

IN THE BEST INTERESTS OF
THE CHILD

**Harmonisation of
national laws with
the Convention on
the Rights of the Child:
Some observations and suggestions**

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Introduction

The UN Convention on the Rights of the Child (CRC) has been ratified by 193 states.¹ Ratification requires states to undertake all appropriate legislative, administrative and other measures to implement children's rights as recognised in the CRC (Article 4). Many state parties start the process of implementation by taking legislative measures to harmonise existing laws with the principles and provisions of the CRC.

Due to the lack of systematic surveys, there is very little comparative information on the harmonisation efforts of state parties to the CRC. In this regard, The African Child Policy Forum (ACPF)'s initiative in carrying out a study on the harmonisation of laws on children in Eastern and Southern Africa is most welcome. The study covers nineteen countries that have all ratified the CRC and provides valuable information on the legislative measures taken by these countries for the implementation of the CRC, as requested in Article 4. It shows the progress made, as well as identifying the difficulties encountered and the remaining challenges.²

The report contains various recommendations and identifies some specific issues that need immediate attention. It is therefore an excellent starting point for further legislative action in the Eastern and Southern Africa region. This document will focus on the practical aspects of harmonisation of national laws with the CRC, and the question of how harmonisation can be best carried out. It will also provide examples of substantive efforts from the region to harmonise national laws with the CRC, after starting with some more general observations, in particular related to the views of the UN Committee on the Rights of the Child (CRC Committee).

Some general observations

External and internal harmonisation

In order to avoid misunderstandings about the concept of harmonisation, the following section explains the distinction between external and internal harmonisation.

External harmonisation is the harmonisation of existing national laws and regulations on children with the provisions of international (or external) treaties, conventions and standards. These include the CRC and related international standards, such as the Minimum Standards for the Administration of Juvenile Justice (known as the Beijing Rules), as well as other international human rights treaties and conventions, such as International Labour Organisation Conventions 138 and 182 regarding child labour.

Harmonisation of national laws may require amending existing provisions or the introduction of new provisions; for example, in the civil code or law on civil procedures.

Internal harmonisation is the harmonisation of the provisions of national laws in order to eliminate inconsistencies, contradiction or gaps. For example, in some countries the age at which compulsory education ends is fourteen, but the minimum age for admission into employment is fifteen, which means that children completing compulsory education are not allowed to work, leaving them open to exploitation. The CRC Committee regularly recommends states to harmonise their provisions by setting the end of compulsory education at the same level as the minimum age for admission into employment. In addition, it recommends harmonising the provisions of customary, traditional or religious laws with the provisions of national laws.

In every comprehensive review of national legal provisions on children, external and internal harmonisation should go hand in hand, but for practical reasons this document will focus on external harmonisation. Following are some remarks on reservations, the legal status of the CRC and the need for systematic reviews of existing and proposed legislation.

The need to revisit reservations to the CRC

When ratifying the CRC, a state can make reservations to one or more articles. This is not a unique provision; reservations can be made to all human rights treaties. A reservation is a unilateral statement whereby a state ratifying a human rights treaty excludes or modifies the legal effects of certain provisions in their application to that state (see Article 2(1)(d) of the Vienna Convention on the Law of Treaties). There is no specific limitation to the number of reservations a state can make, but a reservation incompatible with the object and purpose of the CRC is not permitted (Article 51 (2) CRC and Article 19 of the Vienna Convention).

The matter of reservations has many aspects, and a complex, detailed discussion is far beyond the scope of this contribution.³ However, it goes without saying that reservations limit harmonisation of national legal provisions with the CRC, since all articles of the CRC mentioned in the reservation no longer apply.

As the Human Rights Committee states, ‘reservations may serve a useful function to enable states to adapt specific elements in their laws to the inherent rights of each person as articulated in the Covenant. However, it is desirable in principle that states accept the full range of obligations, because the human rights norms are the legal expression of the essential rights that everybody is entitled to as a human being’ (General Comment No 24, para 4). In line with this

approach, the CRC Committee consistently recommends states to review and gradually withdraw their reservations, in order to achieve the highest level of implementation of the CRC.

For the harmonisation process, this means that states should systematically consider whether it is still necessary to maintain any reservations they have made. Specific measures should be taken to achieve withdrawal of reservations. For example, several states made a reservation to Article 37(c) of the CRC, regarding the separation in detention of children and adults in detention. In order to withdraw the reservation, states must establish a sufficient number of places in institutions for juveniles. In other words, a reservation should not be used as a permanent excuse for maintaining national legal provisions that are used as the pretext for the reservation.

The CRC in relation to different legal systems

In its dialogue about the periodic reports submitted by states, CRC Committee members regularly raise questions about the applicability of the CRC. A distinction is usually made between countries with monistic and dualistic legal systems. In the former category of countries, CRC ratification means that its provisions are incorporated in the national legal system and therefore directly applicable. However, it is often unclear whether the CRC prevails if there is a conflict between a provision of the national law and of the CRC. In the dualistic system, CRC provisions become part of domestic law via specific legislative measures. In other words, it is necessary to harmonise national laws with the CRC in order to give them legal effect.

The CRC Committee believes that countries with both monistic and dualistic legal systems should take action to fully

harmonise national legislation with the CRC, even when primacy is given to the CRC. Complementary legislation and enforcement mechanisms should be adopted, particularly effective judicial and administrative remedies, to ensure full implementation of the CRC. In short, harmonisation with the CRC is necessary regardless of a country's legal system.

Need for comprehensive and participatory review

After the ratification of the CRC most states start to harmonise their national laws with the CRC. Some start the process even before ratification. However, very few states base the harmonisation process on a comprehensive analysis of national legislation, so it is often piecemeal and limited to the time period shortly before and after the ratification.

This is an issue for the CRC Committee, who believe that harmonisation should not be a one-off event after ratification, nor should it be limited in an ad hoc manner to some provisions of national laws. Harmonisation needs to be an ongoing activity based on a systematic review of existing or proposed legislation.

In their conclusion on the Day of General Discussion in 1999, the CRC Committee recommended to state parties 'that they set up a mechanism to ensure that all proposed and existing legislative and administrative measures are systematically reviewed to ensure compatibility with the Convention on the Rights of the Child. Such reviews should be carried out by considering all the provisions of the Convention and be guided by its general principles (Arts 2, 3, 6 and 12); they should also give adequate attention to the need to ensure appropriate consultation with, and involvement of, civil society during the review process.'⁴

This recommendation implies that states should conduct a comprehensive analysis of existing and proposed legislation involving civil society, in particular non-governmental organisations, academics and other individual experts. It also implies the need for development and execution of a systematic plan for harmonisation of national laws with the CRC.

Harmonisation: How?

There is no internationally accepted blueprint for the harmonisation of national laws with the CRC. It is left to state parties to decide how to do it in the most effective way that best fits their legal system and culture. However, this does not mean that every state should reinvent the wheel. State parties should benefit from the experiences of others and follow as much as possible the recommendations of the CRC Committee.⁵

Every state party, regardless of the practical methods it wants to apply, should do the following as minimum and fundamental requirements:

- Conduct an analytical review of existing legislation relevant to children, in order to identify legal provisions that are not in compliance with the CRC as well as shortcomings and gaps. This review should be carried out systematically for new pieces of legislation, not only those directly relevant to children, in order to avoid adopting laws or amendments to laws that are not in the line with CRC obligations.
- Develop and implement a comprehensive plan for the harmonisation of national laws with the CRC. The plan should not be limited to a one-off activity, but provide for an ongoing and consistent process. It should be

noted that in the majority of countries, legislation relevant to the rights of children falls under the responsibility of different ministries; education, health, social affairs, justice, etc. The mechanism recommended by the CRC Committee means that one body, such as the Ministry of Justice, should be given responsibility for monitoring the legislative and administrative measures of all governmental bodies in order to check whether the measures are in compliance with the CRC.

This body could have the authority to make binding recommendations to the responsible minister. Some states already have a special organ, such as a State Council, that advises the government on all pieces of legislation. Such a Council should systematically check whether proposed legislative measures are in harmony with the CRC.

- Make legislation a process in which civil society is involved as much as possible. Drafts of legislation should be sent for comments to relevant non-governmental organisations and other interest groups, such as unions and professional associations of social workers, teachers, psychologists, etc. In addition draft texts can be posted on government websites and, through the media, civil society invited to forward their comments to the responsible body before a given deadline.

A word of caution on consultation with civil society; make sure that the process does not take years or result in a watered-down outcome. In an effort to please everybody, it is possible that nobody will be satisfied.

Children's Act: Consolidation v separate acts

Should a state develop and enact a comprehensive Children's Act or should it enact separate legislation in trying to harmonise existing legislation with the CRC?

Firstly, in most countries it is not likely to be a matter of one or the other. Ensuring that *new* legislation is in line with the CRC is by nature a gradual process. The CRC Committee regularly recommends state parties to develop and adopt a comprehensive Children's Act. This recommendation deserves some elaboration, because the implications are not always clear.

A comprehensive Children's Act that incorporates all the provisions of the CRC is a very ambitious undertaking. It requires more than just copying the text of the CRC; each CRC provision must be translated into concrete and specific rules within the context of national legislation. It may be too ambitious for many countries, and there are questions about the benefits of such an all-encompassing Act.

The Children's Law Review Committee in the Netherlands debated this question. It judged the decisive argument against an all-encompassing Children's Act to be that it would set children apart as a special category. A Children's Act does not contribute to an integrated approach of children into other legislation; for example, on education, healthcare and social security.

The best harmonisation approach may be one that combines a Children's Act with separate legislative measures for specific areas. The Children's Act could contain an elaboration of the general principles of the CRC (Articles 2, 3, 6 and 12) and of civil rights and freedoms (in particular,

Articles 13 – 17). Separate legislative measures could be taken for harmonising existing laws on education, healthcare and social security, among others, with the provisions of the CRC. The same approach could be applied for harmonising Criminal Codes with the provisions of the CRC on juvenile justice (Articles 37 and 40) and on protection from sexual and other forms of exploitation (Articles 33 – 36). A separate Child Protection Act could incorporate Articles 19, 20 and 32 – 36 of the CRC into national legislation.

In all these legislative efforts, specific attention should be given to possible obstacles and the measures to overcome them when it comes to their implementation. It is good practice to include in the proposed law or amendment an estimate of its implementation costs, and if appropriate, a detailed budget. In addition, measures for regular evaluation of the legislative measures are recommended, in order to check whether the intended results have been achieved and, if necessary, to amend the law to make it more effective.

Harmonisation: Some remarks on substance

Harmonisation of national laws with the CRC requires interpretation and elaboration of the provisions of the CRC. The text concerning the provisions of the CRC is unavoidably of a somewhat general nature and allows for different interpretations. For instance, the right to acquire a nationality (Article 7 CRC) can be elaborated in different ways, meaning that the regulations concerning this right can be more generous in one country than another. However, despite possible differences, every state party to the CRC is obliged to ensure that every child in its territory has a nationality (Article 2 CRC, on non-discrimination). States are provided with guidance in their efforts to interpret CRC provisions in two ways:

Firstly, the Concluding Observations that the CRC Committee present after it has examined a state party's report and other relevant information offer specific recommendations regarding the interpretation and implications of CRC provisions. The state should take these recommendations into account when undertaking measures to harmonise its national legislation with the CRC.⁶

Secondly, the CRC Committee regularly adopts General Comments, with ten currently on record⁷, which include recommendations on measures for the implementation of the CRC. All state parties should systematically take them into account when harmonising national laws with the CRC in the areas covered by the General Comments.

Below are some examples of topics for harmonisation that are also addressed in the aforementioned report by the ACPF.

- ***Protection from violence and exploitation (Articles 19 and 32 – 36)***

Harmonisation of national legal provisions with the CRC in this field is far from easy. Violence and exploitation of children takes various forms and happens in different situations. Furthermore, only some of the CRC's provisions are specific (Article 19, on violence in the family and other care settings, and Article 32, on exploitation of child labour) but most of the provisions, in particular Articles 33 – 36, are phrased in general terms. This leaves states with a lot of room to decide what kind of national legal provisions are in line with the CRC. At the same time, there is some guidance and direction available in addition to the CRC Committee's recommendations in its Concluding Observations.

The first example is the *Report of the Independent Expert for the United Nations Study on Violence against Children*.⁸ This report was submitted to the General Assembly of the UN by the Secretary General in October 2006 and contains numerous recommendations for actions to prevent violence against children and to protect children from violence in the home, family, schools, in care and justice systems, the work place and the community. One of the overarching recommendations for states in the report is 'to prohibit all forms of violence against children, in all settings, including all corporal punishment; harmful traditional practices, such as early and forced marriages, female genital mutilation and so-called honour crimes; sexual violence; and torture and other cruel, inhuman or degrading treatment or punishment' (para 97). This prohibition should be in place by the end of 2009 (para 116). In order to implement this recommendation, states are expected to review their existing legislation and amend it as necessary to prohibit all forms of violence against children, including appropriate specifications for the various settings where violence may occur.

In many countries the prohibition of all corporal punishment is a difficult and sensitive matter, so the CRC Committee has issued General Comment No 8 on Corporal Punishment for guidance on this matter. It contains various recommendations for possible legislative measures, as well as awareness-raising and educational campaigns to achieve effective prohibition of all corporal punishment. State parties to the CRC should make use of these recommendations when trying to harmonise their national laws with the CRC.

Other sources of guidance and direction in harmonising national laws on violence and exploitation with the CRC (in particular Articles 32 – 36) are ILO Convention 182 on the Elimination of the Worst Forms of Child Labour and the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography (OPSC). States that have not yet done so should ratify these documents as a matter of priority.

The OPSC is an excellent guide for complying with Articles 34 and 35 of the CRC, requiring states to protect children from all forms of sexual exploitation and sexual abuse, and to prevent the abduction, sale or trafficking in children for any purpose and in any form. Article 3 specifies the activities that must be prohibited in the Criminal Code. Articles 4 and 5 require the establishment of extra-territorial jurisdiction and effective regulation of the extradition process for perpetrators of the prohibited activities.

In conclusion, harmonisation of national laws with the CRC to protect children from all forms of violence and exploitation requires a comprehensive set of legislative measures. This may be challenging, but states are provided with specific guidance, direction and recommendations in this regard.

- ***Protection of child victims and witnesses of crime***

Another major issue strongly related to the previous topic is the protection of child victims and witnesses of violence, exploitation or other crimes. Article 39 of the CRC requires that states take all appropriate measures to promote the physical and psychological recovery and reintegration of child victims. This should take place in an environment that fosters the health, self-respect and dignity of the child.

What kind of legislative measures can states take to bring their laws in line with this obligation? Again, in principle it is left to states to decide what is appropriate. Various legislative and other measures can be taken to provide children with specific support for recovery and reintegration. A particular problem arises when a child victim becomes involved as a witness in criminal or other legal proceedings. What kind of rules should be applied for child victims or witnesses to foster her or his health, self-respect and dignity?

The Economic and Social Council of the UN (ESOSOC) has adopted guidelines on justice in matters involving child victims and witnesses of crime⁹. They contain various recommendations, including the right of the child to be informed about procedures and the importance, timing and manner of testimony; the right to be heard and express views and concerns; the right to effective assistance; and the right to privacy and safety. In short, they are important guidelines for states in their efforts to harmonise domestic laws with international standards and principles.

Another source of information in this regard is the OPSC, in particular Article 8. This requires states to take appropriate measures to protect the rights and interests of child victims of practices prohibited under the OPSC at all stages of the criminal justice process. It also indicates the measures that must be taken, many of which are elaborated in the ECOSOC Guidelines.

- ***Juvenile justice and the minimum age of criminal responsibility***

Many state parties have undertaken legislative measures to harmonise their national laws with the provisions of the CRC, in particular Articles 37 and 40,

applicable to children in conflict with the law. The establishment of a system of juvenile justice in full compliance with the CRC is far from easy and requires not only legislative measures, but also a variety of administrative and social measures. The CRC Committee has provided very specific guidance and recommendations in its General Comment No 10 on Children's Rights in Juvenile Justice. It addresses many important issues, including the prevention of juvenile delinquency; the possibilities of dealing with juvenile delinquents without resorting to judicial proceedings; for example, by using alternative measures; the rules for a fair trial; and the use of deprivation of liberty as a last resort.

One of the most widely debated and contentious issues is the minimum age of criminal responsibility. Article 40, paragraph 3, CRC requires that states set such a minimum age, but does not specify what is acceptable. State parties report a wide variety of minimum ages, ranging from seven to sixteen years. The Beijing Rules¹⁰ state that the minimum age for criminal responsibility should not be set too low, but not exactly what this means: is eight years old too low? Or ten, or twelve?

General Comment No 10 explains what the Committee understands by the minimum age of criminal responsibility. With reference to recommendations the Committee has made in its Concluding Observations on states' reports, it concludes that a minimum age of below twelve is not acceptable.

The Committee recommends states to set their minimum age of criminal responsibility at twelve and to gradually continue to increase it.

Final remarks

There is much more that can be said about the harmonisation of domestic law with the CRC. However, the following remarks sum up some key aspects of the harmonisation process.

Firstly, harmonisation involves much more than simply copying the CRC; it requires elaboration of its provisions. It may differ from country to country, but general guidance can be found in the country-specific Concluding Observations, CRC General Comments and other international standards, such as the Beijing Rules, Havana Rules and UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime. Guidance is also available in the two Optional Protocols to the CRC; on the sale of children, child prostitution and child pornography; and on the involvement of children in armed conflict. It is important that all African countries ratify both Optional Protocols.

Secondly, how harmonisation is carried out will vary from country to country. The most ambitious approach is the drafting and adoption of a comprehensive and all-encompassing Children's Act, but a step-by-step approach can be equally effective, if well-prepared and planned. Both approaches should be open and participatory.

Finally, taking into account the complexity and difficulties of harmonising national laws with the CRC, it may be helpful to develop some guidelines for the harmonisation process. The African Child Policy Forum and UNICEF could take action to establish such guidelines.

Endnotes

1. Since 2000 two newly independent states, East Timor and Montenegro, have ratified the CRC. Only two states have not yet ratified the CRC: the USA and Somalia
2. African Child Policy Forum & UNICEF *In the best interests of the Child: Harmonising laws in Eastern and Southern Africa* (Addis Ababa; 2007)
3. For more information, see: *General Comment No 24: Issues relating to reservations made upon ratification or accession to the Covenant on Civil and Political Rights* (Human Rights Committee; 1994); the *Optional Protocol in relation to Declarations under Article 41 of the Covenant* and Simma, B 'Reservations to Human Rights treaties: Some Recent Developments' in Hafner, G et al. (eds) *Liber Amicorum Professor Seidl-Hovenfeldern* (1998) p30
4. Tenth anniversary meeting of the Committee on the Rights of the Child: *Achievements and Challenges; Day of General Discussion*, September 30 – October 1, 1999 (UN Document CRC/C/87, Annex IV)
5. See also: *CRC Committee's General Comment No 5 on General Measures of Implementation of the Convention on the Rights of the Child* (Articles 4, 42 & 44, para 6) in particular paras 18 – 23 (UN Document CRC/GC/2003/5)
6. All Eastern and Southern African countries have reported on implementation to the CRC Committee at least once, so they have all received Concluding Observations. These documents can be found on the OHCHR website: www.ohchr.org/english/bodies/crc/index.htm

7. The following General Comments are available:

- No 1: *The Aims of Education* CRC/GC/2001/ 1 (April 2001)
- No 2: *The Role of Independent National Human Rights Institutions in the Promotion and Protection of the Rights of the Child* CRC/GC/2002/2 (November 2002)
- No 3: *HIV/AIDS and the Rights of the Child* CRC/GC/2003/ 3 (March 2003)
- No 4: *Adolescent Health and Development in the Context of the Convention on the Rights of the Child* CRC/GC/2003/4 (July 2003)
- No 5: *General Measures of Implementation of the Convention on the Rights of the Child* CRC/GC/2003/5 (November 2003)
- No 6: *Treatment of Unaccompanied and Separated Children outside of their Country of Origin* CRC/GC/2005/6 (September 2006)
- No 7: *Implementing Child Rights in Early Childhood* CRC/GC/7 (November 2005)
- No 8: *The Right of the Child to Protection from Corporal Punishment and other Cruel or Degrading Forms of Punishment* CRC/C/GC/8 (May 2006)
- No 9: *The Rights of Children with Disabilities* CRC/C/GC/9 (September 2006)
- No.10: *Children's Rights in Juvenile Justice* CRC/C/GC/10 (January 2007)

For the full text, see:

www.ohchr.org/english/bodies/crc/comments.htm

8. *Report of the Independent Expert for the United Nations Study on violence against children* UN Document A/61/299. It was accompanied by a book – *World Report on Violence against Children* – which contains detailed information on international human rights law and standards, and on violence in different settings. The book can be downloaded from www.violencestudy.org and the websites of UNICEF, WHO and OHCHR
9. ECOSOC Resolution 2005/20. The adoption of this Resolution was recommended by the Commission on Crime Prevention and Criminal Justice, see UN Document E/CN.15/2005/L.2/ Rev1 (25 May 2005)
10. Beijing Rules: The United Nations Standard Minimum Rules for the Administration of Juvenile Justice, adopted by the General Assembly of the UN, Resolution 40/33 (29 November 1985)



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