left many adult natives illiterate. This accounts for the need to strike a balance in the post-colonial educational reforms by allowing more adults into school than children; it therefore also explains why the minimum age for primary school enrolment initially remained unchanged in the two jurisdictions.

However, in the 1990s Angola and Mozambique ratified instruments containing stringent standards for the promotion and protection of children rights (the CRC and the African Children's Charter included).<sup>192</sup> It is submitted that some of these documents contained standards

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<sup>191</sup> Article 5(1) of Act No. 6/92 of 6 May 1992 as amended in 2001 (Mozambique regulations on the National System of Education).

<sup>192</sup> It was pointed out that Angola and Mozambique ratified the CRC and the African Children's Charter in the 1990s. Angola ratified the CRC and the African Children's Charter in the same year, namely, 1992. Mozambique ratified the CRC in 1994 and the African Children's Charter in 1998. See also Chapter 4, sections 4.2 and 4.3 for more detail on instruments ratified by these countries.

that could have impacted on the educational reform in both countries. For example, the guideline for state parties report under Article 44 of the CRC makes it mandatory for states to provide detailed information about the age of commencement of primary education. Admittedly, these guidelines do not impose legal obligations, but they are authoritative to the extent that they were developed by the body entrusted with monitoring the implementation of the Convention.<sup>193</sup> This could be one of the reasons that led Angola and Mozambique to legislate on the minimum age of enrolment.

In addition, the influence of peers may have led these countries to establish the six-years benchmark for commencement of primary education in their systems. In this regard, a study on primary schooling in Sub-Saharan Africa recorded that 16 out of 26 countries surveyed had a primary school starting age of six.<sup>194</sup> These include Zimbabwe, Madagascar and Malawi, all in the Southern African region, as are Angola and Mozambique. It is possible that the similarities in socio-economic and cultural context (contexts characterised by high poverty rates and large populations of children) affected the minimum age requirements in Angola and Mozambique.

However, notwithstanding legislation and policies providing for commencement of primary education at six, Angola and Mozambique have a large population of children above this age who are not enrolled in primary schools. In 2007 more than 11% of Mozambican girls between

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<sup>193</sup> See Adegbola for insight on the monitoring mandate of the CRC Committee which monitors the implementation of the CRC in Ruth Adegbola (2007) *Children's Rights in Africa: An appraisal of the African Committee of Experts on the Rights and Welfare of the Child*, unpublished LLM dissertation, Centre for Human Rights, University of Pretoria, p 14.

<sup>194</sup> Cynthia Lloyd, Paul Hewett (2003) *Primary schooling in Sub-Saharan Africa: Recent trends and current challenges*, Population Council, Policy Research Division, No. 176, p 8.

the ages of 6-10 were not enrolled in primary school, as compared to the 3% of boys not enrolled. The situation is no different in Angola, where until 2009 about 26.7% of the population between 6-9 years had never attended school.<sup>195</sup> More children are being enrolled into primary schools in both countries, but it is undeniable that many still remain outside schools. This points to huge implementation gaps that need to be addressed to ensure that children enjoy their right to primary education.

### **6.5.2 Expenses for enrolment (and) in primary schools**

The cost of enrolment in primary schools is another thematic area which forms part of the global discussion focusing on the promotion and protection of the right to primary education. Woolman and Fleisch found that a system of school fees prejudices large numbers of learners' access to basic education.<sup>196</sup> In the same vein, a 2003 study highlighted that school fees are a fundamental hindrance to universal primary education.<sup>197</sup> Other studies have also emphasised the importance of implementing a free-of-charge primary school system to ensure that socio-economically vulnerable children have access to school.<sup>198</sup> This shows that the imposition of study fees in the

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<sup>195</sup> See Ministério do Planeamento (2011) *'Inquérito integrado sobre o bem-estar da população (IIBEP): Relatório de Tabelas'*, Ministério de Planeamento, Vol. 2, p 96.

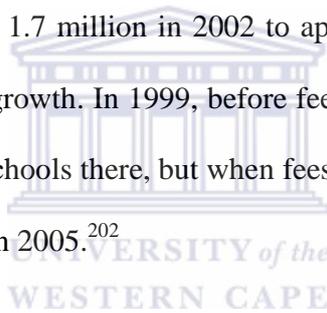
<sup>196</sup> Stu Woolman, Braham Fleisch, *'The Constitution in the classroom: Law and Education in South Africa 1994-2008'*, Pretoria University Law Press (2009), pp 217-218.

<sup>197</sup> Katarina Tomasveski (2003) *'School fees as hindrance to universalisation of primary education'*, Background Study for EFA Global Monitoring Report, pp 1-80; copy on file with the author.

<sup>198</sup> Birger Fredriksen *'Rationale, issues and conditions for sustaining the abolition of school fees'* in The World Bank (2009) *'Abolishing school fees in Africa: Lessons from Ethiopia, Ghana, Kenya, Malawi and Mozambique'*, The World Bank and UNICEF, p 5.

educational system, especially at the primary level, impairs children's enjoyment of their right to education under the CRC.

Examination of the laws and policies of Angola and Mozambique has revealed that the two countries wrote off primary school fees from their systems;<sup>199</sup> it has also shown that these countries embraced new systems based on free primary education.<sup>200</sup> It is submitted that this had the effect of making primary education more affordable for the poor and most vulnerable population of Angola and Mozambique. As a result of this, both jurisdictions experienced a rapid growth in primary school enrolment rates. In Angola, the number of children enrolled in primary schools jumped from an estimated 1.7 million in 2002 to approximately 3.8 million in 2008.<sup>201</sup> Mozambique experienced similar growth. In 1999, before fees were abolished, about 2.3 million children were enrolled in primary schools there, but when fees were abolished, the number almost doubled to an estimated 4 million in 2005.<sup>202</sup>



In line with their commitment to ensure universal free primary education, the governments of Angola and Mozambique have adhered to other commendable initiatives. For instance, both have

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<sup>199</sup> See sections 6.3 and 6.4.

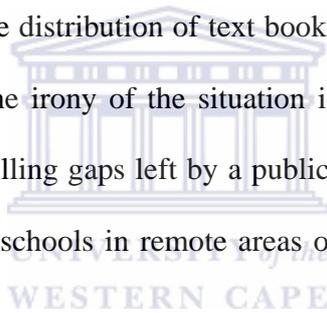
<sup>200</sup> See Law 13/01 of 31 May 2001 of Angola (Angolan law on the national system of education), and Act No. 6/92, dated 6 May 1992 as amended in 2004 of Mozambique (Mozambican law on the national system of education).

<sup>201</sup> Ministério de Educação de Angola (note 149 above), p 16.

<sup>202</sup> See Mozambique Council of Ministers (2006) *Strategic Plan for Education and Culture: make the school a development center for the consolidated Mozambican identity*, Imprensa Nacional de Moçambique, p 25. See also generally Roger Avenstrup (2008) *The experience of Mozambique in Abolishing fees, reducing user cost and providing incentives in primary education: Country Review*, Research report for the Ministry of Education and Culture of Mozambique and the World Bank; copy on file with the author.

pledged, in policy at any rate, to reduce the costs related to primary education by providing textbooks free of charge,<sup>203</sup> a form of assistance given to learners at public schools. Another laudable initiative in Mozambique is the distribution of free meals to encourage learners to remain in schools.<sup>204</sup> The available information suggests that Angola intended adopting a similar programme,<sup>205</sup> but there is no evidence to confirm that it has been implemented. Measures such as these can yield positive results<sup>206</sup> and encourage economically disadvantaged children to stay enrolled in school,<sup>207</sup> so Angola is encouraged to follow the same welcome route as Mozambique.

There are still many pitfalls in the systems of the two countries. For example, only public schools receive support with meals and free distribution of text books, marginalising those children who are in private-sector education. The irony of the situation is that in both countries the private sector plays an important role in filling gaps left by a public sector unable to provide education for all children. Moreover, public schools in remote areas often experience delays in receiving



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<sup>203</sup> In Mozambique, the *Distribuidora Nacional de Mat erial Escolar (DINAME)* is the government agency responsible for distributing text books for primary schools in the country.

<sup>204</sup> See, for example, Conselho Nacional da Crian a (note 14 above), p 71.

<sup>205</sup> As above, p 72.

<sup>206</sup> For example UNESCO categorically stated that '*free primary education should not merely mean exemption from payment of school fees; it should also be extended gradually to include school materials, equipment and text books*'. See UNESCO and its Programme VIII, '*The Right to Education*', p 13, available at <http://unesdoc.unesco.org/images/0013/001331/133113e.pdf> (accessed 21 November 2012)

<sup>207</sup> See Farzana Afridi, '*School meals and child outcomes in India*', paper presented at the IGC-ISI Conference held 20th-21st December 2010, Delhi School of Economics, pp 9-8; copy on file with the author.

materials such as textbooks.<sup>208</sup> In other cases, some public schools are not even included. This defeats the purposes and objectives of the laudable programmes seeking to promote educational opportunities. In addition, learners are expected to cover other basic costs such as transport fares and costs relating to the acquisition of exercise books which are not distributed free of charge.<sup>209</sup> In certain Mozambican rural areas, many children reportedly walk for long distances to access the nearest school,<sup>210</sup> at times arriving late or being unable to attend school when it rains. This indicates that there are still many obstacles to making primary education completely free. Considerable attention needs to be devoted to overcoming them, this in the context of countries where the majority of the population live below the poverty line defined by the World Bank.

Furthermore, reports have highlighted cases of corruption involving staff in the education system of Mozambique.<sup>211</sup> For instance, parents are forced to pay bribes to school staff in order to secure places for their children.<sup>212</sup> The situation is no different in Angola, where unlawful charges of up to USD 600 may be imposed on parents to facilitate school enrolment for their children.<sup>213</sup> This again is another pitfall which impairs the realisation of the right to education. It is even worse for

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<sup>208</sup> See UNESCO website at [http://www.unesco.org/education/wef/countryreports/mozambique/rapport\\_1\\_2.html](http://www.unesco.org/education/wef/countryreports/mozambique/rapport_1_2.html) (accessed 5 March 2012)

<sup>209</sup> As above.

<sup>210</sup> Instituto Internazionale Maria Ausiliatrice (note 16 above), p 4.

<sup>211</sup> Newspaper article published on allAfrica Magazine, 4 January 2012, available at <http://allafrica.com/stories/201201050328.html> (accessed 7 March 2012).

<sup>211</sup> Details at ANGONOTÍCIAS at <http://www.angonoticias.com/Artigos/item/8024> (accessed 29 March 2012).

<sup>212</sup> As above.

<sup>213</sup> Details at ANGONOTÍCIAS at <http://www.angonoticias.com/Artigos/item/8024> (accessed 29 March 2012).

children whose parents or guardians are unable to afford or to pay such illicit costs. Therefore, it is submitted that anything falling short of making this level of education completely free in both countries would amount to a violation of the obligation to provide free primary education under the ICESCR, ICRC and the African Children Charter. These instruments have clear provisions in this regard which must be taken seriously in order to ensure that universal primary education for children is achieved.

### **6.5.3 Corporal punishment in the school environment**

The interface between corporal punishment and the right to education is also a thematic area that has received substantial attention in children's rights literature. A few authors have argued that at times, depending on the cultural environment, applying corporal punishment to discipline children can be useful to adjust their behaviour.<sup>214</sup> By contrast, the majority of writers have maintained that corporal punishment negatively affects the development and well-being of children<sup>215</sup> in that it can cause bodily harm or physical injuries and physiological or mental damage to the child.<sup>216</sup> Notably, however, corporal punishment, at times also referred to as

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<sup>214</sup> See, for example, Jennifer Landsford (2010) 'The special problem of cultural differences in effects of corporal punishment', *Law and Contemporary Problems*, Vol. 73, No. 89, pp 89-106.

<sup>215</sup> Dorine Coleman, Kenneth Dodge, Sarah Campbell (2010) 'Where and how to draw the line between reasonable corporal punishment and abuse', *Law and Contemporary Problems*, Vol. 73, No. 107, pp 107-165; Elizabeth Gershoff (2010) 'More harm than good: A summary of scientific research on the intended and unintended effects of corporal punishment on children', *Law and Contemporary Problems*, Vol. 73, No. 31, pp 31-56. See also generally Elizabeth Smith (2009) 'A survey of the occurrence and the effects of corporal punishment on children in the home', unpublished LLM dissertation, University of South Africa.

<sup>216</sup> Heather Turner, Paula Muller (2004) 'Long-term effects of child corporal punishment on depressive symptoms on young adults: Potential moderators and mediators', *Journal of Family Issues*, pp 761-782. See also Gershoff (note 215 above), pp 31-56.

physical punishment, is a phenomenon that falls within the broader category of practices termed ‘violence against children’.<sup>217</sup> Corporal punishment entails ‘*any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however, light*’.<sup>218</sup> According to the CRC Committee these include ‘smacking’, ‘slapping’, and ‘spanking’ of children, and it may involve kicking, shaking or throwing them or inflicting on them other less humane forms of punishments.<sup>219</sup>

Several soft law and other jurisprudential sources have emphasised that no violence against children is justifiable, thereby underlining the complete unacceptability of violent punishment of children.<sup>220</sup> Further to this, the CRC also contains provisions speaking to the problem of corporal punishment. These prohibit all violent practices inflicted on children, including both mental and physical punishment. Thus, Article 19(1) of the CRC provides that:<sup>221</sup>

[s]tate parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

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<sup>217</sup> Other forms of violent practice which can be inflicted against children include torture. See Para. 24 of CRC Committee General Comment No. 13 on the Right of the Child to Freedom from all Forms of Violence, UN Doc. CRC/C/GC/13/2011 (General Comment No. 13).

<sup>218</sup> See Para. 11 of CRC Committee General Comment No. 8 on the Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment, UN Doc. CRC/GC/8 (General Comment No. 8).

<sup>219</sup> As above.

<sup>220</sup> For example, Para. 1 of the Report of the Independent Expert for the United Nations study on violence against children, UN Doc. A/61/299.

<sup>221</sup> See Article 19(1) of the CRC.

This provision is complemented by several other provisions, such as Article 9 which relates to the separation of children from parents following abuse and neglect, and Article 20, which bans any form of violence against children when they are placed in settings of alternative forms of care.<sup>222</sup>

Article 28(2) of the Convention is the key provision relating to violence in the school setting, enjoining states to adopt all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity. In interpreting this provision the CRC Committee observed that states are required to explicitly prohibit:<sup>223</sup>

(...) corporal punishment and other cruel or degrading forms of punishment in their civil or criminal legislation (...) in order to make it absolutely clear that it is unlawful to 'hit' or 'smack' or 'spank' a child (...)

Emphasis is placed on the prohibition of use of corporal punishment. The Committee further reiterated the need for state to ensure that applicable sectoral legislation, including family law and education law, must clearly prohibit its use in the relevant settings.<sup>224</sup> In interpreting Articles 19 and 28(2) of the CRC, the CRC Committee asserted that addressing the widespread acceptance or tolerance of corporal punishment of children and eliminating it is an obligation

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<sup>222</sup> Article 19 of the CRC is further strengthened by Article 24(3) of the CRC (protection against harmful practices), Article 34 of the CRC (protection against sexual labour), and Article 37 of the CRC (protection from torture, inhuman or degrading treatment or punishment).

<sup>223</sup> Paras. 12-13, 26-29, and 34 of General Comment No. 8.

<sup>224</sup> Paras. 35 of General Comment No. 8.

under the Convention. The Committee further observed that addressing these problems is also a key strategy for reducing and preventing all forms of violence in the societies.<sup>225</sup>

But despite the Committee's appeal there are few cases where domestic norms, particularly African national laws, have outlawed the use of corporal punishment within the school environment.<sup>226</sup> Kenya is one of the African countries with domestic laws banning the corporal punishment in the school setting.<sup>227</sup> Many arguments have been put forward to explain the failure of states to enact legislation prohibiting this practice. For example, it has been contended that corporal punishment is a historically accepted form of socialisation in homes and in schools;<sup>228</sup> it has also been defended on the grounds that it is part and parcel of vital cultural and religious norms and must thus be upheld rather than legislatively abolished.<sup>229</sup>

In Angola and Mozambique in particular, corporal punishment remains unregulated despite the fact that both countries have several reported cases of violence committed against children, especially corporal punishment occurring in school settings.<sup>230</sup> In the Mozambican context,

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<sup>225</sup> Para. 3 of General Comment No. 8.

<sup>226</sup> As at November 2012, a total of 33 countries enacted laws outlawing corporal punishment. See Adam Zolotor, Megan Puzia (2010) 'Bans against corporal punishment: A systematic review of the Laws, changes in Attitudes and Behaviour', *Child Abuse Review*, Vol. 19, pp 229-247.

<sup>227</sup> See Article 53(1) of Constitution of Kenya enacted in 2010.

<sup>228</sup> Robert Morrell (2001) 'Corporal punishment in South African schools: A neglected explanation for its persistence', *South African Journal of Education*, Vol. 21, No. 4, p 1.

<sup>229</sup> Para. 29 of General Comment No. 8.

<sup>230</sup> See generally Save the Children (2009) '*Ending corporal punishment of children*', Save the Children Sweden, Pretoria; and Angolan Deputy Ombudsman's report on '*the problem of violence committed against children in*

attempts to address the problem were made through the adoption of a ministerial dispatch that prohibits the use of corporal punishment in schools. It was expected that this would help solve the problem throughout the education system. Furthermore, the National Teachers Association (*Organisação Nacional dos Professores*) endorsed a Teachers Code of Conduct which bans this practice in schools. However, in the light of evidence pointing to the prevalence of the problem, these initiatives need backing by legislative action to ensure enforcement. Apart from the measures mentioned, the current situation in the two countries falls short of their obligations under the CRC.

## **6.6 An overview of challenges in the realisation of the right to primary education**

The realisation of the right to primary education in Angola and Mozambique faces various obstacles. Many factors influence the quality of primary education<sup>231</sup> in these countries, for example, the lack sufficient educational institutions and the insufficient investment in the education sector.<sup>232</sup> In addition, the high levels of poverty experienced by Angola and

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*public and private entities*', available at <http://allafrica.com/stories/201112150474.html> (accessed 3 April 2012). See also Paras. 32-33, and 36-37 of the CRC Committee Concluding Observations and Recommendations on Angola first state parties reported under Article 44 of the CRC, UN Doc. CRC/C/15/Add.246.

<sup>231</sup> It is noted that it is very difficult to describe what quality of education means. However, UNESCO contends that factors such as class size, availability of textbooks and access to textbooks can impact on learning. Further details available at <http://www.uis.unesco.org/Education/Pages/default.aspx> (accessed 11 June 2012).

<sup>232</sup> For detail on the impact of funding on the quality of education, see generally Lorrette Arendse (2011) 'The school funding system and its discriminatory impact on marginalized learners', *Law Democracy & Development*, Vol. 15, pp 339-360. See also Sloth-Nielsen et al (note 46 above), pp 10-14.

Mozambique further aggravate the inability of learners to access primary education.<sup>233</sup> As pointed out in Chapter 2, the realisation of the right in consideration is also conditioned by the cultural practices and religious beliefs of communities in the two countries.<sup>234</sup> In certain of these, girls by custom are forced to marry at an early age,<sup>235</sup> a practice which forces many children to abandon the educational cycle. As a result, the duties of these countries to ensure the realisation of children's right protected in instruments such as the CRC and the African Children's Charter are negatively affected. The next section discusses some common challenges that both countries face.

### 6.6.1 Investments in primary education

Looking at the amount of resources spent on education helps one to assess whether a government is committed or not to the realisation of the right to primary education,<sup>236</sup> as it is held that the amount of investment in education impacts directly on its quality.<sup>237</sup>

Initially the amount of expenditure on education in Angola and Mozambique was very little. Although detailed information in this regard could not be obtained, it is reasonable to believe that civil war was the major reason why these countries had little to invest in their education sectors.

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<sup>233</sup> Louise Fox, Elena Bardasi, Katleen Broeck (2005) '*Poverty in Mozambique: Unraveling changes and determinants*', Africa region Working Paper Series No. 87, p 1-2, available at <http://www.worldbank.org/afr/wps/wp87.pdf> (accessed 14 October 2012).

<sup>234</sup> See Chapter 2, sections 2.4 and 2.5.

<sup>235</sup> As above. See also <http://www.uis.unesco.org/Education/Pages/default.aspx> (accessed 11 June 2012).

<sup>236</sup> Elijah Taiwo (note 57 above), p 141.

<sup>237</sup> See generally Arendse (note 232 above).

Nevertheless, slight increases in the amounts invested in the education were recorded when the political conflicts affecting them ended. For example, it was found that since 2004, the Angolan education sector recorded gradual increments in funds. Starting from an approximate figure of USD 3.639.246.270 in 2004, a total estimate of USD 16.977.223.196 was invested in 2009.<sup>238</sup> Recent statistics show progressive trends in investment in the educational sector. As at 1997, Mozambique invested 10.7% of its budget on education, about 38% of which was given to primary education.<sup>239</sup> In 2003 only 3.4% of the country's Gross Domestic Product (GDP) went to the educational sector, primary education included.<sup>240</sup> A slight increase was recorded in 2007, with about 5.2% of the GDP going to education – a figure which is lower than the 7% commitment which the government made in Dakar.<sup>241</sup> In 2011, Mozambique was ranked among the three low-income African countries most committed to budgeting for its children, with Angola featuring among high-income countries that performed the least.<sup>242</sup>



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<sup>238</sup> Conselho Nacional da Criança (note 14 above), p 69.

<sup>239</sup> Para 449 of Mozambique combined initial and second state party report submitted to the CRC Committee under Article 44 of the CRC, UN Doc. CRC/C/41/Add.11.

<sup>240</sup> Anna Passos et al (note 162 above), p 6.

<sup>241</sup> The African Child Policy Forum (2011) *The African report on child wellbeing: Budgeting for children: Mozambique country brief*, The African Child Policy Forum, p 2. For more details on the Dakar commitments, see Dakar Framework for Action on Education for All, adopted by the World Education Forum, Dakar, Senegal, 2000.

<sup>242</sup> See The African Child Policy Forum (2011) *The African report on child wellbeing 2011: Budgeting for children*, The African Child Policy Forum, p 15.

In 2006 Angola invested 2.6% of its GDP in the educational sector, while 5% was invested in Mozambique.<sup>243</sup> Notably, however, until 2012 neither Angola nor Mozambique had reached the benchmark established under the Dakar Framework for Action on Education, which enjoins states to invest at least 7% of their GDP on education.<sup>244</sup> In addition, no funds are given to the private sector, which is directly involved in providing education in Mozambique.<sup>245</sup> I submit that this undermines the extent to which these countries will be able to fulfil their duties to ensure access to universal free and compulsory primary education as protected under the CRC. Children will continue being victimised until the situation improves.

### 6.6.2 Infrastructure

Shortages of schools and the prevalence of inadequate teaching institutions also impair the realisation of the right to primary education in Angola and Mozambique. The number of pupils of primary-school-going age is fast increasing, yet there are few schools to accommodate this rapidly growing population. Between 1992 and 2004, the number of primary schools in Mozambique more than tripled due to coordinated actions of the government and its development partners.<sup>246</sup> Similarly, in Angola more primary schools are being built, with the current figures showing encouraging prospects. However, there are many other growing

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<sup>243</sup>Information available at [http://www.indexmundi.com/mozambique/demographics\\_profile.html](http://www.indexmundi.com/mozambique/demographics_profile.html) (accessed 19 October 2012).

<sup>244</sup> Daudet Yves, Singh Kishore (2001) *The right to education: An analysis of UNESCO standard setting instruments*, UNESCO, pp 80-87.

<sup>245</sup> Bilale (note 153 above), p 64.

<sup>246</sup> Many schools were built with aid obtained from donor agencies. See details at UNICEF website at [http://www.unicef.org/mozambique/children\\_1594.html](http://www.unicef.org/mozambique/children_1594.html) (accessed 6 March 2012).

concerns affecting the two countries, including lack of water and separate latrines for boys and girls and unsuitable infrastructures for children with disabilities.<sup>247</sup> Many schools were built in the colonial era and are now in need of rehabilitation.<sup>248</sup> It was also found that there is a general shortage of equipment. For example, a 2012 study placed these two jurisdictions in the category of Sub-Saharan countries that have an estimated primary school population of more than 2.5 million pupils without a classroom desk.<sup>249</sup> If primary education is to be made meaningful, the countries need to focus on these obstacles to improve the situation. It is submitted that by addressing these problems, these countries will be able to implement quality education in an environment that is acceptable and conducive for learners.<sup>250</sup>

### 6.6.3 Problems relating to school staffing

The education systems of Angola and Mozambique are faced with a shortage of staff. Available information indicates that in some provinces in Angola the pupil-teacher ratio may vary between 30 to 100 primary school children for every one primary school teacher.<sup>251</sup> The situation is little different in Mozambique, where the teacher-student ratio recorded in 2010 stood at 58.49 for

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<sup>247</sup> Further details at UNICEF website at, [http://www.unicef.org/mozambique/children\\_1594.html](http://www.unicef.org/mozambique/children_1594.html) (accessed 6 March 2012).

<sup>248</sup> See Conselho Nacional da Criança (note 14 above), p 71.

<sup>249</sup> This information is available at <http://www.tutodesk.org/tutodesk/sites/default/files/files/Tutodesk%20Africa%20Maps%20%28April%202012%20Landscape%20layout%29.pdf> (accessed 15 October 2012).

<sup>250</sup> For details on acceptable quality of education see generally CESCR General Comment No. 13.

<sup>251</sup> More details at <http://education.stateuniversity.com/pages/40/Angola-TEACHING-PROFESSION.html> (accessed 27 March 2012).

every primary school teacher.<sup>252</sup> In 2009, the CRC Committee stressed that despite the rapid increase in the school enrolment rate, the teacher-student ratio had not decreased to an acceptable level in Mozambique.<sup>253</sup> This also affects the quality of education.

Given the shortage of staff, primary school teachers' workloads in Mozambique have doubled or trebled;<sup>254</sup> in Angola, a tripartite shift-system is also being implemented in primary schools,<sup>255</sup> a system which, it is submitted, impairs the quality of education because teachers do not have sufficient preparation time and their classes are too short for proper instruction to take place. The current situation calls for the construction of more schools or at least an increase of staff capacity to ensure that children can stay long enough to learn the basic skills. It also points to the need to assign teachers to specific work shifts in order to increase productivity. Moreover, the number of children in the classrooms has increased, the average being one teacher to 74 pupils, which makes it difficult for teachers to give detailed attention to each and every child's work.<sup>256</sup> This

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<sup>252</sup> Information available at <http://www.indexmundi.com/facts/mozambique/pupil-teacher-ratio> (accessed 28 March 2012). See also *2009 Relatório da Revisão Periódica Universal de Moçambique – Conselho de Direitos Humanos ONU*, prepared by Organizações da Sociedade Civil de Moçambique, p 6; copy on file with the author.

<sup>253</sup> More details available on CRIN website at <http://www.crin.org/resources/infodetail.asp?id=23877> (accessed 20 June 2012).

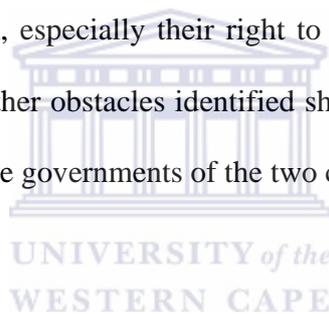
<sup>254</sup> See Para. 457 of Mozambique combined initial and second state party report submitted to the CRC Committee under Article 44 of the CRC, UN Doc. CRC/C/41/Add.11.

<sup>255</sup> This is understandable, to some extent, given the commitment of Angola and Mozambique to ensure that every child has access to primary school education. See also Ministério de Educação, '*Programa empreendedorismo no currículo do ensino secundário*', Ministério de Educação (2008), p 3.

<sup>256</sup> See details at UNICEF website at <http://www.unicef.org/mozambique/education.html> (accessed 6 March 2012). See also Conselho Nacional da Criança (note 14 above), p 74.

undermines the quality of education that learners receive, their ability to develop basic skills, and the implementation of children's educational rights protected in the CRC.

Another striking fact is that many primary school teachers do not have adequate training. In Angola, for instances, about 75% of the total number of primary school teachers have only completed four to six years of school.<sup>257</sup> In Mozambique, the number of primary school teachers with training is estimated at 58%,<sup>258</sup> the remaining being under-qualified.<sup>259</sup> As a result of these various problems, it has become a common trend in these countries for learners to complete primary education without being able to read or write.<sup>260</sup> I submit that this situation violates children's right to basic education, especially their right to primary education under the CRC. Addressing this problem and all other obstacles identified should be seen as a matter of priority requiring speedy intervention by the governments of the two countries.



## 6.7 Conclusions

This chapter considered how the right to primary education protected under international law, especially the CRC, is reflected in the domestic norms and policies of Angola and Mozambique. It expounded on the significant steps that have been taken to ensure that every child enjoys his or

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<sup>257</sup> See details at <http://education.stateuniversity.com/pages/40/Angola-TEACHING-PROFESSION.html> (accessed 27 March 2012).

<sup>258</sup> Information available at UNICEF website at [http://www.unicef.org/mozambique/children\\_1594.html](http://www.unicef.org/mozambique/children_1594.html) (accessed 4 April 2012).

<sup>259</sup> See Passos et al (note 162 above), p 9.

<sup>260</sup> Details available at UNICEF website at <http://www.unicef.org/mozambique/education.html> (accessed 6 March 2012).

her right to primary education, steps evident in the wide recognition given to this right in the domestic laws and policies.

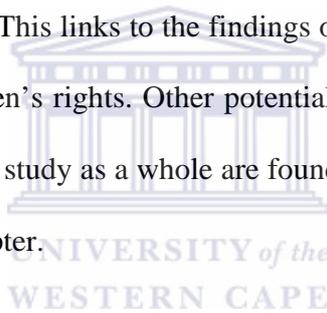
However, the chapter also highlights the ambiguities and gaps that prevent children from enjoying their rights, and posits that despite commendable progress, the laws of Angola and Mozambique remain weak as they have no provisions compelling parents to send their children to school, a situation at odds with the requirement of compulsory primary education protected under the CRC. In addition, the laws of Mozambique fail to embrace the principle of free-of-charge education. This reflects lack of legislative incorporation of all 4-A typology standards associated with the right under analysis. To be precise, the lack of incorporation of the principle of free-of-charge education under the Mozambique legal framework on the right to education trumps on the need to provide accessible education for all. This was demonstrated by the fact that children living in rural areas in Mozambique miss out on educational opportunities because schools are not accessible to them as these are placed far from their homes geographically.

There are further constraints to enjoyment of the right to primary education. The laws and policies of Angola still show many disjunctions with the practical situation on the ground. In addition to the finds reflected here, other tangible results can be obtained by employing an empirical methodology to assess the situation of the countries under the study. Although the empirical method was not used in this study, it was found that on a practical level many children of school-going age are not enrolled in primary school in these countries. This was partly attributed to the financial burden of sending children to school, at the same time that it was explained by reference to lack of sufficient educational infrastructure. Moreover, there are

problems with staffing and investments in the educational sector which affect the quality of educational services.

In short, while the laws and policies are moving into closer alignment with the standards of the CRC, their implementation in practice lags behind significantly. Both countries thus need to strengthen their practical actions in order to ensure the delivery of children's rights protected in the CRC and, by extension, their compliance with their obligations under the Convention.

One way of improving matters is by conducting effective monitoring of the education systems, especially at primary school level. This links to the findings of Chapter 4, which call for stronger mechanisms for monitoring children's rights. Other potential solutions to some of the problems identified in this chapter and in the study as a whole are found in the recommendations discussed in the next – and concluding – chapter.



## CHAPTER 7

### RECOMMENDATIONS AND CONCLUSION

#### 7.1 Introduction

This study is an enquiry into the implementation of the United Nation Convention on the Rights of the Child (CRC) in two Portuguese-speaking African countries, namely, Angola and Mozambique. It fits within the context of international, regional and national debates focusing on the implementation of child rights instruments, specifically the CRC. The study has contributed to these debates in various ways by arguing that the implementation of the Convention is an important step for the realisation of children's rights.

Several themes were explored, including the general measures required for implementing the CRC,<sup>1</sup> the policies and the laws of Angola and Mozambique,<sup>2</sup> and the administrative and institutional measures for implementing the Convention as adopted by these countries.<sup>3</sup> The chapters examining these matters draw clear conclusions, make recommendations about the challenges obstructing the implementation of the Convention, and highlight the need to address these challenges. The purpose of this present chapter is to conclude the study.

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<sup>1</sup> See Chapter 3, section 3.7.

<sup>2</sup> See generally Chapters 4 and 6.

<sup>3</sup> See generally Chapters 5 and 6.

Since the bedrock of the study is to investigate the implementation of CRC in Angola and Mozambique,<sup>4</sup> it is essential first to consider why the Convention is important for them and then assess whether they have given effect to the Convention's standards. In order to achieve this I return to the discussions in the previous chapters. I discuss the findings showing the progress achieved thus far and the gaps still remaining. Further, I highlight recommendations which in my view constitute some of the solutions needed and point to the way forward to advance children's rights in Angola and Mozambique. I also provide insight into future research work that is needed to develop the findings discussed in this study. Finally, in the conclusion of the chapter, I reiterate that Angola and Mozambique have advanced substantively in providing for their children, especially after ratifying the CRC, but that a lot more needs to be done.

## **7.2 The relevance of the Convention in relation to the study countries**

Chapter 3 provided a substantive discussion of the standards contained in the CRC and the framework for the implementation of the Convention.<sup>5</sup> It further highlighted the existence of instruments regulating children's rights predating the Convention. The chapter argued that the major weakness of some of these instruments was that either they lacked the necessary binding character to give effect to their standards or lacked a comprehensive approach to children's rights matters. These weaknesses defeated the extent to which these instruments could be used to advance children's rights, and thus, opened space for the adoption of the CRC.

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<sup>4</sup> See Chapter 1, sections 1.2-1.5.

<sup>5</sup> See generally Chapter 3.

The main reason behind the adoption, in 1989, of the CRC was to ensure effective implementation of children's rights as binding international law norms.<sup>6</sup> In this regard, the Convention added two elements to the dimension of instruments that predated it. First, it made it mandatory for states parties to implement the rights recognised in the Convention. To this end, the CRC was conceived as a binding document. Many years after the adoption of the Convention, the obligation to implement its standards was supported by CRC Committee in General Comment No. 5 to provide guidance to states on how to fulfil their duties under the Convention.<sup>7</sup> Second, the comprehensive approach to children's rights as reflected in the CRC filled the gaps in the binding instruments predating the Convention which lacked this approach.

Consequently, the Convention occupies, in relation to all states and particularly the countries under study, an important position in the rank of international law instruments envisaging the promotion and protection of children's rights, and serves as the yardstick for domestic standard setting on matters concerning the subject. This means that if any of these countries envisages achieving the realisation of children's rights, they must comply with the standards of the CRC to address the barriers obstructing the realisation of these rights.

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<sup>6</sup> See also Kaime arguing in this regard in Thoko Kaime (2010) 'Vernacularising' the Convention on the Rights of the Child: Rights and culture as analytic tools', *The International Journal of Children's Rights*, Vol. 18, No. 4, p 638.

<sup>7</sup> See generally Committee on the Rights of the Child (CRC Committee) General Comment No. 5 on the General Measures of Implementation of the Convention on the Rights of the Child, UN Doc. CRC/GC/2003/5 (General Comment No. 5).

### **7.3 Defining progress and the gaps in the countries under examination**

The study clearly demonstrated, at least in respect to the two countries discussed, that states are moving towards the realisation of children's rights. I will come back to discuss the extent to which this is happening in Angola and Mozambique.<sup>8</sup> However, in the meantime, there is no doubt that progress has taken place ever since the CRC was ratified by these countries.

Evidence of progress is the fact that in response to the obligations under the CRC, the two countries under examination incorporated children's rights provisions in their Constitutions and enacted domestic laws (child welfare and juvenile justice laws) encompassing numerous principles embedded in the Convention. Reference was made to the domestication of the four principles (namely, best interest, non-discrimination, the child's right to participate, and the right to life survival and development) forming the soul of the CRC.<sup>9</sup> Mention was also made of the fact that substantive socio-economic rights for children such as the right to education<sup>10</sup> and the right to health<sup>11</sup> gained recognition in the child-welfare statutes of Angola and Mozambique. Importantly, the domestic laws and policies in other areas overlapping with children's rights, including family law statutes, domestic violence laws and the national action plans for children, also reflect the standards of the CRC.<sup>12</sup> This has the effect of promoting compliance with those

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<sup>8</sup> See section 7.7 below.

<sup>9</sup> Save the Children UK South Africa Programme (2006) *'Legal and policy frameworks to protect the rights of vulnerable children in Southern Africa'*, Save the Children, p 8.

<sup>10</sup> See generally Chapter 6, section 6.3.2.

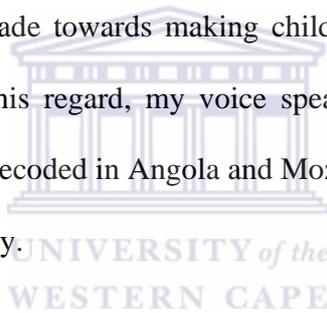
<sup>11</sup> See Chapter 4, section 4.5.2.

<sup>12</sup> See generally Chapter 4, section 4.6.

principles and standards, and furthers the possibilities for children's rights to flourish in the two jurisdictions.

Progress shown in Chapter 5 pointed to the establishment of mechanisms for the coordination of implementation of children's rights as well as to the creation of institutions capable of monitoring the implementation of these rights. The role of the judiciary, and particularly institutions with specialised jurisdiction to administer justice for children, was also assessed.

In the light of the above factors, I am compelled to concur with Sloth-Nielsen who asserts that considerable progress has been made towards making children's rights visible in a variety of domains on the continent.<sup>13</sup> In this regard, my voice speaks conspicuously in regard to the advancements of children's rights recoded in Angola and Mozambique as detailed throughout the various chapters of the present study.



Nevertheless, there are major implementation gaps remaining on the ground. For example, it was substantively demonstrated in Chapters 4 and 6 that the Angolan and Mozambican laws focusing on children's rights were either weak in certain domains or silent about certain aspects of the CRC. In respect of the weaknesses, for example, despite making primary education compulsory, the laws of Angola and Mozambique missed out by not placing obligations on parents and guardians to ensure that their children attend schools.<sup>14</sup> In relation to other gaps, it was seen that

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<sup>13</sup> Julia Sloth-Nielsen 'Children's rights and the law in African context: An introduction' in Julia Sloth-Nielsen (ed.) 'Children's rights in Africa: A legal perspective', Ashgate (2008), p 4.

<sup>14</sup> See Chapter 6, section 6.3.2.

the laws of these countries have no provisions regulating inter-country adoption and banning harmful cultural practices such as female genital mutilation. Furthermore, the laws of these countries lack provisions regulating access to contraceptives for children, and they do not stipulate if children need or do not need parental consent for HIV testing, which are aspects that fall within the right to health covered in Article 24 of the CRC.

Also, policy implementation and institutional measures were generally weak owing to factors such as lack of adequate budgetary allocation,<sup>15</sup> under-staffing and lack of qualified professionals in the education and social welfare sectors of both countries. Additionally, despite the fairly strong composition of Mozambique institutions tasked with coordination and monitoring of children's rights, their mandates are relatively weak.<sup>16</sup> In case of Angola, the bodies tasked with human rights monitoring, especially the State Department for Human Rights, have a deficient compositional structure lacking representation by civil society and thus undermining their role in the promotion of children's rights. These gaps need to be addressed. However, certain similarities, some differences as well as advantages can be found by comparing specific aspects in the two countries.

#### **7.4 Comparing the situational position in the countries under examination**

At the level of legislative measures the two countries under examination have done fairly well, with both of them having enacted specific laws covering children's rights in addition to other

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<sup>15</sup> See Chapter 6, section 6.6.1.

<sup>16</sup> See Chapter 5, section 5.3.3.

sectoral laws overlapping with the interests of children.<sup>17</sup> Angola, however, still lacks a comprehensive law covering anti-trafficking.<sup>18</sup>

In relation to the policy measures, the study revealed that Mozambique lies far ahead of Angola. It has considerably clear policies covering the advancement of children's rights in various domains, including the state budget, the national action plan for children, and a poverty reduction strategy.<sup>19</sup> Angola, despite having a state budget covering areas pertaining to children's interests,<sup>20</sup> lacks a policy for orphans and vulnerable children, and needs to consolidate actions envisaging the reduction of poverty in order to promote the realisation of children's rights.

Lastly, the Angolan and Mozambican administrative and institutional measures envisaging the implementation of the CRC were similar in many ways. The study showed varying compositional structures of the institutions tasked to coordinate and monitor implementation of children's rights in Angola and Mozambique. However, the similar mandates and nature of decisions of these bodies lead to comparable results. Examples were given of the Angolan *Conselho Nacional da Criança* (CNAC) which coordinates actions regarding the implementation of policies and initiatives affecting children, and the Mozambican National Council for Child

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<sup>17</sup> See Chapter 4, sections 4.3-4.6.

<sup>18</sup> See Chapter 4, section 4.6.3.

<sup>19</sup> See generally Chapter 4 section 4.7.

<sup>20</sup> See Chapter 4, section 4.7.1.

Rights (CNDC) tasked with a similar mandate.<sup>21</sup> It was said that both institutions were good vehicles to advance children's rights but had gaps that needed to be addressed.

The bodies tasked with the administration of justice for children in these countries were also similar even though they were created and placed under different institutions. For example, it was said that Angola has special sections tasked with children's matters functioning under the ordinary court structure, while Mozambique created a specialised court system separate from other courts to deal with these matters.<sup>22</sup> However, in both systems there were many challenges, including lack of skilled staff, shortage of infrastructures and the fact that courts make limited use of international law instruments such as the CRC.<sup>23</sup> I reiterate that these challenges limit the extent to which children's rights can flourish in these jurisdictions, and again advocate for the need to address them. The next section provides some suggestions and makes recommendations, which in my view can help to the advance children's rights in the two countries discussed.

### **7.5 Way forward for the realisation of children's rights in Angola and Mozambique**

The protection of human rights requires states to take certain measures to ensure that rights-bearers enjoy their rights.<sup>24</sup> In the same vein, the realisation of children's rights protected in the

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<sup>21</sup> See Chapter 5, section 5.2.2.

<sup>22</sup> See Chapter 5, section 5.4.2.

<sup>23</sup> See generally Chapter 5, section 5.4.3.

<sup>24</sup> See Lilian Chenwi 'Towards the abolition of the death penalty in Africa: A human rights perspective', Pretoria University Law Press (2007), p 210.

CRC compels states to adopt measures ensuring that children enjoy their rights effectively.<sup>25</sup> In this regard, the following recommendations are made, and are geared towards addressing the challenges obstructing the implementation of the CRC.

### **7.5.1 Legislative enactment and law reform**

The first recommendation is that Angola and Mozambique must take immediate steps to make their children's rights statutes fully operational and the second is that both countries must consider undertaking further law reforms.

In regards to the first recommendation, the findings in Chapter 4 revealed a lack of regulations to facilitate the implementation of the statutes in these countries. This has a negative impact on the implementation of children's rights and contradicts the principle that the ultimate test for any legal system purporting to deal with human rights (children's rights included) is the difference it makes to the lives of people.<sup>26</sup> Thus, I am of the view that, unless enabling regulations are enacted the current statutes of these countries will continue making little difference for children's rights, which require comprehensive legislative action envisaging their realisation. This view is substantiated on the argument that the existing children's statutes of Angola and Mozambique need to be fully operational for them to achieve the ultimate goals and objectives envisaged.

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<sup>25</sup> See Article 4 of the CRC.

<sup>26</sup> Christof Heyns (2001) 'The African regional human rights system: In need of reform?', *African Human Rights Law Journal*, Vol. 1, No. 2, p 156.

In addition to making the children's statutes of Angola and Mozambique fully operational, there is a need to fill the gaps left by these instruments. This captures the second part of the recommendations proposed here.

Indeed, while it may be commendable that the two countries have enacted statutes covering children's rights, there is an immediate need to fill the manifold gaps left by these instruments in the various aspects left unregulated. In this regard, I recommend further law reform to fill gaps relating to lack of provisions regulating intercountry adoption, children's consent to HIV testing, confidentiality of results, and to include children living in child-headed households in the child laws of both countries under analysis. As was discussed considerably in Chapter 5, these themes are not covered in the children's statutes of Angola and Mozambique.<sup>27</sup> Other concrete example of Angolan and Mozambican laws needing reforms to fill the gaps are the statutes protecting the right to primary education, which must be reviewed to accommodate duties for parents and guardians to send their children to school.<sup>28</sup>

Furthermore, it was argued that the role of the institution tasked with the coordination of implementation of children's rights needs to be strengthened for greater results.<sup>29</sup> To achieve this, I submit, it is necessary first to address the gaps linked to the mandate of these institutions, which were relatively weak. Here again, legislative reform will be necessary, given the fact that these institutions derive their mandates from the laws creating them.

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<sup>27</sup> See Chapter 4, section 4.5.2.

<sup>28</sup> See Chapter 6, section 6.3.2.

<sup>29</sup> See generally Chapter 5, section 5.2.2.

In addition, law reform must take into account contemporary issues such as advancements in the field of information technology, especially internet services, which expose children to a wide variety of risks and abuses, including, child pornography, child trafficking and other abuses. Moreover, the laws must account for other issues including regulating for families where children are being raised by parents having the same sex as this would anticipate with solutions for the development of children's rights in these countries.<sup>30</sup>

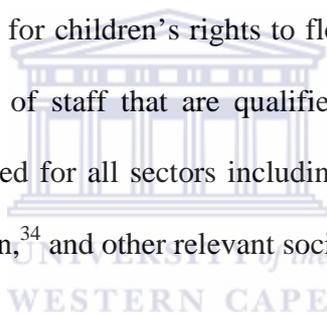
In my view, there are two possible pathways to implement the reforms proposed here. In the first place, it would be necessary to develop new statutes covering children's rights for both countries so that the new statutes integrate all aspects which are not covered in the current laws. However, it may be very complex to achieve this as it may be difficult to obtain consensus from all those who are involved in the law-making process. In this way, this first route to addressing the challenges faced by both countries is simply listed as an option but not recommended. Second, the two countries may choose to enact distinct and completely separate statutes covering the gaps of the current children's statutes. The proposed pieces of legislation shall take the form of Amendment Acts supplementing the existing children's statutes. I believe that this is a more practicable solution which should help these countries advance the situation of their children inasmuch as it would be quicker for them to obtain consensus over law amendment than to make a new law. Nevertheless, the above legislative measures need to be backed by other actions, some of which are discussed below.

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<sup>30</sup> These ideas are based on lecture notes on the topic '*The future of children's rights*', delivered by Professor Michael Freeman at the Law Faculty of the University of the Western Cape, 17 October 2012.

### **7.5.2 Training for those working with children**

It has been stated that the lack of consciousness among lawyers, judges and the judiciary as a whole affects the respect for human rights standards.<sup>31</sup> To this I add that the lack of consciousness in all sectors (whether public or private) providing services for the public undermines the protection of human rights (children's rights included). This is very important, as the discussions in chapters 4, 5 and 6 showed substantive training gaps and deficiencies in the quality of services offered in various sectors working with children.<sup>32</sup> These deficiencies were in relation to the quality of training for professionals working in the justice sector,<sup>33</sup> educational sectors and human rights monitoring mechanisms which were discussed in the study. Such predominant gaps make it difficult for children's rights to flourish. Consequently, I recommend effective training and recruitment of staff that are qualified for jobs dealing with children's matters. Training must be prioritised for all sectors including, but not limited to, the judiciary, the departments of health, education,<sup>34</sup> and other relevant social services and the private sector.



### **7.5.3 Involvement of civil society, private sector and international cooperation**

It is further recommended that civil society organisations and the private sector be involved in activities dealing with the implementation of children's rights. The sad and regrettable fact that these institutions had such little involvement in the drafting process of the Angolan children's statute must not be repeated because it retards progress. Moreover, under General Comment No.

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<sup>31</sup> See Lilian Chenwi (note 24 above), p 216.

<sup>32</sup> See Chapter 4, section 4.3, and Chapter 5 section 5.4.3. See also Chapter 6 section 6.6.3.

<sup>33</sup> See Chapter 5, section 5.4.3.1.

<sup>34</sup> See Louise Fox et al (2012) '*Education reforms in Mozambique: Lessons and challenges*', The World Bank, p 56.

5 concerning the general measures for implementation of the CRC, states were reminded of the need to involve civil society in tasks aimed at implementing the CRC. This is an obligation under the CRC, and states have the primary duty to create an environment that facilitates the involvement of these institutions to discharge their responsibilities in relation to children.<sup>35</sup> One way of promoting the involvement of the private sector in the educational system of Mozambique is by providing funding for private schools, given that currently they receive no such funding from the government.<sup>36</sup>

Lastly, in the context of the financial burdens weighing on the world today, the importance of international cooperation cannot be overemphasised in the quest to advance children's rights in Angola and Mozambique. It was noted that their budgets are highly dependent on international assistance.<sup>37</sup> Moreover, it was explained that when donor aid is reduced or when it is given with certain strings attached, the lives of many children in these countries are impacted upon by huge external debts that trap them in endless cycles of poverty.<sup>38</sup> This makes it important for Angola and Mozambique to adopt clear policies on the type of assistance they need for the realisation of children's rights.

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<sup>35</sup> See Paras. 27, 56-59 of General Comment No. 5.

<sup>36</sup> See Chapter 6, section 6.6.1 and Bilale Fernando (2007) '*Educational performance in Mozambique: An economic perspective*', unpublished Master of Economics dissertation, Department of Economics, University of Stellenbosch, p 64.

<sup>37</sup> See Chapter 2, section 2.7.2.

<sup>38</sup> As above.

## **7.6 Some brief remarks for future studies**

The study is limited by many factors listed in the introductory chapter.<sup>39</sup> One limitation was that it was not possible to undertake an empirical study of the situation on the ground. Therefore, future studies may delve deeper to analyse and discuss the actual situation of the implementation of CRC by looking into more practical issues. This may bring to the surface findings which were not demonstrated in this study, and it may yield more recommendations for the advancement of the situation of children in Angola and Mozambique.

In addition, it would be a great contribution if future research attended to the implementation of specific rights in each of these countries, whether this be undertaken using a comparative approach or a separate country-by-country analysis.

## **7.7 Conclusion**

The examples discussed in this thesis highlighted certain advancements amidst huge barriers facing the implementation of children's rights in the countries under examination. On the positive aspects, child-laws were enacted and children's interests were included in policy documents.<sup>40</sup> Furthermore, the countries created institutions dealing with children's matters, and made provisions for these institutions to adopt administrative measures to advance the rights under consideration.<sup>41</sup> This has had a positive effect in terms of advancing the purposes of the CRC.

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<sup>39</sup> See Chapter 1, section 1.5.

<sup>40</sup> See generally Chapters 4 and 6.

<sup>41</sup> See generally Chapters 5 and 6.

However, on the negative side, the laws focusing on children's rights remain relatively weak and the policies are faced with implementation gaps. Furthermore, weaknesses were detected in institutions dealing with children's matters in that they derive their mandates from fragile laws. Hence, for children's rights to develop in Angola and Mozambique, there is a need to address these setbacks, and to this end, I propose the adoption of the recommendations discussed above, including law enactment and reform initiatives, training for all sectors, and involvement of civil society.

In section 7.3, I promised I would discuss the extent to which the states examined here are moving towards the realisation of children's rights. Now drawing from the categories outlined in Chapter 1, and taking into account all the efforts made by these countries, in a fair assessment, I am convinced that they both stand as states that have partially implemented the CRC.<sup>42</sup> This position is substantiated by the fact that the countries under analysis only met partially the requirements to implement the CRC as defined in Chapter 3.<sup>43</sup> Indeed, as was discussed in the substantive chapters of this study<sup>44</sup> and reiterated in this concluding chapter, the Angolan and Mozambican laws, policies, institutions and administrative measures for implementing the CRC need strengthening in order for them to meet the standards of the Convention. It is not enough to have laws, policies and institutions meeting partially the requirements of the CRC. Full implementation requires the adoption of legislative, policies and administrative measures that comply fully the Convention.

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<sup>42</sup> See Chapter 1, section 1.7.

<sup>43</sup> See generally Chapter 3, section 3.7.

<sup>44</sup> See specifically Chapters 4-6.

Nevertheless, the discussions highlighted some variations on the pattern of implementation of the Convention between the two countries to the extent that in certain aspects one country appeared more implementing than the other and vice versa. For instance, on the policy level, while Angola lacks a comprehensive policy dealing with Orphans and Vulnerable Children (OVC), Mozambique has one. On the institutional level Angola is the only country of the two in the study which has established an institutions with a related mandate to monitor the implementation of children's rights while Mozambique still lags behind in this aspect.

Lastly, and despite the variations highlighted and the limitations encountered during the investigation,<sup>45</sup> it is hoped that the findings and the recommendations proposed here may help these states to advance to a status of fully implementing states and thereby contribute positively to improving the lives of the many children living in Angola and Mozambique. Recommendation should be made to the effect that in implementing the recommendations proposed in this study these countries must take into account the voice of children as the Convention aims to advance, nothing else either than their legitimate rights.

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<sup>45</sup> See Chapter 1, section 1.5.

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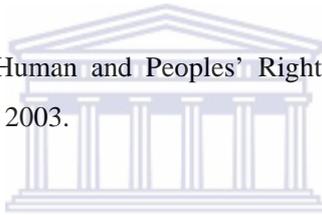
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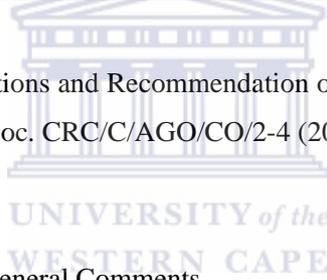
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