

A close-up photograph of a woman with a purple headwrap and a colorful striped shawl, carrying a young child on her back. The woman is looking towards the camera with a slight smile. The child is also looking towards the camera. The background is dark and out of focus.

Protecting children from harmful practices in plural legal systems

New York 2012

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with a special emphasis on Africa



New York 2012

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ACRONYMS

ACHPR	African Charter on Human and Peoples' Rights
ACRWC	African Charter on the Rights and Welfare of Children
AU	African Union
AWP	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CRC	Convention on the Rights of the Child
FATA	Federally Administered Tribal Areas (in Pakistan)
FGM	female genital mutilation
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IACHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
NHRI	National Human Rights Institutions
SAARC	South Asian Association on Regional Cooperation
SAIEVAC	South Asia Initiative to End Violence against Children, an apex body of SAARC since 2011
SADC	Southern Africa Development Community
SCSL	Special Court for Sierra Leone
SRSR	Special Representative of the Secretary-General
UDHR	Universal Declaration of Human Rights

FOREWORD

Across regions, millions of children continue to suffer from various forms of harmful practices, including female genital mutilation, early and forced marriage, breast ironing, son preference, female infanticide, virginity testing, honour crimes, bonded labour, forced feeding and nutritional taboos, accusation of witchcraft, as well as a great number of other less known practices.

Harmful practices may be traditional or emerging, but generally have some cultural, social or religious underpinning. Common for most harmful practices is that they have devastating consequences on the child's life, development, health, education and protection.

The UN Study on Violence against Children urged states to prohibit by law all forms of violence against children, including harmful practices. This recommendation is a key priority for the mandate of the Special representative of the Secretary General on Violence against Children as well as for Plan International. To advance progress in the implementation of this recommendation, they co-organized an expert consultation, in June 2012. This thematic report was informed by those important discussions.

The expert consultation placed a particular emphasis on addressing harmful practices in plural legal systems. It built upon significant developments and experiences across regions, with a particular emphasis on Africa and the work promoted by the African Union and the African Committee of Experts on the Rights and Welfare of the Child. The discussions examined the interplay between children's right to legal protection from all harmful practices, and religious and customary laws. Informed by significant developments that have helped to address deeply rooted social conventions and support the abandonment of harmful practices against children, the consultation put forward important recommendations to advance national implementation efforts.

We are confident that the conclusions and recommendations highlighted in this report, calling for the harmonization of national legislation, customary and religious laws with international human rights standards, and the introduction of a legal prohibition of harmful practices, supported by a steady process of implementation to prevent and address those practices, will help to accelerate progress in children's protection from harmful practices across regions.

We look forward to further strengthening our collaboration to prevent and eliminate all violence and harmful practices against children everywhere and at all times.



Nigel Chapman
Chief Executive Officer
Plan International



Marta Santos Pais
Special Representative of the UN Secretary-General
on Violence against Children

The protection of children from violence, including harmful practices, is enshrined in international human rights standards that are long adopted by the international community. But in strong contradiction to this ethical and legal imperative, harmful practices remain pervasive and socially condoned, and continue to seriously hamper the enjoyment of children's rights.

Every week, new reports bring us the dramatic and horrific stories of new victims, forced to marry at an early age, accused of witchcraft and attacked for bringing misfortune, subject to begging and bonded labour, food restrictions or forced feeding, and endangered in many other practices.

For the most part, these stories end with little hope, conveying the long-term damage these practices inflict on a child. More and more, however, even small successes give us a deep sense of hope that these children will enjoy a bright future in a world that is free from violence.

A single-minded girl named Najoob with no police or legal protection bravely defied her family and her country's long-held tradition to divorce her husband. She was just eight years old.

Najoob was married to a man twenty years her senior. Under the contract arranged between her father and her "suitor," the groom agreed to pay a bride price, or "lobola," and to allow the young girl to remain with her parents until age 18. However, only a few days later, her father forced her to move in with her new "husband" who then brutally and continuously tormented her.

"When I wanted to play in the garden," she said, "he hit me." She would run from room to room to escape, but in the end, "he always got me." After two months of horrendous sexual abuse, the girl asked her father for help. But he told his daughter that he couldn't help her. "If you want, go to the court alone," he said.

And that is exactly what she did. Armed with nothing but courage, this eight-year-old child ran away to a maternal uncle and then with his support bravely appeared in court to demand the dissolution of her marriage. Responding to her sympathetic and direct manner, the judge granted the divorce.

Only expressing an attitude that is all too common in countries where wives are bought and sold as commercial property, the girl's husband was outraged. He screamed and yelled that he paid for her and that she was his property. Finally, he agreed to the divorce. But with no law in the country against child marriage, neither the girl's father nor her husband faced any charges. Legally they had committed no crime.

Although still concerned that her younger sisters may suffer the same cruel fate as she and her two older sisters did before her, this eight-year-old is looking forward to the bright days of going back to school and a husband-less future until she decides to marry. Najoob's bravery in rejecting tradition is viewed by many as a good opportunity to help hundreds of other girls in her country to benefit from new legislation to set 18 as a minimum age for marriage for girls and boys and prohibit forced marriage.

1

SETTING THE SCENE

The protection of children from all forms of violence is a human rights imperative. Although it is recognized by international and regional human rights standards, including the Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (ACRWC), violence persists; widespread and socially and culturally accepted, it constitutes a harsh reality for millions of children worldwide, including in the form of harmful traditional practices.

Throughout the world, countless numbers of girls and boys fall victim to harmful practices, including female genital mutilation or cutting (FGM/C), early and forced marriage, degrading initiation rites, breast ironing, son preference, acid attacks, stoning, honour killings, forced feeding, witchcraft rituals, and many other less-known forms. Often violent in nature, these practices compromise the development and education of the child, leave serious and long lasting health and psychological consequences, and may result in disability or death.

Some harmful practices, such as honour killings and stoning, constitute forms of torture often justified by morality or family honour.

Other practices may find no cultural or religious justifications, such as acid attacks against girls, but they are deeply rooted in gender-based discrimination. Still others may reflect ill-perceptions or misconceptions, or discriminatory and harmful beliefs towards marginalized children, including children with disabilities, children with albinism, those belonging to a low caste or accused of witchcraft. Overall, these incidents are associated with serious forms of violence.

In the practice of early and forced marriage, the causes are multi-faceted, including poverty, the fear of loss of respectability and of shame and stigma, or the search for protection from the risk of rape and insecurity. But here again they are often associated with situations of violence, abuse and exploitation.

The protection of children from harmful practices has for long been a topic of concern in the United Nations and was also given high attention by the United Nations Study on Violence against Children (A/61/299) (hereafter UN Study), submitted to the General Assembly in 2006.

The UN Study presented a set of strategic recommendations to prevent and respond to all forms of violence. Most especially, it urged States “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 honour crimes...” and it recognized the importance of transforming “attitudes that condone or normalize violence against children, including (...) acceptance of corporal punishment and harmful traditional practices.”²

In 2009, to promote the dissemination of the UN Study and ensure effective follow up to its recommendations, the UN Secretary General appointed a Special Representative of the Secretary General on Violence against Children (SRSG).

The SRSG has identified the legal prohibition of all forms of violence, as well as an appropriate legal framework to protect children and prevent and respond to violence as one of her three priority focus areas.

Despite the UN Study's call for all harmful practices to be prohibited by law, this is not yet a reality in many countries around the world. In some cases, general legislation on assault and bodily injury is applicable but rarely used or enforced as a result of the social acceptance of these deeply entrenched practices. In other cases, different practices appear compartmentalized in distinct pieces of legislation, hampering the consideration of commonalities and shared root causes and the promotion of a common holistic strategy. In countries with plural legal systems, where national legislation interplays with customary and religious law, legal interpretation and implementation face enhanced complexities that may create serious barriers to the realization of children's rights.

In her initial report submitted to the General Assembly in 2010, the SRSG underscored the importance of legislative reform as a deterrent to acts of violence against children, including harmful practices. As she stated then, "[e]ven in countries where harmful practices persist behind deeply entrenched traditions, the legislative process has provided opportunities to involve community and religious leaders, parliamentarians, professional associations, academic institutions and grass-roots organizations, and engage communities concerned."³

In order to reflect on these questions and identify avenues for change, the SRSG and Plan International, in close cooperation with the African Committee of Experts on the Rights and Welfare of the Child, the Committee on the Rights of the Child, UNICEF, OHCHR, UN Women, UNFPA and the International NGO Council on Violence against Children co-hosted an international expert consultation, held in June 2012, in Addis Ababa. The consultation considered significant developments where law reform and enforcement, supported by awareness-raising and a widely participatory social mobilization process, has helped to address deeply rooted social conventions and promote the abandonment of harmful practices against children.

Inconsistencies in legal regulation, selective implementation and compliance, and insufficient resources, together with lack of awareness within communities, prejudices amongst personnel, and weak capacity to address children's rights among law enforcement officials, the judiciary, traditional leaders and judges in customary and religious courts, were identified as critical challenges.

The consultation presented important recommendations to address these crucial questions, with a view to accelerating progress in law enactment and enforcement and in support of the abandonment of harmful practices with the involvement of, and commitment by concerned communities.

This report is informed by those reflections and recommendations. With a special focus on Africa, it builds upon the important work developed by the African Union and across nations in the African region, and addresses law reform in countries with plural legal systems that combine national codified law with informal and unwritten customary and religious law.

The report is designed to support the development of the CRC/CEDAW General Comment/General Recommendation on harmful practices and an African Union (AU) report on harmful practices in Africa, as well as to promote developments in other regions. The report will also contribute to the 2013 session of the Commission on the Status of Women that will be devoted to the "Prohibition and elimination of all forms of violence against women and girls."

Violence against children, harmful practices and law reform

The list of harmful practices worldwide is long, ranging from lesser-known practices such as uvulectomy (removal of flesh from the soft palate at the back of the mouth), milk teeth extraction, breast ironing, forced feeding and nutritional taboos, and the mutilation and sacrifice of children used in witchcraft rituals, to the more commonly known practices of female genital mutilation/cutting (FGM/C), forced and child marriage, honour killings, acid attacks, son preference, female infanticide and prenatal sex-selection as well as virginity testing.

Harmful practices often inflict many forms of violence against children - such as physical, sexual, mental and emotional.

Research has often focused on the gender dimension of most of these practices (for instance on FGM/C, or child marriage) without paying adequate attention to the question of age. Largely, children are subject to harmful practices in an atmosphere that neither solicits nor respects their views and status, and does not fully recognize them as human beings who are rights holders.

As noted above, the UN Study called on the prohibition of all forms of violence against children in all settings, including harmful traditional practices, such as early and forced marriages, female genital mutilation and honour crimes.

Legislation provides a critical foundation to protect children from violence, including harmful practices. It is an expression of states' accountability and commitment to the realization of children's rights, and a decisive contribution to the prevention and abandonment of those practices, to the protection of children concerned and to efforts to fight impunity. In this regard, the explicit prohibition of harmful practices by law provides an indispensable underpinning for other measures required to promote their effective and lasting abandonment.

To be effective and achieve social change, legislation needs in fact to be supported by other efforts such as public information and awareness campaigns, collective discussions involving communities concerned, and capacity building of professionals working with and for children. When laws enacted to reflect the CRC, the ACRWC and other relevant international standards are not supported by widespread information, education, public debate and social mobilisation initiatives, they may clash with cultural norms and accepted practices and fail to be used and achieve their goal.

In countries with plural legal systems, where national legislation exists alongside with customary and religious law, legal interpretation and implementation face greater complexities, tensions and challenges that may seriously compromise children's best interests.⁴ These systems can sometimes be relatively accessible and work in synergy. But the interplay and tension between them can also compromise the safeguard of the rights of women and children, and perpetuate violence and discrimination based on gender, age or other status.

As noted in the World Report on Violence Against Children, even when protective laws are in place, they "are not effectively implemented in many places because of the strength of traditional attitudes, and in some cases because of the existence of religious or customary legal systems" that actually support these attitudes.⁵

Key concepts and definitions

For the purpose of this report, a **child** is a person below the age of 18 years.

Child marriage is the marriage in which one of the spouses, girl or boy, is under 18.

Forced marriage is a marriage in which an informed and valid consent is lacking from one or both spouses. Whether a person under 18 can be considered capable of giving a mature, independent and informed consent to marriage is still under debate, which is why this report uses the term “child and forced marriage.”

The term “**harmful practice**” has often been associated with efforts promoted in relation to FGM/C, which has generated progress both in prohibiting and promoting the abandonment of this widespread practice. Significant lessons learned from this process can be applied more broadly to many other practices, including those which have remained less researched, largely invisible and unchallenged. Although boys are also subjected to harmful practices, existing research indicates that girls are disproportionately affected.

As highlighted by article 19 of the Convention on the Rights of the Child, **violence against children** means all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse.

Plural or multiple legal systems indicate the presence of more than one source of law in a country's legal system, including formal statutory legislation in force alongside a system based on tradition and religion. The existence of plural legal systems in a given state is in some cases made explicit in the national constitution.

2

INTERNATIONAL HUMAN RIGHTS STANDARDS TO PROTECT CHILDREN FROM HARMFUL PRACTICES

International legal framework

Existing international and regional instruments call for the protection of children from all forms of violence in both public and private spheres and call upon States to take measures to secure their prevention and elimination. To achieve this goal, States are required to adopt all necessary legislative and other measures, and to ensure that such measures have full force and effect within their domestic legal system. At the international level, these instruments include the Universal Declaration of Human Rights (UDHR); the International Covenant on Civil and Political Rights (ICCPR);⁶ the International Covenant on Economic, Social and Cultural Rights (ICESCR);⁷ the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the Convention on the Rights of People with Disabilities (CRPD); the Convention for the Protection of All Persons from Enforced Disappearance (CED); and the Convention on the Rights of the Child (CRC), as well as their respective protocols.⁸

In view of their particular relevance, the CRC and CEDAW are worth singling out. In the CRC, the four cardinal principles: non-discrimination; best interests of the child; the right to life, survival and development; and respect for the views of the child, frame children's protection from violence and harmful practices. Article 19 requires States to ban all forms of violence against children; while Article 24(3) stipulates that "States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children."

CEDAW calls for an end to all forms of gender-based discrimination, including against girls, and defines all forms of violence against women (and girls) as a form of discrimination. Its underlying philosophy is that "discrimination against women violates the principles of equality of rights and respect for human dignity"⁹ and constitutes an obstacle to the full realization of women's potential. Article 2(f) requires States Parties "to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against women." CEDAW also requires States Parties "To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices that are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women." Article 16 of CEDAW requires that States Parties eliminate discrimination against women in "all matters relating to marriage and family relations."

Jurisprudence from human rights treaty bodies

The obligations of States Parties to address violence against women and children (particularly girls) have been brought increasingly to the fore by treaty bodies responsible for monitoring the implementation of relevant human rights treaties. The CRC Committee requires States to report on the legislative, administrative and other measures they have taken to address violence against children, including harmful practices that affect the health of the child.¹⁰ The Committee gives guidance to States Parties through its Concluding Observations, as well as General Comments¹¹ and other working methods.

In General Comment no. 4 on the rights of adolescents to health and development,¹² the Committee emphasized that “States Parties need to ensure that specific legal provisions are guaranteed under domestic law, including with regard to setting a minimum age for sexual consent, marriage and the possibility of medical treatment without parental consent. These minimum ages should be the same for boys and girls (article 2 of the Convention) and closely reflect the recognition of the status of human beings under 18 years of age as rights holders...”¹³

In General Comment 13 on the right of the child to freedom from all forms of violence framed by Article 19, the Committee recognized that legislative measures refer to both legislation, including the budget, and implementing and enforcing measures. They comprise national, provincial and municipal laws and all relevant regulations, which define frameworks, systems, mechanisms and the roles and responsibilities of concerned agencies and competent officers.

It is now an established practice for States Parties to report on measures taken to combat violence against women and children to the relevant human rights treaty bodies.¹⁴ Among others, a consistent concern generally raised by treaty-monitoring bodies in relation to violence against women and children is the co-existence and use of discriminatory customary law and practice that contradict laws prohibiting violence against women “in countries where customary law prevails alongside codified law.”¹⁵

The African Committee of Experts on the Rights and Welfare of the Child, which is responsible for monitoring the implementation of the ACRWC, highlights the obligation of States Parties to eliminate harmful practices. In exercising its promotional mandate, the Committee has selected the theme of the elimination of harmful practices that affect children for the Day of the African Child in 2013.¹⁶

Due diligence

The concept of “*due diligence*” regarding a State’s responsibility for non-state acts is of significant relevance in addressing harmful practices against children. The concept was first developed in *Velasquez Rodriguez v. Honduras*, a case reviewed by the Inter-American Court of Human Rights (IACHR) in 1988, concerning state responsibility for enforced disappearances. The concept establishes that an illegal act, “which violates human rights and is initially not directly attributable to a State..., can lead to the international responsibility of the State, not because of the act itself, but because of the lack of *due diligence* to prevent the violation or to respond to it as required by the relevant human rights treaty.”

According to the jurisprudence of the CEDAW Committee, “States may ... be responsible for private acts if they fail to act with *due diligence* to prevent violations of rights or to investigate and punish acts, and for providing compensation.”¹⁷ The Committee recommends that States Parties should:

- Ensure that laws against family violence and abuse, rape, sexual assault and other acts of gender-based violence give adequate protection to all women, and respect their integrity and dignity,¹⁸ and
- Take all legal and other measures necessary to provide effective protection of women against gender-based violence, including effective legal measures.¹⁹

Regional standards

In the African region, violence against children is addressed by the African Charter on Human and Peoples’ Rights (ACHPR), particularly the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (AWP),²⁰ and the African Charter on the Rights and Welfare of the Child (ACRWC).²¹

The ACHPR provides protection for women’s and children’s rights. Article 18 calls on States Parties to ensure the “elimination of every discrimination against women and to also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.”

Supplementing provisions of the Charter to enhance its protection, the AWP requires States to:

- Enact and enforce laws to prohibit all forms of violence against women;²²
- Adopt legislative, administrative, social and economic measures to ensure the prevention, punishment and eradication of all forms of violence against women;²³
- Take all necessary legislative and other measures to eliminate harmful practices;²⁴ and
- Enact national legislative measures to guarantee that no marriage shall take place without the free and full consent of both parties and that the minimum age of marriage for women is 18 years.²⁵

The Protocol explicitly subjects marriage and family law to equality standards and preserves a voice for women in the establishment and interpretation of cultural policies. Countries in Africa where laws on harmful practices have not yet been enacted are expected to adopt and enforce legislation prohibiting FGM, child and forced marriage and other harmful practices.

The ACRWC neither overplays nor devalues the role of culture in the lives of African children. The Preamble emphasizes the importance of “the virtues of ...[African] cultural heritage, historical background and the values of the African civilization...”²⁶ Article 1 establishes that “[a]ny custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall to the extent of such inconsistency be discouraged;”²⁷ and Article 21 stresses States’ obligation to “...take all appropriate measures to *eliminate*...” those harmful social and cultural practices that negatively affect children.²⁸

The protection and promotion of children’s rights are culturally legitimate goals in Africa.²⁹ A child’s right to fully participate in cultural life is also recognized by the ACRWC in Article 12. Moreover, Article 16(1) of the ACRWC calls upon States Parties to

Take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse, while in the care of a parent, legal guardian or school authority or any other person who has the care of the child.

It should be highlighted that both the CRC and the ACRWC include provisions that require States to give primacy to all provisions that are more conducive to the realization of the rights of the child and which may be included in domestic law or international standards in force in that State.³⁰ With the near universal ratification of the CRC and the ACRWC (within the context of Africa), both instruments mutually reinforce the protection of children’s rights and the safeguard of their right to freedom from violence as a result of harmful practices.³¹

American Convention on Human Rights

In the Americas, Article 5 of the American Convention on Human Rights recognizes that:

1. Every person has the right to have his physical, mental, and moral integrity respected.
2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment (...)

And Article 19 states that: “Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.”³²

In other regions, important instruments require States Parties to take measures to eliminate harmful practices and violence against children. Under the **European human rights system**, the European Convention for the Protection of Human Rights and Fundamental Freedoms³³ provisions on the right to life, the prohibition of torture, inhuman or degrading treatment or punishment, prohibition of slavery and forced labour, the right to respect for private and family life and the prohibition of discrimination are all applicable to the protection of children from harmful practices.³⁴ The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse is also highly relevant for harmful practices that involve sexual violence.

More recently, the Committee of Ministers of the Council of Europe adopted a new landmark Convention on preventing and combating violence against women and domestic violence.³⁵ Enjoying 23 signatures and one ratification to date,³⁶ the Convention is a strong contribution to the prevention and elimination of

harmful practices. According to its provisions, States Parties must for instance ensure that culture, tradition and so-called “honour” are not regarded as a justification for any form of violence included in the Convention, and they must match sanctions with the seriousness of the offence (proportionality) and its consequences for the victim. They must also undertake prevention measures, including regular awareness-raising campaigns. The Convention establishes extra-territorial application including in situations where the offence is perpetrated against a national or habitual resident in another territory and where the acts are not criminalized in the territory where they were committed.

Resolutions of the European Parliament on female genital mutilation

The European Parliament has also paid special attention to protection from harmful practices, including through its resolutions on female genital mutilation,³⁷ the most recent adopted in June 2012.³⁸ The Parliament specifically condemns this practice, stressing that “such violations can under no circumstances be justified by respect for cultural traditions of various kinds or initiation ceremonies.” Moreover, in its Resolution of 16 January 2008, Towards an EU Strategy on the Rights of the Child,³⁹ the Parliament highlights that ‘no forms of violence against children in any setting, including the home, can be justified and all violence must be condemned including female genital mutilation, forced marriages and honour crimes.’⁴⁰

In **Asia**, the 2004 Declaration on the Elimination of Violence against Women in the ASEAN Region provides eight measures for regional collaboration in eliminating violence against women, including legislation that prevents violence and promotes recovery and reintegration of victims. It aims to:

enact and, where necessary, reinforce or amend domestic legislation to prevent violence against women, to enhance the protection, healing, recovery and reintegration of victims/survivors, including measures to investigate, prosecute, punish and where appropriate rehabilitate perpetrators, and prevent re-victimisation of women and girls subjected to any form of violence, whether in the home, the workplace, the community or society ...

The South Asian Association on Regional Cooperation (SAARC) Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia, 2002, requires States Parties to:

- ensure that their national laws protect the child from any form of discrimination, abuse, neglect, exploitation, torture or degrading treatment, trafficking and violence (article 4. (3)(a); and to
- make civil registration of births, marriages and deaths, in an official registry, compulsory in order to facilitate the effective enforcement of national laws, including the minimum age for employment and marriage (article 4. (3)(d)

To implement these obligations, the South Asia Initiative to End Violence against Children (SAIEVAC), an Apex body of SAARC since 2011, identified early marriage as one of the key thematic areas for its work. In its 5-year workplan SAIEVAC has set the target that by 2015 all its member countries have raised the legal age of marriage for both boys and girls to 18 and implemented article 4(3)(d) of the SAARC Convention. SAIEVAC has also decided to dedicate its next technical consultation to the theme of harmful practices to further address the situation in the region.

3

PLURAL LEGAL SYSTEMS AND THE PROTECTION OF CHILDREN FROM HARMFUL PRACTICES

Introduction

This section explores the existence of plural legal systems in Africa and the potential tensions between them, particularly between customary or religious law and national legislation in line with internationally human rights standards. Experiences from different countries demonstrate how these tensions can be overcome.

As mentioned above, plural or multiple legal systems refer to the presence of more than one source of law in a country's legal system. Multiple legal systems may include English common law, French civil or other law, statutory law, customary law, and some form of religious law. They exist in virtually all African jurisdictions⁴¹ as well as in a number of countries in Asia and the Americas. In some States, tribal courts act alongside religious and statutory courts.

In countries with plural legal systems the nature of a case and the status and identity of the parties will often determine the court's jurisdiction. In other words, issues governed mainly by religion are dealt by religious courts (as long as at least one of the parties subscribes to the religion) whereas issues falling within custom and tradition are dealt with where they occur by customary courts or adjudication procedures.

In plural legal systems, people rarely confine their actions within one system of law. Rather, they tend to draw from all the various systems and to follow the one that may suit them best.⁴² Therefore, judges have a continuing task of determining the applicable law in each matter, particularly in the private-law realm, where issues of a private nature, especially those within the domestic sphere, are entertained.⁴³

On its face, legal pluralism may appear to be accessible, fair, non-discriminatory and to reflect the historical, legal and other developments of a country. In reality, however, it may allow for the justification of harmful practices on grounds of culture, religion or tradition based on sources of law that may compromise the realization of human rights.⁴⁴

Customary law consists largely of unwritten rules that may be applied informally by traditional leaders or, in some cases, by courts within the formal judicial structure. Created to preserve indigenous customs and appease traditional leaders, these customary laws and practices have sometimes placed vulnerable groups, especially women and children at risk of harmful practices.

As noted by some authors, plural legal systems have resulted in fundamental contradictions when applying customary law to treaty-based human rights standards:

"Fundamental contradictions inherent in the legal system – the coexistence of modern, statutory laws with traditional customary laws and practices – has created a complex and confusing legal regime ... Not surprisingly, many of the problems which are faced today in much of Africa 'are the product of trying to piece together, in a hasty fashion, not only the different legal systems but also fundamentally different conceptions of society and the family.'"⁴⁵

A special system of courts, which is sympathetic to the cultural or religious affiliation of the litigants, is an important component of legal pluralism, because it can give full and proper expression to their beliefs and practices. However, it also has given rise to the belief that matters falling in the purview of customary courts should not be subject to any review or scrutiny by the State or other judicial bodies, even when decisions from such courts uphold harmful practices.⁴⁶ This perspective raises a major problem that the national process of law enactment and enforcement, as well as this report seek to address.

Customary law courts can be more accessible to people at the grassroots level than courts within the formal judicial system. In some cases, the minimal presence of civil and other authorities in distant parts of a country compels governments to recognize traditional courts, or courts of elders, which apply customary law to most cases in remote and rural areas, including private law matters and criminal cases. When compliance with human rights is secured, this may be a positive development that can be built upon to secure the right to access to justice.

Constitutional framework within the African region

The colonial history of Africa, characterized by plural legal systems, led many African countries to adopt constitutions that recognize long-practiced customary law as an equal source of law to be applied in appropriate situations. Mainly, this has been limited to “issues of personal law.” Thus, although customary and informal law systems developed in spheres invisible to the dominant legal system, they remained central to the lives of most of their subjects.⁴⁷

Most African constitutions recognize human rights in one form or another. In Angola, Benin, Burundi and Togo, international human rights instruments, which have been duly ratified, are explicitly incorporated into the constitution; several other States require their enactment into national law.⁴⁸

In at least 20 constitutions, international treaties duly ratified and published “assume a superior position to domestic law,”⁴⁹ thereby creating a conducive environment for upholding human rights, including children’s rights.

The Constitution of Angola

The Constitution of Angola, adopted in 2010, indicates that general or common international law received under the terms of the Constitution form an integral part of the Angolan legal system.⁵⁰ Moreover, “constitutional and legal precepts relating to fundamental rights must be interpreted and incorporated in accordance with the Universal Declaration on Human Rights and international treaties on the subject ratified by the Republic of Angola;”⁵¹ and “the constitutional principles regarding fundamental rights, freedoms and guarantees are directly applicable to, and binding upon, all public and private entities.”⁵²

The right to culture, guaranteed by many human rights documents, including the CRC and the ACRWC, is recognized in around 41 African constitutions and protected in various ways including “the freedom of individuals and communities to promote, enjoy, practice and maintain their culture, including the use of their own languages as well as national languages.”⁵³ In two countries, namely Ethiopia and Namibia, the right to culture is considered non-derogable and therefore not subject to suspension even in time of emergencies.⁵⁴

To ensure that customary law develops in accordance with the nation's constitutional values, South Africa's Bill of Rights provides for the development of customary law by the courts. In this connection, the Constitution of South Africa indicates that "[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

South Africa's Constitutional Court recognizes the primacy of human rights

In South Africa, women's rights' activists defeated an effort by traditional leaders to include exclusionary clauses in the country's 1994 constitution and paved the way to a landmark case. Exclusionary clauses "place family law outside the purview of the constitution and create the risk of discrimination against vulnerable groups including the protection of women and children from harmful practices.

In *Bhe and Others v Magistrate, Khayelitsha and Others*, an application was made on behalf of Ms. Nontupheko Bhex and her deceased partner to allow their two minor daughters to inherit immovable property, namely a house. The litigants contended that the customary law rule of male primogeniture unfairly discriminated against the two children. The Court agreed that the principle of primogeniture as expressed in the Black Administration Act 38 of 1927 and its regulations discriminated on the basis of race and gender. This decision was confirmed by the Constitutional Court.⁵⁵ In relevant section, particularly regarding children's rights, Justice Langa said:

"The primogeniture rule as applied to the customary law of succession cannot be reconciled with the current notions of equality and human dignity as contained in the Bill of Rights. As the centerpiece of the customary law system of succession, the rule violates the equality rights of women and is an affront to their dignity. In denying extra marital children the right to inherit from their deceased fathers, it also unfairly discriminates against them and infringes their right to dignity as well. The result is that the limitation it imposes on the rights of those subject to it is not reasonable and justifiable in an open and democratic society founded on the values of equality, human dignity and freedom."⁵⁶

In its decision, the Court highlighted both South Africa's international obligations and its constitutional mandate to develop customary law according to human rights values.⁵⁷

In the Tanzania case of *Asha Mbulayambe v William Shibungi*, which dealt with the right of a widow to inherit from her late husband's estate, the Court stated that "where there is clear statutory law that is more in line with equity than some other law on the same point, such as customary or Islamic law, then statutory law should prevail."⁵⁸

These constitutional provisions demonstrate clearly that law reform can only begin on a platform that enables law-makers and judicial bodies to address and develop customary law in a way that closes the gap between the traditional or religious laws that guide day-to-day living and the law framed by human rights standards and recognized by the State.

In instances where judicial powers are vested in multiple legal systems, the formal system serves as an appeal from the traditional courts. For instance, in Nigeria, the law allows defendants to challenge the constitutionality of *Sharia* criminal statutes through the common-law appellate courts. In Niger too, customary courts are based largely on Islamic law and local tradition; while formal law does not regulate these courts, defendants can appeal a verdict in the formal court system.

Despite the absence of an explicit recognition of formal courts to challenge the validity of substantive and procedural issues dealt with by customary or religious courts, some constitutions in Africa allow the customary system to operate only as long as they do not violate the bill of rights of a country's constitution. Others go further and require these systems to comply with international human rights instruments.

The 2010 Constitution of Kenya embraces African customary law only to the extent that it is not “repugnant to any written law.” Recognizing the potential conflict between international law and some customary laws, the drafters provided a provision according to which: “any law, including customary law that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.” This provision is further consolidated by the recognition that “the general rules of international law shall form part of the law of Kenya” and that “[a]ny treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.”⁵⁹

Of all Southern Africa Development Community (SADC) countries with plural legal systems, only the constitutions of Angola, Namibia and South Africa make it clear that the provisions of the Bill of Rights take precedence in a conflict between customary law and statutory law.

The general trend that emerges from the constitutional recognition and status of customary law is a cautious position towards the outright abolition of customary law or practices. At the same time, that caution is mitigated by a progressive and evolutionary approach towards the abolition of harmful practices that oppose the realization of international human rights and children's rights standards.

Legal protection of children from violence, including harmful practices

Some of the constitutions discussed above provide specifically for child's right to protection from all forms of violence or harmful practices as condoned in some customary law. The right to freedom from torture and cruel, inhuman and degrading treatment or punishment is recognized in about 49 constitutions⁶⁰ and is explicitly defined as a non-derogable right in six.⁶¹

Under the Constitution of Kenya, every child has the right, among others, “to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour.”⁶²

The Transitional Constitution of the Republic of South Sudan (2011) provides that “[e]very child has the right...not to be subjected to negative and harmful cultural practices which affect his or her health, welfare or dignity.”

Going a step beyond the constitutional protection of children from harmful practices is the more comprehensive stand-alone legislation on children's rights, a significant trend across African countries in the last decade.⁶³ For instance, according to the Children's Act of Botswana,⁶⁴ “every child has a right

not to be subjected to social, cultural and religious practices that are detrimental to his or her well-being.” Beyond this general prohibition, the Act lists some specific harmful practices that are prohibited.⁶⁵

The Children’s Act of Kenya,⁶⁶ the Tanzanian Law of the Child Act of 2009⁶⁷ and the Lesotho Child Welfare and Protection Act also prohibit harmful practices; the latter seems to categorize harmful practices explicitly as violence against children, stating that:

“A child shall have the right to be protected from torture or other cruel, inhumane or degrading treatment or punishment including any cultural practice which dehumanizes or is injurious to the physical, psychological, emotional and mental well-being of a child.”⁶⁸

On the relationship between customary law and children’s rights law generally, it is important to note the provision of the Lesotho Child Welfare and Protection Act, which recognizes that:

- This Act must be administered and enforced so as to open up more avenues for the promotion, protection and realization of the rights and welfare of children.
- Where there is anything to the contrary or less protective ... in any law, the provisions of this Act shall apply.⁶⁹

These provisions constitute good practice that can support the promotion of future developments in tandem with the provisions of the ACRWC.

4

IMPLEMENTING LEGISLATION TO SUPPORT THE ABANDONMENT OF HARMFUL PRACTICES

Introduction

Explicit legal prohibition provides a sound foundation to prevent and address harmful practices to protect those at risk and to fight impunity. But to be effective, legislation needs to be supported by an engaged and multidimensional process of national implementation that includes: information and awareness raising initiatives; available and accessible services; active institutions; and a wide process of social mobilization. With the involvement of community and religious leaders, parliamentarians, professional associations, academic institutions and grass-root organizations to influence and mobilize society for change, legislation can then gain traction as a genuine deterrent.

In this regard, the genuine involvement of communities where harmful practices are prevalent is crucial. Their engagement can help to avoid stigmatization and social exclusion. It can help communities to understand and address the social dynamics behind deeply entrenched traditions and acknowledge their detrimental impact on children's rights and well-being. In turn, this process of social mobilization can result in communities' empowerment to effectively promote the abandonment of such practices.

As experience in Africa and beyond as shown, when such a process of dialogue and engagement is pursued by motivating change from within, legislation is then envisaged as a fruit of true conviction, rather than the imposition of judgemental and external values.

Traditionally in Africa, children are viewed as a "gift" which must be cared for. Consequently, there are many positive practices that protect children. As noted by save the Children, some examples include traditional naming ceremonies that take place shortly after a child is born, to mark a child's inclusion in the extended and protective family circle and the start of the family's obligations to care for and protect the child. Similarly, initiation ceremonies, which indicate the transition of children to adulthood, create a sense of identity and belonging to a broader community, and have a strong education component.⁷⁰

This section addresses some critical dimensions of the process of national implementation that help to translate legal provisions into action and a process of lasting social change.

Education and awareness-raising initiatives

Law enactment to prohibit and address harmful practices is gaining momentum in countries across regions; at the same time, its implementation remains a challenge. When law enforcement is pursued in isolation from social engagement, without information and advocacy campaigns, and lacking support from adequate child protection measures, harmful practices run the risk of moving underground where they are hidden from the public domain, and make their prevention and children's protection particularly difficult.

High levels of illiteracy may hinder the abandonment of age-old practices that are detrimental to the health and development of children.

Education is an empowerment tool that not only makes available knowledge and information, but also choices, and provides enlightenment as to what courses of action can be taken.⁷¹

The role of education and awareness-raising on the harmful consequences of these practices cannot be over-emphasized; and it needs to start with children themselves. Children need to be educated and informed about their rights, to gain confidence and skills and become the first line of prevention of harmful practices. Human rights education is a critical contribution to this process and should be included as a core component of the formal and informal school curricula, helping to generate knowledge on international and regional standards on the rights of the child, preventing the marginalization and stigmatization of child victims, and empowering children to be part of this important process of social change.

Changing social norms through a collective approach

Paralegals trained to mobilize communities in Zambia

In Zambia, child abuse cases must be reported to the Victim Support Unit of the police. The need to travel long distances to the police station, makes reporting a real hardship for community members.

Plan International is supporting the set-up and training of local committees and paralegals, equipping them with basic legal knowledge to provide advice and referrals to community members who want to report child abuse. The trained paralegals include village headmen and women who are also custodians of customary law. Further equipped with a simplified Zambian penal code and other relevant statutory laws, the paralegals orient other local leaders and sensitize their communities on children's rights to advocate for the enforcement of child protection laws.¹

As described in the story above, effecting social change requires the mobilization of diverse actors at different levels, including community leaders, survivors of harmful practices turned anti-harmful-practices advocates, the media, government officers and other relevant non-state actors. These actors represent influential agents in the communities whose collective efforts can galvanize action towards addressing harmful practices at the local level.

The impact of social change however depends on the extent to which information is made available to communities affected by long-held traditional perceptions and practices that are harmful to children, and about alternatives to existing social conventions.

Religious leaders play a decisive role in the protection of children from violence, including harmful practices. With their influential voice and initiatives, they enhance awareness amongst families and communities about the detrimental impact of harmful practices on children; they clarify that these practices are not based or legitimized by religion; and support a process of social change that can lead to the lasting abandonment of those practices.

At the 2006 Religious for Peace World Assembly, held in Kyoto, Japan, religious leaders from all world religions adopted the “Multi-Religious Commitment to Confront Violence against Children” (the Kyoto Declaration), offering their support to mobilizing the international community through the United Nations Study on Violence against Children to address this critical issue. Their strategic recommendations include the following:

“We will create greater awareness in our communities about the impact of all forms of violence against children, and work actively to change attitudes and practices that perpetuate violence in homes, families, institutions and communities (...)

We will promote the child as a person with rights and dignity, using our religious texts to provide good examples that can help adults to stop using violence in dealing with children (...)

We call upon our governments to adopt legislation to prohibit all forms of violence against children, including corporal punishment, and to ensure the full rights of children, consistent with the Convention on the Rights of the Child and other international and regional agreements. We urge them to establish appropriate mechanisms to ensure the effective implementation of these laws and to ensure that religious communities participate formally in these mechanisms. Our religious communities are ready to serve as monitors of implementation, making use of national and international bodies to maintain accountability. (...)

This process of social change is most likely to occur in communities where increased education, knowledge and awareness about harmful practices and their negative impact are taking place. Reaching a large segment of the population with information and opportunities for discussion and dialogue about social norms and values is most effective through a collective approach where everyone has a chance to participate. “A collective shift is necessary; change can only come when a ‘critical mass’ of families in a community abandon the practice.”⁷³

In Ethiopia, over 80 per cent of women interviewed who had been forcefully married as children and their families cited tradition and “the desire to maintain the family’s good name and social standing” as the strongest reason for early marriage.⁷⁴ Despite the fact that many families are aware of the negative consequences of early marriage, the social “forces that drive parents to marry their girl-children off” are important to understand.⁷⁵ These include economic factors⁷⁶ that are behind certain harmful practices such as dowry, bolstering the argument that legal, social and economic responses are critical to address the practice in a holistic manner.

Efforts to combat harmful practices will therefore be most effective when citizens are sensitized to them within the context of an on-going process that brings together government and community actors. Such a process will help achieve key aims of legislation in addressing harmful practices: to make an explicit statement of state disapproval, to send a message of support to those renouncing the practices, and to deter future incidents.

Social strategies for eradicating harmful practices

According to UNHCR, effective (social) strategies for eradicating harmful practices include:⁷⁷

- action-oriented activities subsequent to awareness-building through education and information focusing on the negative consequences of harmful practices;
- emphasis on health and social consequences rather than only on legal or human rights aspects;
- focus on educating target populations such as religious leaders, traditional leaders such as chiefs, tribal elders and political leaders, traditional birth attendants, other health workers, men, women and children themselves on the negative consequences of harmful practices;
- the promotion and provision of technical support, and the mobilization of resources for national and local groups that will initiate community-based activities aimed at eliminating harmful practices.

These social strategies, however, must be founded on clear and enforceable law. Such a legal foundation serves as a catalyst for the effectiveness of social norms strategies. A good example is the situation of children accused of witchcraft in Akwa Ibom State of Nigeria. Social debates and international pressure around the subject have resulted in firm legislative and other measures taken by the Government of Nigeria, including the establishment of a Commission of Inquiry into Witchcraft Accusations and Child Rights Abuses and the trial of a self-acclaimed killer of 'child witches.' The Government's efforts, propelled by public criticisms and social discourse have resulted in a reduction in the number of new cases of children accused of witchcraft.⁷⁸

Birth registration

Increasing the visibility of harmful practices and violence against children requires an efficient data collection system that begins with birth registration. Indeed, a universal system of birth registration is critical to prevent harmful practices and to effectively protect child victims.

Birth registration provides an official record of a child's existence, family relations and nationality. It enables access to basic social services to which the child is entitled, including health and education for which official proof of birth is often required; and it enables access to effective protection when the child is at risk of violence, injury and neglect, including as a result of harmful practices.

An ill-functioning birth registration system may not take note of the hidden violence perpetrated against children with albinism or those accused of witchcraft, or be able to acknowledge and address cases of infanticide. The lack of a birth certificate and the difficulty to prove a child's age may place girls and boys at risk of early marriage.

According to UNICEF, only half of children under five in developing countries are registered.⁷⁹ Registration rates are particularly low in rural areas and amongst the poorest households, where services may not exist, and where families may be uninformed about the importance of this fundamental right, or be unable to afford associated costs. This situation paves the way to marginalization, discrimination and poverty, and enables incidents of violence against children to remain invisible and unaddressed.

In Sub-Saharan Africa, birth registration rates in rural areas reach only 30 per cent of the child population.⁸⁰ But in a number of countries important measures and incentives are being promoted to reverse this pattern. In Tanzania, for example, in a bid to encourage and increase the rate, registration within three months of birth is free, and children enrolling in pre-school will be able to present a required certificate. In Uganda, the Registration Services Bureau launched a computerized system based on the use of mobile phones to deliver timely and accurate records of births (and deaths) via text messages to a central server in the capital city of Kampala.

Similar efforts are being promoted in other regions. In Bangladesh, for instance, birth registration data is being made available online in an effort to combat child marriages.⁸¹

Bangladesh registers birth data online

In Bangladesh, where the legal age for marriage is 18, the parents of a 15-year old girl were trying to marry her off by hiding her age. Finding them without proper documents, the local officials denied approval of the marriage.

To reduce the practice of early marriage, still at unacceptable levels, the Bangladeshi government is now registering birth data online. In addition, it is increasing birth registrations with a full rollout expected by June 2013. "Once fully online, it will be easier to stop this practice of parents hiding the ages of their daughters to marry them off" said an official of the Birth and Death Registration Project. In 2006, the government launched a campaign to reach the estimated 90 per cent of the population with no birth documents. Today, an estimated 114 million of the country's 150 million inhabitants have birth certificates.⁸²

5

PROTECTING CHILDREN FROM HARMFUL PRACTICES WITHIN PLURAL LEGAL SYSTEMS

Harmful practices that cause violence to children persist in many nations around the world. They range from widely known practices, such as early or forced marriage and FGM/Cutting to those that are lesser known, including breast ironing, accusations of witchcraft or injury and torture of children with albinism.

Legislative processes in many countries address these practices with the aim of preventing and eliminating them, and some are making headway. But deep seated social values and beliefs, condoned by unwritten or customary laws pose serious obstacles to the further success of these efforts. Comprehensive law reform and implementation efforts are strongly needed to prohibit and promote the lasting abandonment of these practices.

A. Child and forced marriage

Violence is part of the daily lives of millions of girls across the world in addition to the “triple work burden of housework, school work and work outside the home, paid or unpaid.”⁸³ This heightened vulnerability to violence is compounded by the phenomenon of child marriage resulting from the interplay of economic and social forces.⁸⁴

Boys are also subjected to forced marriage but the vast majority of victims are girls; half the world’s child brides live in South Asia. According to UNICEF, 46 per cent of young women aged 15–24 were married before the age of 18 in South Asia, 38 per cent in Sub-Saharan Africa, and 29 per cent in Latin America and the Caribbean.⁸⁵

Child marriage has lasting and damaging consequences on the health, education and well-being of girls, and compromises their right to take part in informed decisions. Forced marriage occurs when the consent of the child is neither sought nor considered by the families or communities that arrange such marriages.⁸⁶

As recognized by the Special Rapporteur on Contemporary Forms of Slavery,⁸⁷ in a servile marriage the spouse, usually a female, is also trapped in other slavery-like practices such as domestic servitude and sexual slavery. She has no choice but to perform the tasks expected of her. If she refuses, or if her performance is unsatisfactory, physical, psychological and sexual abuse often follow.⁸⁸

The ACRWC explicitly prohibits child marriage and allows for no exceptions. It requires States Parties to explicitly ban child marriages and set the age of marriage at 18 in their legislation.⁸⁹

Naturally, law enactment needs to be followed by effective implementation and, in turn, enforcement of laws that ban child marriage needs to be supported by socio-economic measures. Indeed, research shows that the prevalence rate of child or forced marriage is highest among girls with little or no formal education, and among households with the lowest income levels and generally most common among the poorest (and least educated) 20 per cent of any population.⁹⁰ This results in further risks during pregnancy, child birth and child rearing. For instance, the majority of girls who are married give birth each year, and face grave risks such as obstetric fistula, disability and death.⁹¹ Thus, in addition to

necessary legal measures to promote the prohibition of child and forced marriage, governments are also required to support communities in addressing the socio-economic situations that fuel the practice.⁹²

Although implementation continues to be a challenge, legislation in the majority of African countries bans both child and forced marriages. For instance, in order to comply with its international human rights obligations, the Government of Madagascar increased the minimum age of marriage to 18 years⁹³ and included registration of traditional, or non-official, marriages under the formal legal system.⁹⁴ In a country where traditional marriages are more numerous than officially registered marriages, this measure is expected to contribute to the reduction of child and forced marriages. In The Gambia, the Children's Act provides that "...no child is capable of contracting a valid marriage, and a marriage so contracted is voidable."⁹⁵ The Eritrean Civil and Penal Code has been revised to raise the minimum age of marriage to 18 for both boys and girls, and to ensure that marriage is consensual.⁹⁶ And the law in Malawi, which prohibits child or forced marriage,⁹⁷ is now reportedly being revised to increase the legal age of marriage from 16 to 18 years. Proposals to set or increase the age of marriage are taking place in other countries such as Mali and Yemen.⁹⁸

In Egypt, important developments took place to protect children from early and forced marriage. With the amendment to the Children's Act (Act No 126 of 2008), the age of marriage for girls was raised from 16 to 18 years. The Act provides that no marriage contract shall be authenticated if the parties have not attained the approved age and prescribes administrative punishment for failing to meet this condition. Implementation efforts, however, remain critical, particularly in rural areas where situations like the phenomenon of "tourist" or "temporary" marriages of young Egyptian girls to foreign men remain a challenge.⁹⁹

Ukuthwala: A tradition of abducting child brides in rural South Africa

Although child and forced marriage is against the law in South Africa, its rural Eastern Cape is home to a persisting practice called Ukuthwala, which translates as 'to pick up' or 'to take' and whereby a young man, preliminary to marriage, takes the girl by force to his home. Today, this practice is compounded by a disturbing twist: the abduction of girls by older men, often widowed by AIDS, whose mistaken believe that sex with a young virgin will cure or prevent infection leads to devastating consequences from rape, starvation, and other abuses.

A documentary called "Ukuthwala – Stolen Innocence" has brought attention to the problem, and inspired concerted awareness-raising campaigns. The World AIDS Campaign and other organizations have spent many hours talking to men in the villages and explaining that the 'rules' have changed. For some, it was an awakening, and as one man said, "We apologize...as we did not know we were breaking the law." The national Prosecuting Authority in South Africa is also working in Eastern Cape villages to raise awareness about the illegality of such practice.

Still, shortcomings in law reform persist in a number of countries with legal pluralism, where religious and customary laws often define the minimum age of marriage according to the attainment of puberty. A number of factors, including poverty, push girls into marriage even before attaining puberty.

B. Female genital mutilation / cutting

Female genital mutilation or cutting (FGM/C) is prevalent in about 28 African countries¹⁰⁰ and in immigrant communities in the diaspora.^{101 102} FGM contains a number of diverse traditional rituals that may involve surgical removal of parts or all of the most sensitive female genital organs.¹⁰³ In some societies, the practice is perceived as part of girls' and women's cultural gender identity, ensuring status, family honour and marriageability. Reasons cited for maintaining the practice include religion, custom, preserving female chastity and fidelity, protecting her from excessive sexual emotions, hygiene, aesthetics and fertility-related issues.¹⁰⁴ The practice violates the girls' rights to protection from violence, dignity, privacy and bodily integrity, among others.¹⁰⁵ The use of the word mutilation reinforces the wide view of this practice as a violation of human rights, while the word "cutting" is often perceived as less judgemental and is used to avoid alienating communities that may be practicing it.

A growing number of countries have promoted important initiatives to enhance understanding and concern about the serious physical, psychological and social implications of this harmful practice and to examine the factors behind its perpetuation, and they are promoting support to communities in their efforts and commitment to abandon this practice.

According to UN Women, approximately 20 per cent of countries in the world explicitly prohibit FGM.¹⁰⁶ Out of 28 countries where it is practiced, only 19 including South Africa and Zimbabwe are reported to have federal laws prohibiting FGM.¹⁰⁷

Legislation banning FGM takes different forms. In some countries, such as Ethiopia, it is incorporated in criminal law; in others, such as Benin and Eritrea a specific law is enacted.¹⁰⁸

Most laws banning FGM provide for statutory penalties. In Tanzania, for example, FGM performed on girls under 18 meets with 5 to 15 years' imprisonment, a fine of 300,000 TZS (\$188), or both.¹⁰⁹ In Niger, although FGM is against the law and punishable by six months to three years in prison, aggravating circumstances are considered in sentencing; for instance, if the victim dies, the practitioner can be sentenced from 10 to 20 years' imprisonment.

Despite the large number of laws that ban FGM, prosecutions are rare. This is partly because law enforcement personnel and communities may be unaware of or indifferent to the law and because victims are reluctant to testify. Without the necessary community awareness and support, a punitive legal approach may force the practice underground. The media continues to report that FGM persists in hiding and is practiced even on babies.

Irrespective of whether a separate criminal law or any other law such as a Children's Act prohibits FGM, the ultimate goal should be to develop a comprehensive legal framework that is applicable to all forms of FGM and all harmful practices. It is important for legislation to include measures that prevent FGM, protect and support the victim, provide for punishment of the perpetrator, and ensure the thorough implementation and evaluation of the law.

C. Son preference and infanticide

Son preference refers to a strong partiality for boys over girls by parents and communities, which often results in the neglect of basic rights of girls, including their health, nutrition and education. On a more extreme level, son preference may lead to pre-natal sex selection and the abortion of female foetuses, as well as female infanticide, or femicide, which may occur deliberately or through forms of neglect, such as starvation.¹¹⁰

The rationale behind son preference is the belief that having a girl child is “culturally and economically less advantageous than having a boy child.”¹¹¹ Rooted in the patriarchal system, son preference is not unique to developing countries or rural areas. Embedded in the deep seated values of many societies, it gives voice to value judgements, expectations and behaviour of family members.¹¹²

Son preference is prevalent in Africa, Asia, Latin America and the Middle East, with pre-natal sex selection, abortion of female foetuses and female infanticide most prevalent in Asia, particularly in China and India.¹¹³ The advance of modern technology raises concerns that pre-natal sex selection and the attendant consequences may be on the rise rather than decreasing. A “moral ambivalence” towards the widely known and socially acceptable traditional practice of female infanticide is demonstrated by the elaborate ceremonies connected to this harmful practice, which supposedly absolves parents of blame for infanticide, and in turn leads to persisting impunity. In some cases, even where infanticide is recognized as a crime it generally draws less severe sentences than murder of an adult.

A number of Asian countries have taken measures to prevent sex selection. For example, the Republic of Korea amended its law in 1994 to increase the sanctions against selective-induced abortion as well as foetal sex screening.¹¹⁴ The 2003 Children’s Act of Goa in India has also underscored the need to eliminate prenatal sex selection, female foeticide and infanticide.¹¹⁵

In some countries, infanticide is also a consequence of negative attitudes towards children born outside of wedlock. In other countries it is fuelled by the practice of accusing children of witchcraft. Sorcery-related femicide of women and girls has been reported in India, Nepal, Papua New Guinea, and Ghana.¹¹⁶

D. Killings in the name of honour

Honour killings are usually committed against women and girls by one or more relatives who believe the victim has brought shame on the family. The act is often justified on the grounds that it was committed to defend or protect the honour of the family in connection with marital relationships, alleged adultery, or falling in love with someone without the approval of the family.

Honour killings violate international human rights treaties including the CRC, which recognizes the right of the child to life, survival and development and to protection from violence.

The Human Rights Committee addressed honour killings in its General Comment 28 and recognizes that laws which impose or permit more serious penalties on women and girls than on men for offences such as adultery violate the requirement of equal treatment.¹¹⁷ Efforts to mitigate honour crimes on the grounds of custom and tradition allow the perpetrator to define the meaning of honour and perpetuate the crime. It also allows the concept of honour to become the focus of legal argument rather than accepted as the central, material fact that a girl has been abused or murdered.

Legislation banning honour killings should also address the root causes of this practice and secure effective protection from discrimination and violence against women and girls, including those in immigrant and minority communities.

E. Using children in forced begging, bonded labour and sexual slavery

Forced begging

The use of children in begging is explicitly prohibited by the ACRWC; article 29(b) specifically calls upon States Parties to take appropriate measures to prevent “the use of children in all forms of begging.”

In many cities around the world, it is common to see children begging on the streets, in public squares or at traffic lights. Most of these children are begging due to poverty and further used by adults to gain money. An example of this harmful practice is the situation in which *Koranic* teachers (known as *marabouts*) force children (known as *talibes*) to beg for money and food on street corners in a number of African countries.¹¹⁸

These children are often young boys who are poorly dressed and from very poor backgrounds. In Senegal, research has found most of them to be around 10 years of age even though the involvement of children as young as two years has been reported. Most beg full time and do not attend any school, including the *Koranic* schools referred to above.

Outlawing the practice of forced begging

In Senegal, Article 3 of Law No. 2005-06 outlaws the practice of forced begging and foresees the prosecution and imprisonment of those who force or entice begging of children:

“Whosoever organizes the begging of another in order to benefit, or hires, leads, or deceives a person in order to engage him in begging or to exercise pressure on him to beg ... will be punished by imprisonment of 2 to 5 years and a fine of 500,000 to 2,000,000 francs. The execution of the sentence will not be stayed when the crime is committed against a minor....”

Bonded labour

Bonded labour exists in almost all corners of the world.¹¹⁹ “Debt bondage” is an extension of this system whereby advances given by employers force men, women or children in families to work towards the endless task of repayment. In Nepal, the **kamalari system**, a form of indentured servitude, persists in spite of the official abolition of slavery. A combination of hard work by charity groups and the court system has contributed to counteracting the problem and rescuing thousands of children from bonded labour. This harmful practice denies children and their families freedom of movement, and protection from exploitation.

Rescuing girls from Nepal's Kamalari system

When Geeta was 12, her father made a deal with a local teacher; and so began her employment. Working from sunrise until late at night, she earned about \$US 10 per year.

Under Nepal's Kamalari system, girls as young as five are sold by their families to work as domestic servants in wealthier homes, such as those of high-caste landowners, business people or civil servants. From extremely poor families, the girls are often seen as little more than a drain on family income. Taken from their communities to areas where they don't speak the language, they are alone, isolated and vulnerable to all sorts of harm, including physical violence and sexual abuse.

Plan International is working to dismantle the Kamalari system. In addition to rescuing and rehabilitating the girls, it helps them return to school or provides support, such as training in starting a business, and runs public awareness campaigns from the village up to the national capital.

Now 21 years old, Geeta is freed from her contract and has started her own business in which she employs her entire family. She has been able to rent a roadside café where she has earned nearly 50 times her annual wage as a Kamalari.

Sexual slavery

"Trokosi" is a religious form of sexual slavery and violence against children that is practiced in a number of West African countries.¹²⁰ The practice involves sending young virgin girls to religious shrines to atone for the crimes committed by their male relatives.¹²¹ Trokosi is conducted allegedly as a means of controlling crime within traditional communities; only a priest can determine whether a girl has atoned for the sin committed by her family, and when to free her from the religious shrine. In instances where the trokosi dies while at the shrine, her family is required to send another virgin girl in her place. Failure to do so is believed to lead to a recurrence of calamities in the family of the alleged wrongdoer. Girls thus continue to pay for the same offense, from generation to generation.¹²²

To address this harmful practice, Ghana's constitution prohibits slavery and servitude, including trokosi.¹²³ A more detailed prohibition of the practice accompanied the enactment of the Criminal Code (Amendment) Act of 1998, which protects the rights of women and children by banning all religious servitude. The law provides that "whoever sends to or receives at any place any person; or participates in or is concerned in any ritual or customary activity in respect of any person with the purpose of subjecting that person to any form of ritual or customary servitude or any form of forced labour related to a customary ritual commits an offence and shall be liable on conviction to imprisonment for a term not less than three years."¹²⁴

This ban faced strong resistance in its early years and the law's effectiveness was impeded by a lack of effective prosecution. Those who objected to the ban, argued that it only increased crime and immorality and that the practice needed to be reinstated. However, awareness-raising has led to the enforcement of the law and left the ban in place.

F. Violence against children with disabilities and children with albinism

Social and structural discrimination often condemns children with disabilities to a position of extreme vulnerability. As a consequence, they are at particular risk of violence that remains hidden and is committed with almost total impunity. Some of this violence is a result of harmful practices that view a child with any form of disability as a bearer of shame and bad luck to the family and thus allows a designated individual from the community to kill such a child.¹²⁵

In some countries, disability is envisaged as the result of witchcraft and evil spirits inhabiting the child; in an attempt to liberate the child, severe measures are accepted including starvation, exposure to extreme heat or cold and harsh beatings. These practices cause serious injury and psychological harm and may lead to death.

The CRC Committee has expressed “serious concern at reports of massacres committed against children with albinism.”¹²⁶ Albinism is a skin disease due to the absence of melanin, a substance which creates the body’s colour. In some African countries people with albinism (PWA) are victims of discrimination and violence because of persistent beliefs and myths. They are often seen as people who do not die but simply fade away in their colourless state. PWA are perceived as a curse from the gods and a charm made from their body parts is considered to have magical powers that bring wealth, success and good luck.

Discrimination, violence and harmful practices against children with albinism have reached alarming proportions in a number of countries.¹²⁷

Emphasizing the importance of law reform and prosecution to protect the rights of children with albinism, an organization called Under the Same Sun based in Canada and active in the protection of children with albinism, advocates for law reform and calls on national governments to prosecute crimes against persons with albinism, assist in public education schemes to counter dangerous myths and support displaced persons with disabilities.¹²⁸ As noted by this organization, a universal birth and death registration system is critical to prevent and respond to incidents of violence; a census may be a crucial first step in addressing the challenges faced by children with albinism, although it may also incur the risk of exposing those children to profiteers’ attacks.¹²⁹

To investigate, prosecute and condemn the perpetrators of such crimes and to undertake preventive measures that bring these practices to an end, clear legislation and its effective enforcement are urgent.

G. Children accused of witchcraft

Witch hunting and witch burning based on superstition and belief in evil spirits have been known in societies worldwide for centuries. Recently, however, attacks against children are gaining visibility, revealing a serious pattern of discrimination and stigmatization, violence, neglect, abandonment and murder.¹³⁰ As a result of fear and superstition, these incidents are rarely reported.

Vulnerable children such as children with disabilities, children with albinism, prematurely born children or specially gifted children are often the target of witchcraft accusations. Branding a child as a witch is in itself a form of psychological violence that must be legally prohibited and effectively addressed; but in many cases it is also associated with physical violence and neglect. The incidence of “child witches” has been documented in several African countries, including Angola, Cameroon, the Central African Republic, the Congo, the Democratic Republic of the Congo, Liberia, Nigeria and Sierra Leone.¹³¹

In some cases, local religious leaders and traditional healers further perpetuate this harmful practice, which serves as a lucrative business venture for them.¹³² Uninformed parents and families who believe or have been led to believe that their child is a witch often seek assistance to exorcise the witchcraft spirit. As payment for the services, parents and families must contribute considerable sums of money and other material possessions.

In addition to social and cultural beliefs, political and economic factors play a role in the phenomenon of children accused of witchcraft in African societies.¹³³ Social and economic conditions, including misfortune, illness and death, fuel the belief in witchcraft and lead to the abuse and neglect that accused children face.

There is an urgent need to deal more decisively with the prevention of this harmful practice, to address its root causes and to undertake effective law enactment and enforcement in line with international human rights standards and in many cases with constitutional obligations.

H. Food taboos including forced feeding

Discrimination in food allocation or restrictions with adverse implications for children's development, and nutritional and health status remains a long-standing practice in a number of countries.

Participants at the 2005 regional consultation for the UN Study on Violence in West Africa, noted that in countries such as Mauritania, Niger, and Northern Mali, parents' desire to marry their children at a very young age incites them to force-feed their 5-10 year old daughters to promote their physical development, make them as plump as mature women, and therefore pleasing to men.¹³⁴ Unfortunately, there is no law that specifically prohibits or condemns forced feeding of children in these countries.

In South Asia, the practice may take the form of seclusion of a young girl for a specified period, accompanied by food taboos.¹³⁵ In some communities, food taboos are based on the fear of demons; for example, oily food is considered to be preferred by demons, and a menstruating girl becomes doubly vulnerable to evil influences by eating fried and oily foods.¹³⁶

In other countries, forced over-feeding of girls in order to fatten them, with a view to increasing marriageability and securing a substantial bride price or dowry is a prevalent practice that can cause physical and psychological pain and which compromises a girl's right to health and physical integrity and dignity.

I. Acid attacks

A number of other harmful practices affect children in different regions. One of them is acid attacks where sulphuric or nitric acid is thrown at or poured on an individual, usually a girl or woman who is involved in marriage-related conflicts. Bangladesh has undertaken legislative, administrative and other appropriate measures, including an active campaign to eliminate acid attacks, accompanied by legislation and vigorous prosecution of perpetrators.¹³⁷

Acid Attack changes the life of a 10-year old

Ten-year-old Zaib was standing at a bus stop when the former fiancé of her older sister rode by on a motorcycle and hurled a jug of sulphuric acid at her. The acid ate away much of her face, sealed shut her eyelids, and, splashing into her mouth, badly scarred her throat. Taking the case to court, the family was pressured to settle its claim for a fine and no jail time for the perpetrator.

Only 17 days later, a new law was enacted that established tougher penalties and fines. It also closed a loophole that had allowed defendants to avoid jail. Although the new law has raised awareness about this phenomenon, many incidents remain unreported

For Zaib, although doctors performed some surgery on her face, her family cannot afford the further medical care that she needs. Zaib has missed much school and spends most of the day at home. The few times she has ventured outside, neighbourhood children stare at her face and turn away. She cries so much, her father said, there are times when she begs to die.

In Colombia, where acid attacks are reportedly becoming more common, the parliament has introduced a bill to protect citizens against such attacks.¹³⁸ The bill prescribes a minimum of 12 years in prison for the act of throwing acid, provides for victim services and proposes other measures to address under-reporting and control the sale of corrosive substances.¹³⁹

J. Stoning

Stoning is a cruel form of torture practiced as a sentence for adultery and other socially condemned sexual relations. Although it applies to both men and women, the practice is more often carried out against women contributing to the perpetuation of gender inequality. This form of inhuman sentencing is known to exist in at least 14 countries in Asia and Africa, where often fails to receive the attention it deserves.

K. Virginity testing

Virginity testing on young girls, conducted in some Asian and African countries, is justified as a means to support premarital chastity or sexual purity and in some countries to reduce HIV/AIDS infection. The South African Children's Act 38 of 2005 prohibits virginity testing only on children under the age of 16, but it does provide safeguards for children between 16 and 18 by indicating that older children must consent in a prescribed manner, and receive proper counselling, and that the results of the test may not be disclosed without the child's consent.¹⁴⁰ Effective implementation of these safeguards remains critical to avoid the risk of being undermined in the name of tradition.

L. Breast ironing

A less known but emerging practice, and worthy of note is that of breast ironing. This harmful practice “has been silenced for too long” because, like other harmful practices against women, such as female genital mutilation, “it was thought to be good for the girl; even the victims themselves often thought it was good for them.”¹⁴¹

Breast ironing is a procedure to flatten the growing breasts of pre-pubescent or pubescent girls by pounding or massaging them with hot or heated objects such as stones, spatulas, coconut shells or wooden spoons.¹⁴² Considered a way to delay a girl’s physical development, and limit the risk of sexual assault and teenage pregnancy, breast ironing often results in burns, deformities and psychological problems in young girls, sometimes younger than nine years of age.¹⁴³

The practice is carried out by mothers, grandmothers or other female relatives, and sometimes girls are taught to perform it on themselves. The fact that close family members are frequently the main drivers, makes it easier for the practice to remain hidden and to persist. It is therefore important for legislation to emphasize the unlawfulness of such a practice, regardless of any consent by persons concerned, in addition to encouraging wide advocacy and social mobilization initiatives, with the strong involvement of the communities where the practice is maintained.

6

CONCLUSIONS AND RECOMMENDATIONS

Building upon the UN Study on Violence against Children and designed to accelerate progress in the implementation of its recommendations, the present report highlights the human rights foundation of children's protection from violence, as a consequence of harmful practices.

The adoption and implementation of national legislation in conformity with international human rights standards, including the Convention on the Rights of the Child and its Optional Protocols and the African Charter on the Rights and Welfare of the Child, is an expression of states' accountability for the realization of children's rights. Legislation is indispensable to explicitly prohibit all harmful practices against children, to secure the protection and redress of children at risk, and to fight impunity. Communicating a clear message of condemnation of harmful practices, legislation legitimizes efforts by national authorities and civil society organizations and provides an indispensable underpinning for other measures designed to promote and support the abandonment of such practices. In addition, it constitutes a sound foundation for children to seek counselling and support, as well as to report and seek redress from incidents that compromise the enjoyment of their rights.

Law reform is an on-going process and requires steady efforts to fill implementation gaps and address emerging concerns. When harmful practices persist behind deeply rooted social conventions, this process offers a strategic platform to involve community and religious leaders, parliamentarians, professional associations, academic institutions and grass root organizations.

Legal reform also provides a crucial opportunity to engage with families and communities where the practices are maintained. This can help to avoid their stigmatization and marginalization; address the social dynamics behind those entrenched traditions; and consider opportunities for change and support to those communities in their efforts to abandon harmful practices. To advance this process of social change, information, awareness raising and social mobilization initiatives need to be promoted in a manner that is culturally sensitive, non-judgemental and non-stigmatizing.

Enacting legislation to protect children from violence, including harmful practices is by nature a complex and wide-ranging process. Through constitutional reform or the introduction of new provisions in family and criminal codes and in child protection and domestic violence legislation, legal change is gaining ground in a number of states in the African region and beyond.

In countries with a plural legal system, where national legislation exists alongside with customary and religious law, legal interpretation and implementation may face complexities and tensions leading to situations that compromise the realization of children's rights, and perpetuate violence and discrimination based on age, gender or other status.

Incrementally, however, significant legislative developments show that these tensions can be overcome. Indeed, as noted by the national initiatives documented in this report, there is a growing recognition that the validity and legal force of custom is dependent on its conformity with human rights, and it cannot threaten the values of equality, human dignity and freedom.

The recommendations below build upon these important initiatives and, guided by the ethical and normative foundation provided by international human rights standards, are designed to strengthen law

enactment and implementation efforts to accelerate progress in children's protection from harmful practices.

a) Undertaking a comprehensive national legislative review

States should undertake a comprehensive legislative review to ensure that domestic legislation relevant to children's protection from violence and harmful practices, foreseen in statutory, customary or religious laws, is in full conformity with human rights standards, including the Convention on the Rights of the Child and its Optional Protocols and relevant regional treaties, such as the African Charter on the Rights and Welfare of the Child.

b) Safeguarding the supremacy of human rights standards

In countries with plural legal systems, the supremacy of legislation aligned with international human rights standards should be explicitly recognized in the law to avoid potential conflicts in legal interpretation and implementation. While traditional, customary and religious adjudication mechanisms may be accessible to people at the grassroots level and play an important role in the protection of children from harmful practices, it is crucial to ensure that resorting to these mechanisms does not jeopardize children's rights or preclude child victims from accessing the formal justice system.

c) Introducing a clear legal ban on harmful practices

National legislation should include a clear and comprehensive prohibition of all harmful practices against children. This overall ban should be supported by detailed provisions in relevant pieces of legislation to secure the effective protection of girls and boys from those practices, to provide for means of redress and to fight impunity, as well as to address the root-causes behind harmful practices, including discrimination against particularly vulnerable children. Legal provisions providing justification of, or allowing consent to harmful practices against children, including on grounds of culture, tradition, honour or religion, should be removed from all national legislation.

d) Establishing accountability and fighting impunity

Legislation should ensure the investigation of incidents and establish the accountability of perpetrators of harmful practices against children, including those advising, attempting to, aiding or condoning those practices. Any agreement or payment to exempt the perpetrator from criminal or civil proceedings or sanctions should be prohibited by law.

e) Establishing mandatory reporting responsibilities and protection orders

Standards establishing an obligation to report incidents of harmful practices should be incorporated in regulations and codes of conduct of professional groups and institutions working with and for children. Mandatory reporting responsibilities should ensure the recognition of the privacy and confidentiality of those who report. Moreover, legislation should include mandatory restraining or protection orders to safeguard the rights of children at risk of harmful practices, and provide for their effective safety.

f) Ensuring recovery and reintegration of child victims and restoring their rights

Legislation should provide for the physical and psychological recovery and reintegration of child victims in an environment that fosters their health, self-respect and dignity. Legislation prohibiting child and forced marriage should, giving due consideration to the best interests of the child, render child and forced marriage null and void; in these situations, the rights of child victims should be upheld and, under any resulting dissolution of marriage, legislation should allow the child to retain or inherit property by virtue of the marriage, as well as housing, maintenance and the custody of children.

g) Ensuring a universal vital registration system

To protect children from harmful practices, including child and forced marriage, legislation should ensure the universal and mandatory registration of births, as well as of marriage, divorce and death.

h) Engaging strategic stakeholders, including community and religious leaders

Traditional and religious leaders play a decisive role in the protection of children from violence, including harmful practices. It is crucial to further strengthen this collaboration and build upon their influential voice and initiatives to enhance awareness amongst families and communities about the detrimental impact of harmful practices on children; to clarify that these practices are not based or legitimized by religion; and to support a process of social change that can lead to the lasting abandonment of those practices.

i) Supporting the protective role of the family

To advance implementation of legislation, parents, as well as members of the extended family and the community should be involved and supported in discussions on children's rights and their protection from violence, on the detrimental impact of harmful practices and their root causes, and on opportunities for promoting the abandonment of those practices. To address the social and economic drivers of those practices, children and their families should benefit from basic social services aiming at children's wellbeing, education and protection.

j) Empowering children to support the prevention and abandonment of harmful practices

Quality education should be provided to all children, including survivors of harmful practices. Education plays a critical role in promoting respect for children's rights, helping to overcome discriminatory attitudes and superstitious beliefs, and mobilizing social support for the protection of children from harmful practices. Children should be given space, empowered and supported to participate in advocacy and implementation efforts aiming at the prevention and abandonment of harmful practices, and the safeguard of their own rights.

k) Supporting implementation with strong institutional mechanisms

Implementation needs to be supported by strong national institutional mechanisms for the protection of children from violence, including harmful practices. These include an effective governmental coordinating body, independent human rights institutions, an impartial judiciary and an efficient law enforcement system. Responsibilities of these institutions need to be clearly established. Moreover, capacity building initiatives to prevent and respond to incidents of violence and harmful practices should be ensured to all professionals working with and for children, and supported by clear guidance and child-sensitive mechanisms and procedures.

l) Consolidating data and research on harmful practices

Throughout the world, countless numbers of girls and boys fall victim to harmful practices. Often violent in nature, these practices leave serious and long lasting health and psychological consequences, and may result in disability or death. In spite of this serious impact, lack of data and research on the nature, magnitude and incidence of harmful practices on children's rights remains a major challenge in all regions of the world. Evidence is essential to inform legislative and other measures supporting the sustained abandonment of harmful practices against children. It is therefore critical to identify, document and share information on local customary and religious practices that promote the right of the child to freedom from harmful practices, as well as on the social dynamics behind their persistence.

m) Strengthening international, regional and bilateral cooperation

The incidence of harmful practices against children is not limited by geographic borders. It affects communities spread across neighbouring countries or living apart as a result of migration. Efforts to prevent the occurrence of these practices and to safeguard children at risk require enhanced cross-border and international collaboration. Such cooperation is critical to promote joint awareness and sensitization efforts, and identify and build upon good practices in law and policy development and implementation. Similarly, transnational cooperation opens avenues for the promotion of mutual administrative and judicial assistance to provide immediate protection and safeguard the rights of children at risk, to fight impunity, and to establish extra-territorial jurisdiction over these practices. To strengthen the protection of children at risk, national legislation on asylum should give consideration to harmful practices against children as a ground for granting asylum.

Endnotes

- ¹ Source: Los Angeles Times, June 11, 2008.
- ² United Nations Secretary-General, Study on Violence Against Children, 2006, paras 25, 98, 100.
- ³ Special Representative of the Secretary-General on Violence against Children annual report to the UN General Assembly, (A/65/262), para 20.
- ⁴ Special Representative of the Secretary-General on Violence against Children annual report to the UN General Assembly, (A/67/230), p. 7.
- ⁵ (2006), p. 74.
- ⁶ See Arts. 3, 7 & 24 UDHR together with General Comments 17, 20 & 28.
- ⁷ See particularly General Comment 13 on the Right to Education that addresses the matter of school discipline and corporal punishment.
- ⁸ The provision of the CRC is to be read together with 2 General Comments of the CRC Committee: No. 8 and No. 13. General Comment No. 8 addresses the right of the child to protection from corporal punishment and other cruel or degrading punishment (Arts. 19, 28(2) & 37(a) of the CRC). General Comment No. 13 addresses "all forms of violence;" Art. 19 (para.1) of the CRC provides that: *States 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 guardians(s) or any other person who has the care of the child.* Additionally, the CEDAW provisions on harmful practices are to be read together with 2 General Recommendations of the CEDAW Committee: General Recommendation No. 19 on Violence against women and General Recommendation No. 14 on Female Circumcision.
- ⁹ Preamble to the CEDAW.
- ¹⁰ CRC Committee, Concluding Observations: Mali (2007); Sierra Leone (2008). See also CEDAW Committee, Concluding Observations: Kenya and Mozambique (2007).
- ¹¹ See CRC Committee General Comments Nos. 3 (2003), 4 (2003), 7 (2005), 8 (2006), 11 (2009), 12 (2009) and 13 (2011).
- ¹² CRC Committee, General Comment No. 4, 'Adolescent Health and Development in the Context of the Convention on the Rights of the Child' (2003).
- ¹³ CRC General Comment No. 4 (2003), para 9.
- ¹⁴ United Nations Department of Economic and Social Affairs (UNDESA), Division for the Advancement of Women *Handbook for Legislation on Violence against Women* (2010), p. 6.
- ¹⁵ Ibid §16. See for example CEDAW Committee, Concluding Observations: Senegal (1994); Ethiopia (1996); Cameroon and DRC (2000); Ghana (2001).
- ¹⁶ See <www.acerwc.org/achievements/> for some of the themes of the Day of the African Child annually since the early 2000s.
- ¹⁷ See CEDAW Committee, General Recommendation No. 19 (1992) on violence against women para 9.
- ¹⁸ CEDAW Committee (1992) para 24(b).
- ¹⁹ CEDAW Committee (1992) para 24(t).
- ²⁰ See particularly Arts 4, 5 & 6 of the AWP.
- ²¹ See art. 16(1) ACRWC.
- ²² AWP Art. 4(2)
- ²³ Ibid §24
- ²⁴ AWP Art. 5
- ²⁵ AWP Art. 6
- ²⁶ Preamble to the ACRWC, para. 7.
- ²⁷ Art. 1(3), ACRWC.
- ²⁸ Art. 21 (1). Art. 21(2) proceeds to mention 'child marriage and the betrothal of girls and boys' as some of the harmful practices which are prohibited.
- ²⁹ K Taime *The African Charter on the Rights and Welfare of the Child: A Social Legal Perspective* (2009) PULP 40.
- ³⁰ Art 41, CRC and Art. 1(2), ACRWC.
- ³¹ D M Chirwa 'The merits and demerits of the African Charter on the Rights and Welfare of the Child' (2002) 10 *International Journal of Children's Rights* 157. See also A Lloyd 'A theoretical analysis of the reality of children's rights in Africa: An introduction to the African Charter on the Rights and Welfare of the Child (2002) *African Human Rights Law Journal* 11.
- ³² Art. 6(b) Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women. Sec 7 provides a range of duties for states parties as measures for the elimination of violence against women.
- ³³ As amended by Protocols No. 11 and 14.
- ³⁴ Arts 2,3,4,8 and 14.
- ³⁵ Adopted on 7 April 2011.
- ³⁶ As of 20 September 2012; 10 ratifications are required for its entry into force.
- ³⁷ 2001/2035(INI).
- ³⁸ European Parliament resolution of 14 June 2012 on ending female genital mutilation.
- ³⁹ 2007/2093(INI)
- ⁴⁰ European Parliament towards an EU strategy on the rights of the child (2008) para 42. Para 46 further provides that medical practitioners should be made aware of harmful practices, 'with particular attention being paid to vulnerable groups including immigrant girls and women, those from ethnic minorities and disabled girls.'
- ⁴¹ Kassan (2008) p. 172.
- ⁴² Rwezaura (1994-1995) p. 524.
- ⁴³ B Rwezaura 'Tanzania: Building a new family law out of a plural legal system' (1994-1995) 33 *University of Louisville Journal of Family Law*, p. 523.
- ⁴⁴ C Himonga 'Implementing the Rights of the Child in African Legal Systems: The *Mthembu* Journey in Search of Justice' (2001) *The International Journal of Children's Rights*, p. 90.

⁴⁵ UU Ewelukwa "Post-Colonialism, Gender, Customary Injustice: Widows in African Societies" (2002) 24 *Human Rights Quarterly*, ps. 446-447. The approach in Malawi was however different; it chose the establishment of traditional courts which dealt with both customary and criminal law matters. In Cote d'Ivoire, the preference was the abandonment of customary law in favour of the French civil code system. See F.Banda, *Women, Law and Human Rights in Africa* (2005) P. 20.

⁴⁶ W Wicomb & H Smith 'Customary communities as 'peoples' and their customary tenure as 'culture': What we can do with the Endorois decision' (2011) 11 *African Human Rights Law Journal*, p. 426.

⁴⁷ Ibid 48.

⁴⁸ These include: Malawi, Nigeria, Seychelles, South Africa, Swaziland and Zimbabwe.

⁴⁹ These states are: Angola, Benin, Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, Comoros, Congo, Democratic Republic of Congo, Djibouti, Guinea, Madagascar, Mali, Mauritania, Niger, Rwanda, Senegal, Togo and Tunisia.

⁵⁰ Art. 13.

⁵¹ Art. 26.

⁵² Art. 28.

⁵³ Heyns & Kaguongo (2006) p. 705.

⁵⁴ Idem, p. 682.

⁵⁵ 2005 (1) Butterworths Constitutional Law Reports 1 (Constitutional Court).

⁵⁶ Same as above, para 95.

⁵⁷ Section 39(2).

⁵⁸ High Court Civil Appeal No. 56 of 1986, (13/6/88) per J Chipeta, cited in B Rwezaura 'Building a New family Law out of a Plural legal System' (1994-1995) 33 *University of Louisville Journal of Family Law* 533.

⁵⁹ Sections 2 (5) and 2 (6)

⁶⁰ Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Congo, Cote d'Ivoire, Democratic Republic of Congo, Djibouti, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Gabon, The Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mauritius, Mozambique, Namibia, Niger, Nigeria, Rwanda, Sao Tome & Principe, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, Sudan, Swaziland, Tanzania, Togo, Uganda, Zambia and Zimbabwe.

⁶¹ Democratic Republic of Congo, Ethiopia, South Africa, Sudan, Swaziland and Uganda.

⁶² Constitution of Kenya, Sec 53(1)(d).

⁶³ See generally J Sloth-Nielsen 'Domestication of Children's Rights in National Legal Systems in African Context' in J Sloth-Nielsen (ed) *Children's rights in Africa: A legal perspective* (2008) ps. 53-72.

⁶⁴ Sec 62(1).

⁶⁵ Sec 61(3) of the Act prohibits torture and other cruel, inhuman and degrading treatment, but it also recognises some form of corporal punishment for children; not more than six strokes in terms of sec 90(1) of the Act: Children Act 08 of Botswana 2009.

⁶⁶ Children's Act No. 8 of Kenya 2001. Sec 14.

⁶⁷ Law of the Child Act of Tanzania, 2009. Sec 13(1).

⁶⁸ Lesotho Child Welfare and Protection Act, Sec 15.

⁶⁹ Lesotho Child Welfare and Protection Act, Sec 1(3)-(5).

⁷⁰ <http://resourcecentre.savethechildren.se/content/library/documents/childrens-protection-and-cultural-rights-fact-sheets>

⁷¹ R Hanzi, 'Sexual abuse and exploitation of the girl child through cultural practices in Zimbabwe: A human rights perspective', unpublished LLM dissertation, University of Pretoria, 2006, 51.

⁷² Plan Norway's 2011 Report.

⁷³ UNICEF Innocenti Research Centre "A Study on violence against girls," (2009) p. 37.

⁷⁴ B Alemu 'Early marriage in Ethiopia: Causes and health consequences' (2008) p. 5 available at Exchange on HIV/AIDS, sexuality and gender, Harmful traditional practices < http://www.kit.nl/net/KIT_Publicaties_output/ShowFile2.aspx?e=1415 > (accessed 26 May 2012).

⁷⁵ Idem

⁷⁶ International Centre for Research on Women, "Cash incentive program aims to delay when Indian girls marry" 26 May 2011 available at <<http://www.icrw.org/media/news/motivation-prevent-child-marriage>>.

⁷⁷ UNHCR *Policy on Harmful Traditional practices* (Annexes), 19 December 1997, available at: < <http://www.unhcr.org/refworld/docid/3efc79f34.html> > (accessed 27 May 2012).

⁷⁸ U.S. Department of State Report 2011: Nigeria.

⁷⁹ http://www.childinfo.org/birth_registration_progress.html

⁸⁰ idem

⁸¹ Irin News, "Bangladesh: Reducing child marriage through online birth records" (3 July 2012) available at < <http://www.irinnews.org/Report/95782/BANGLADESH-Online-birth-data-to-prevent-child-marriage>>.

⁸² www.irinnews.org/Report/95782/BANGLADESH-Online-birth-data-to-prevent-child-marriage (03/07/2012).

⁸³ Report of the UN Secretary-General on the girl child (2011), A/66/257, paras. 14 & 16.

⁸⁴ Idem, para. 32.

⁸⁵ UNICEF, *Early Marriage and forced marriage, Childinfo, January 2012*, www.childinfo.org/marriage-progress.html

⁸⁶ The South Asia Initiative to End Violence Against Children (SAIEVAC), Workplan 2010-2015, 10 & 18, available at <http://srs.violenceagainstchildren.org/sites/default/files/political_declarations/SAIEVAC5YEAR0WORKPLAN2010.pdf > (accessed 5 July 2012).

⁸⁷ Report by the Special Rapporteur on contemporary forms of slavery, including its causes and consequences, Gulnara Shahinian to the Human Rights Council, 10th July 2012, A/HRC/21/41.

⁸⁸ Ibid, p. 5, para 17.

⁸⁹ Art. 21(2), ACRWC.

⁹⁰ Report of the UN Secretary-General on the girl child (2011), para. 34.

⁹¹ Ibid, para. 36;

⁹² Ibid, para. 38.

⁹³ Law No. 2007-022 of 20 August 2007 concerning marriage standardizes the marriageable age at 18 for both genders (instead of age 17 for boys and age 14 for girls).

⁹⁴ CRC Committee, Concluding Observations: Madagascar, (CRC/C/MDG/CO/3-4), (March 2012), para 53.

⁹⁵ The Children's Act, section 24.

⁹⁶ Report of the UN Secretary-General on the girl child (2011), para. 39.

⁹⁷ See Malawi Child Care, Protection and Justice Act, 2010 sec. 81.

⁹⁸ Report of the UN Secretary-General on the girl child (2011), para. 39.

⁹⁹ CRC Committee, Concluding Observations: Egypt, (CRC/C/EGY/CO/3-4), (June 2011), para 72.

¹⁰⁰ www.childinfo.org/fgmc_progress.html

¹⁰¹ Outside of Africa, cases of FGM are recorded in the Middle East and Asia, in countries and territories such as Yemen, Oman, Jordan, the Palestinian Authority, Iraq, Malaysia, Indonesia and India. It is also prevalent among immigrant communities in some industrialized countries of Europe, North America, New Zealand and Australia, although it is generally difficult to obtain evidence of FGM prevalence in these communities.

¹⁰² UNICEF Innocenti Digest "Changing a harmful social conception: female genital mutilation/cutting, p. 2.

¹⁰³ WHO, "Eliminating Female Genital Mutilation: An Interagency Statement (UNAIDS, UNDP, UNECA, UNESCO, UNFPA, UNHCHR, UNHCR, UNICEF, UNIFEM, WHO)" (2008) 11.

¹⁰⁴ As above; UNICEF Innocenti Digest p. 12.

¹⁰⁵ UNICEF, "Legislative reform to support the abandonment of female genital mutilation/cutting", (2010), 4.

¹⁰⁶ Which is around 38 countries in the world.

¹⁰⁷ Available at < http://www2.ohchr.org/english/bodies/cedaw/docs/cedaw_crc_contributions/EqualityNow.pdf>.

¹⁰⁸ Respectively Benin's Law 3 of 2003 on the Repression of the Practice of Female Genital Mutilation, and Eritrea's Proclamation 158/2007 to Abolish Female Circumcision.

¹⁰⁹ See US Department of State, (2012), Tanzania.

¹¹⁰ Raoul Wallenberg Institute of Human Rights and Humanitarian Law *United Nations Fact Sheets No. 1-25* (1996) p. 452. See also MAN UP 'Son preference' available at < http://www.manupcampaign.org/index.php?option=com_content&view=article&id=160:test-issue&catid=59:vaw-issues&Itemid=128>.

¹¹¹ B R Siwal, (2005), Preventive Measures For Elimination of Female Foeticide (2005) 1, Eldis, www.eldis.org/fulltext/PREVENTIVE_MEASURES_FOR_FEMALE_FOETICIDE.pdf

¹¹² Raoul Wallenberg (1996) p. 453.

¹¹³ Lancet, volume 377, issue 9781, ps. 1921-1928, June 2011.

¹¹⁴ UNICEF, "Law reform and implementation of the Convention on the Rights of the Child" (2007), p. 69.

¹¹⁵ Ibid §117.

¹¹⁶ See Report of the Special Rapporteur on Violence against Women, its causes and consequences, (A/HRC/20/16) (23 May 2012) paras. 39-40.

¹¹⁷ International Covenant on Civil and Political Rights – ICCPR, General Comment 28, UN doc. ICCPR/C21/Rev.1/Add.10, para. 31.

¹¹⁸ A report issued by Human Rights Watch in April 2010 estimated 50,000 child beggars in Senegal. "Off the backs of the children: Forced begging and other abuses against Talibes in Senegal" (April 2010), available at <<http://www.hrw.org/reports/2010/04/15/back-children-0>>.

¹¹⁹ See, for instance, United Nations Economic and Social Commission for Asia and the Pacific "Harmful traditional practices in three countries of South Asia: Culture, human rights and violence against women" (2007).

¹²⁰ See E Dovo & S.K. Kufogbe, The Distribution of Trokosi Shrines (Female Ritual Bondage in Ghana, in 21 Bulletin of the Ghana Geographical Association (1998).

¹²¹ See J Ayisi Agyei, *African Women: Championing Their Own Development and Empowerment-Case Study, Ghana, 21 Women's Rts. L. Rep. ps.117, 124* (2000).

¹²² Ibid §124.

¹²³ Constitution of Ghana Art. 16(1).

¹²⁴ Criminal Code (Amendment) Act 314 (A) (1998).

¹²⁵ CRC Committee, General Comment No 9, The Rights of Children with Disabilities, (CRC/C/GC/9), (2007), para 31.

¹²⁶ CRC Committee, Concluding Observations: Burundi, (CRC/C/BDI/CO/2), (October 2010), para 33.

¹²⁷ UNICEF Children accused of witchcraft: An anthropological study of contemporary practices in Africa (2010), p. 27.

¹²⁸ See generally Under the Same Sun, "Children with albinism in Africa: Murder, mutilation and violence" (a report submitted to the UN Special Representative of the Secretary general on Violence against Children) (June 2012)

¹²⁹ Idem.

¹³⁰ UNICEF Children accused of witchcraft: An anthropological study of contemporary practices in Africa (2010), p. 1

¹³¹ UNICEF Children accused of witchcraft: An anthropological study of contemporary practices in Africa (2010), p. 15.

¹³² Ibid §134, p.3.

¹³³ Ibid §134, p. 2.

¹³⁴ World Report on Violence against Children, (2006), p. 60.

¹³⁵ See United Nations Economic and Social Commission for Asia and the Pacific "Harmful traditional practices in three countries of South Asia: Culture, human rights and violence against women" (2007) p. 44.

¹³⁶ As above.

¹³⁷ See generally, Hooma Shah "Brutality by acid: Utilizing Bangladesh as a model to fight acid violence in Pakistan" (2009) 26 *Wisconsin International Law Journal* 1172. In 2011, in the *Ebcin v. Turkey* (no. 19506/05) case, the European Court has reconfirmed, among others, that acid attacks are serious act of violence, in violation of Article 3 (prohibition of inhuman treatment) and Article 8 (right to respect for private and family life).

¹³⁸ IPS News, "Colombia tightening laws against acid attacks" <<http://www.ipsnews.net/2012/07/colombia-tightening-laws-against-acid-attacks/>>.

¹³⁹ As above.

¹⁴⁰ Section 12 of the Act.

¹⁴¹ Gender Empowerment and Development (GeED) *Breast ironing: A harmful traditional practice in Cameroon* (2011) 1.

¹⁴² GeED (2011) 5; U.S. Department of State 'Country Reports on Human Rights Practices for 2011: Cameroon, available at <<http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper>> (accessed 27 May 2012).

¹⁴³ As above.