

Harmonization of domestic laws with international Provisions of children's rights

Some practical guidance

1. Introduction

The UN Convention on the Rights of the Child (CCR) and the African Charter on the Rights and Welfare of the African Child (ACRWC) expect from States Parties to undertake legislative and other measures for the implementation of the rights enshrined in those treaties of human rights of children (1). The Study of the African Child Policy Forum (ACPF) on Harmonization of Laws on Children in Eastern and Southern Africa shows among other things that it is far from easy to bring national laws in full compliance with the provisions of both the CRC and the ACRWC. Some practical guidance, based on the results of the ACPF study and experiences in other countries States Parties to the CRC may therefore be useful for governments, parliamentarians, NGO's and others involved in national legislative efforts to harmonize domestic laws with provisions in the CRC and the ACRWC.

2. CRC and ACRWC: some general remarks

This guidance is a set of rather practical "tips" and options for the process of harmonization. The focus will be on compliance with the CRC because all African States have ratified this convention. But 38 of the 53 African States also ratified the ACRWC and therefore should include the provisions of this charter in their efforts to harmonize domestic laws with international children's rights provisions.

By way of example: article 24, par. 3 CRC requires States Parties to abolish traditional practices prejudicial to the health of children. Article 21 ACRWC also calls for the elimination of harmful social and cultural practices but is much more specific: customs and practices discriminatory to the child on the grounds of sex or other status and child marriage and the betrothal of girls and boys shall be prohibited including the establishment of a minimum age for marriage at 18 for boys and girls. African States Parties to both the CRC and ACRWC should take into account both provisions in their harmonization efforts (2)

Finally: in order to create the most comprehensive of human rights of children in Africa it is important that all African States not only ratify the CRC (which they did), but also the ACRWC (which 15 still have to do). The CRC and the ACRWC are complementary to each other and

their full implementation will make Africa a world fit for the African child.

3. Optional Protocols to the CRC

There are two optional protocols to the CRC: one on the involvement of children in armed conflicts (OPAC) and one on the sale of children, child prostitution and child pornography (OPSC). States Parties to these optional protocols should in their efforts to harmonize domestic laws take into account the legislative requirements under these protocols. Regarding the OP on children in armed conflict it is recommended to take into account not only the text of this OP but also the recommendations of the CRC committee in its Concluding Observations made for countries that submitted their initial report on the implementation of this OP. The Committee recommends very specific legislative measures for an effective implementation of this OP.

The OP on the sale of children, child prostitution and child pornography requires specific legislative measures to criminalize various activities specified in art. 3 OPSC. In addition legislative measures are required to establish extra territorial jurisdiction and to regulate an effective process of extradition of perpetrators.

Compliance with the legislative measures required under the two OP's is a crucial contribution to a better protection of children from involvement in armed conflict and from becoming victims of commercial sexual exploitation and related activities such as sale and trafficking.

So far 50% of the African States have ratified both optional protocols (3). The other States are encouraged to make the ratification of the two optional protocols a matter of legislative priority. But at the same time, it is recommended to already take into account the legislative requirement of these optional protocols in their harmonization of domestic law. This would facilitate the ratification and implementation of these optional protocols.

4. Harmonization of domestic law

The term harmonization is used for practical reasons and can be defined as the activity of a government meant to ensure that the national laws and related administrative regulations are in full compliance with the CRC and in case they have also been ratified with the ACRWC and the two optional protocols to the CRC (4).

This harmonization is an ongoing process starting with a review of existing laws and regulations and continuing with a systematic checking

of compliance of proposed legislation with the CRC and - as far as ratified - the ACRWC and the Optional Protocols.

With reference to the previous paragraphs with some general information on international children's rights which should be covered in an harmonization process, this paragraph will focus on the harmonization activity as such with practical tips or suggestions and options on how it can be done.

4a. A comprehensive harmonization policy

It is necessary to develop and implement a national plan or policy for the harmonization of national laws with international children's rights. Such a comprehensive plan is necessary in order to avoid that the harmonization becomes an activity depending on ad-hoc decisions focusing on some areas of the CRC e.g. combating commercial sexual exploitation and trafficking and/or limited to a rather short period of time, e.g. shortly after the ratification of the CRC. The main objective of a comprehensive harmonization policy is to achieve and maintain a full compliance with the CRC and where applicable the ACRWC and the Optional Protocols.

The key components of this national policy are:

- review of existing laws (5);
- systematic checking of proposed laws;
- format/structure of legislative measures;
- drafting and consultation;
- implementation.

In the following paragraph practical tips/options will be presented for each of these components. To avoid misunderstanding: there is no fixed model or blue print for harmonization of laws. How that harmonization will be done is left to the discretion of national governments and depends not only on the national legal system and culture, but also on available human and financial resources.

4b.1 a review of existing laws

Every harmonization should start with an in-depth review of existing laws, that is: a thorough study of the existing legal provisions and regulations in order to identify non-compliance with the CRC (et alia) (6) and to suggest measures to remedy this non-compliance and/or to fill the gaps that may exist. Special attention should be given to customary laws and traditions and to religious laws. The study should result in a report that can serve as the agenda for the legislative measures aiming at full compliance with the CRC.

Suggestion 1: Establish a national review committee composed of representatives of the government, NGO's and where appropriate UN agencies and of independent experts, including experts in customary law and religious law in countries where these laws play an important role. It could serve the impartiality of this committee if its chairperson is an independent highly respected expert. The committee should complete its work in a relatively short period of time e.g. 12 to 18 months. The government should seek technical and other assistance for the committee from e.g. UNICEF and the OHCHR. The committee should decide on its working methods and various possibilities should be considered, e.g.

Options:

- a wide consultation of all relevant groups may be advisable but that should not result in or be an excuse for a process that drags on for years;
- the study is done by the committee and its secretariat and the report could be disseminated among all relevant groups for comments;
- the study could result in a number of reports following more or less the clustering of the articles of the CRC as recommended in its reporting guidelines (see also hereafter par. 4b.3 on format/structure);
- the study could be limited to identifying non-compliance and gaps or produce also draft pieces of legislation; but that certainly needs more than the 12-18 months suggested before.

Suggestion 2: limit the work of the review committee to the identification of non-compliance and gaps of the existing laws.

Reasons: this can be done in a relatively short time and is the first but important step in the process of harmonization because the report will create a momentum, de facto presenting the agenda for legislative measures to be taken. This momentum should be used as a basis for concrete and targeted legislative plans of the government.

4b.2 systematic checking of proposed laws

While working on a comprehensive review of existing laws it is necessary to make sure that new legislation is in full compliance with the CRC (et alia). This process of checking of new legislation is by nature an ongoing process. It should be conducted in a systematic manner that requires clear structures and/or well defined responsibilities. Every piece of legislation and administrative regulation, either issued by the competent ministry or initiated by parliament should be checked against provisions of the CRC. This can be done by e.g. a responsible civil servant/expert in each of the ministries. But this could easily result in patchwork which may show

either different interpretations of the relevant provisions of the CRC or even contradictions.

Suggestion 3: establish a small unit of expert civil servants within the Ministry of Justice or the Attorney General's office or another governmental body responsible for ensuring compliance with human rights provisions. All drafts of legislation/administrative regulations should be sent to this unit for checking the content against the provisions of the CRC (et alia). Ideally this unit should be part of a larger department charged (among others) with the task to ensure that all actions taken by the national and local government - not only legislative actions - are in full compliance with the human rights treaties (international and regional) ratified by the State.

4b.3 format/structure of the legislative measures

The government has to decide on how national laws should be brought in compliance with the CRC. It is sometimes suggested, also by the CRC Committee, that it could be done by one all encompassing children's rights act. This will be most likely a time consuming activity because it is not easy to cover all the provisions of the CRC (et alia) in one single act. It also will result in taking child relevant provisions out of mainstream legislation e.g. on education, health care and social security. Finally it may be difficult to achieve the necessary political support for all elements of the comprehensive children's rights act, because some of them may be sensitive and/or subject to very different opinions. This may result in perhaps serious delay in the enactment of the parts that could be approved by parliament without serious opposition.

In short: an all encompassing children's rights act is an ambitious undertaking and states are of course free to follow this approach, but it may be more realistic to develop and implement a systematic step-by-step policy for compliance of the existing laws with the CRC (et alia)
(7)

Suggestion 4 In this approach the following steps may be considered
(8):

- inclusion in the constitution of the basic children's rights; an excellent example of this step provides art. 28 of the Constitution of South Africa (9);
- the introduction of separate pieces of legislation covering the various areas of the CRC. In this regard the clustering of articles as recommended by the CRC Committee in its reporting guidelines could be an helpful tool. For instance and by way of suggestion:

. a bill by which the national laws are brought in compliance with the civil rights and freedoms enshrined in the CRC (art. 7,8,13-17 and 37(a))

. a bill changing or complementing existing laws and regulations in order to comply with the CRC provisions on family environment and alternative care which should include (among others) provisions addressing child abuse and neglect (art. 19 CRC) and providing children without parental care with the necessary alternative with a clear preference for family type of alternative care such as kafalah and foster care over placement in institutions (art. 20, 21, 25 CRC). Other provisions of the CRC that should be incorporated in the national laws and regulations can be found in art. 5, 9-11, 18 par.1-2, 27 par.4 and 39 CRC.

Similar pieces of legislation could be drafted to cover the CRC provisions on basic health and welfare (art. 6, 18 par. 3, 23, 24, 26, 27, paragraphs 1-3), on education, leisure and cultural activities (art. 28, 29 and 31) and on special protection measures (art. 22, 32-36, 37 b-d, 38, 39 and 40).

The general principles of the CRC, in particular non-discrimination (art. 2), the best interests of the child (art. 3) and the right to be heard (art. 12) should be integral parts of each of these pieces of legislation.

To avoid misunderstanding: these pieces of legislation are not necessary resulting in separate stand-alone acts. In many instances it may result in an act by which existing laws are amended in order to comply with the CRC. For instance compliance with the CRC provisions on the protection from commercial sexual exploitation may be achieved by changing/amending the Criminal Code/Penal Law (10). Compliance with the provisions regarding family environment and alternative care may result in changes of the civil code and/or a specific family law or child protection act.

This programme of various separate acts may seem quite heavy but keep in mind that within the recommended comprehensive policy the groundwork has been done by the independent review committee. Furthermore, some of these pieces of legislation may be rather short depending on the degree of compliance with the CRC in the area covered by the piece of legislation.

After having decided on the structure of the process of harmonization of national laws with the CRC the actual drafting should be done. Some suggestions/tips in this regard:

4b.4 drafting and consultation

The drafting of the various legislative measures requires answers on questions like: who should do it, how and in what order (priority setting).

Who? The answer to this question is of course left to the government and most likely will vary from State to State. The drafting could be left to the experts of the competent ministry. But given the fact that some areas of the CRC (clusters of articles; see under 4b.3) are most likely not exclusively the responsibility of one ministry (e.g. family environment and alternative care or special protection) an inter-ministerial working group may be set up including not only civil servants but also independent experts.

One may consider to include in the working group representatives of NGO's and other sectors of civil society. This may increase the acceptability of the products of the working group. But at the same time it may result in a commitment of NGO's/civil society that can hamper later critical comments in a round of consultations.

Another option is to establish a working group of independent experts. If provided with the necessary resources it could produce the various pieces of legislation in a relatively short period of time. But these products should be subject to a wide consultation of all relevant stakeholders, including among others the relevant ministries, NGO's and other sectors of civil society (see hereafter under consultation).

How? First: the working group should be provided with a clear mandate which should include the order of work in terms of priorities set by the government. Second: the drafting as such should be prepared by a designated expert (or a small group of e.g. 3 experts) or by the secretariat of the working group. These drafts for the different areas should then be discussed and approved in the full working group. Thirdly: the drafting should address the non-compliance and gaps identified by the review committee.

Finally and most importantly: the drafting should be based on an interpretation of the meaning and requirements of the provisions of the CRC (et alia). In this regard the following can provide the necessary guidance:

- according to article 31 of the Vienna Convention on the Law of Treaties “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. If this interpretation of the terms of a treaty leaves the meaning ambiguous or obscure or leads to a result that is manifestly absurd or unreasonable, supplementary means of interpretation may be used

including preparatory work of the treaty and the circumstances of its conclusion (art. 32 Vienna Convention) (11);

- the interpretation by the CRC Committee of the provisions of the CRC should be fully taken into account. In that regard the recommendations of the CRC Committee in its concluding Observations for the country concerned should be an important guidance for the drafting of legislative measures. In addition the drafters should use and follow as much as possible the views of the CRC Committee expressed in its General Comments. For instance a piece of legislation meant to comply fully with the provisions of the CRC in the field of juvenile justice should take into account the recommendations and views of the Committee expressed in General Comment No 10 on Children's Rights in Juvenile Justice (February 2007) as well as the rules contained in the Beijing Rules and the Havana Rules (12).

Similar remarks can be made e.g. regarding legislation for children with disabilities with reference to General Comment No 9 on The Rights of Children with Disabilities (September 2006) and legislation for the protection of children affected or infected by HIV/AIDS with reference to General Comment No 3 on HIV/AIDS and the rights of the child (March 2003) (13).

Consultation: part of the drafting process must be an open and genuine consultation with all stakeholders of the CRC. The nature of this consultation may be influenced by the degree of involvement of stakeholders in the drafting as such. But it is recommendable to organize a consultation and to use the comments to the draft pieces of legislation for producing a revised final version.

Particular attention should be paid to a consultation of children and parents. This will require most likely the support of NGO's and other organizations. It also will require the "translation" of the draft in a child friendly version, containing in an understandable way the key provisions of the draft in order to allow children and parents to express their views.

In countries with substantive customary laws and/or religious laws it is very important to engage in an open and well organized consultation with traditional and religious leaders.

The drafting and the consultation should result in a piece of legislation that can be submitted to parliament for final consideration and hopefully approval. All these considerable efforts are meant to contribute to a recognition and realization of the rights of the child. That will not happen if the harmonized national laws are not implemented. Therefore finally some remarks on the implementation.

4b.5 Implementation

Right from the beginning of the harmonization of laws the implementation of the proposed changes of the law should be a part of the discussion. This could be already on the agenda of the review committee but it must be part of the drafting process. This means that every proposal for a change of the existing law or for the introduction of a new law should contain an elaborated paragraph on its implementation. This paragraph should indicate what is necessary in terms of human, financial or other resources, for an effective implementation. Depending on the content of the proposed piece of legislation it may contain proposals on e.g.:

- the allocation of budgets needed for the implementation. Depending on the country's available resources this may be a progressive allocation, such that a gradually increasing budget has reached the level necessary for the full implementation in 3 à 5 years. An example in this regard is the South African Bill on Juvenile Justice;
- the training of professionals who should be involved in the implementation of the proposed law. Depending on the content of the proposed law they could be police officers, prosecutors, judges, probation officers, social workers, medical professionals or others involved in child protection such as professionals working in orphanages, children's homes or other institutions;
- the development of cooperation between e.g. government officials and/or professionals necessary for effective implementation and the establishment of organizational infrastructures. One can think e.g. of the introduction or strengthening of an effective foster care service, among others necessary to reduce the number of children in institutions, or the establishment of a well trained service of probation for juveniles in conflict with the law.

Finally a necessary part of the implementation is a regular evaluation. Don't assume that the good intention of the law will result in the intended improvements in the daily life of children and their parents or other caregivers.

Include in the proposed law concrete proposals for its regular evaluation e.g. for the first time three years after its entering into force and thereafter every 5 years. This evaluation is an important tool to ensure that the law achieves its intended goals and that, when necessary, the implementation practice is changed or the text of the law is amended.

NOTES

1. See article 1 ACRWC: "legislative or other measures as may be necessary to give effect to the provisions of this charter"; article 4

CRC: “all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention”.

2. Other examples in this regard are e.g. art. 30 ACRWC on children of imprisoned mothers and art. 31 on responsibility of the child. But there is a high degree of congruence between most of the provisions of the CRC and ACRWC.

3. Some States have only ratified one or the other protocol. There are States that so far have only signed an optional protocol but not yet ratified it. See for detailed information about the ratification the website of the CRC Committee

<http://www.ohchr.org/english/bodies/crc/index.htm>

4. The CRC has been ratified by all African States members of the African Union, but this is not the case for the other children’s rights instruments; see par. 2 and 3 of this guidance.

5. The term “Laws” is used as a kind of a “pars pro toto” and includes not only pieces of legislations formally (to be) adopted by a parliament but also administrative regulations or decrees issued by a competent minister or by the president of a country e.g. in the areas of education, health care, child protection or juvenile justice. It furthermore includes when applicable customary law and/or religious laws.

6. Hereafter the focus will be on the CRC but where applicable should include compliance with the ACRWC and the Optional Protocols (see par. 2 and 3). As a reminder we will use from time to time the phrase the CRC (et alia).

7. The action taken to ensure compliance of new laws with the CRC is a different process that requires a separate structure/format; see par. 4b.2.

8. It goes beyond the scope of this guidance to present and discuss in detail the monist and dualist theories about the relationship between international and national law, because it is a long standing jurisprudential, legal and political debate. See in this regard e.g. General Comment No 9 of the Committee on Economic, Social and Cultural Rights on Domestic Application of the Covenant (UN Doc. E/1999/22, Annex IV, 1998), par. 5 : “ Although the precise method by which Covenant rights are given effect in national law is a matter for

each State Party to decide, the means used should be appropriate in the sense of producing results that are consistent with the full discharge of its obligation by the State Party”. This applies in my opinion equally to the actions to give effects to the CRC.

9. Another possibility is to include the key CRC provisions in a Bill of Rights although experiences in that regard have not been satisfactory; see e.g. Yash Ghai, *The Kenyan Bill of Rights: theory and practice*, in Philip Alston (ed.), *Promoting Human Rights through Bills of Rights: Comparative Perspectives* (1999), at 187.

10. This may apply particularly for States that ratified the Optional Protocol on the Sale of children, child prostitution and child pornography.

11. Information on the preparatory work of the CRC can be found in: *The United Nations Convention on the Rights of the Child. A Guide to the “Travaux Préparatoires”*, compiled and edited by Sharon Detrick. Marinus Nijhoff Publishers Dordrecht/Boston/London 1992. See also: *Legislative History of the Convention on the Rights of the Child. Volume I and II*. United Nations New York/Geneva 2007.

12. Beijing Rules: United Nations Standard Minimum Rules for the Administration of Juvenile Justice (adopted by the General Assembly of the UN on 29 November 1985, resolution 40/33).
Havana Rules: United Nations Rules for the Protection of Juveniles Deprived of their Liberty (adopted by the General Assembly of the UN on 14 December 1990, Resolution 45/113).

Summary of the practical suggestions.

1. Harmonization of national laws and regulations with international children’s rights should be based on the provisions of the CRC and, when ratified, of the ACRWC. Furthermore it should take into account the legislative requirements of the two Optional Protocols when ratified by the State.

2. All African States that have not done so yet should, as a matter of priority, ratify the ACRWC and the Optional Protocols to the CRC.

3. Harmonization of existing laws must begin with a comprehensive review identifying non-compliance and gaps with the CRC and if applicable the ACRWC and the Optional Protocols.

Establish a multi sectorial review committee with representatives of the government, NGO's and other relevant sectors of the civil society and independent experts. Set a deadline for the delivery of the report on this review.

4. Establish an effective system to check all proposed new legislation in order to ensure its compliance with the CRC and other applicable international children's rights instruments. Within the government a focal point, a small unit, should be created for this purpose, either as a separate unit or as part of a human rights department/directorate.

5. Adopt a comprehensive harmonization policy based on the report of the review committee, in which methods, priorities and deadlines are defined together with the establishment of a national working group for harmonization of children's rights.

6. Regarding the structure of the drafting process the following suggestions/tips may be helpful:

- include in the constitution the key provisions of the CRC (see Constitution South-Africa);
- develop and implement a step-by-step drafting of the necessary legislative measures following as much as possible the clustering of articles of the CRC recommended by the CRC Committee in its reporting guidelines;
- in the drafting as such the interpretation of the (meaning of) the articles of the CRC should follow internationally accepted rules (Vienna Convention on the Law of Treaties; art. 31 and 32 in particular). In addition the specific recommendations the CRC Committee made in its Concluding Observations for the country should be a key guidance in the drafting process. This also applies for the views and recommendations the CRC Committee expressed in its General Comments.

7. Measures for an effective implementation of the approved legislation should already be developed during the drafting process in terms of e.g. proposals for budget allocations and the provision of human resources in terms of well trained professional and/or volunteers. Include a system of regular evaluation of the laws to check its effectiveness and make on the basis of the results of the evaluations adjustments of the laws as necessary.

