

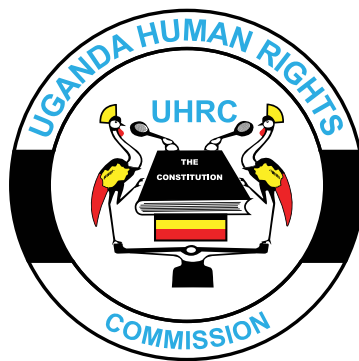
# AN ASSESSMENT OF THE COMPATIBILITY OF UGANDAN LEGISLATION WITH THE CONVENTION ON THE RIGHTS OF THE CHILD



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# **AN ASSESSMENT OF THE COMPATIBILITY OF UGANDAN LEGISLATION WITH THE CONVENTION ON THE RIGHTS OF THE CHILD**



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## **REPORT ON THE ASSESSMENT OF THE COMPATIBILITY OF UGANDAN LEGISLATION WITH THE CONVENTION ON THE RIGHTS OF THE CHILD**

The Uganda Human Rights Commission has the pleasure and honour to present to Parliament its report on the assessment of the compatibility of Uganda's legislation with the Convention on the Rights of the Child.

Uganda ratified the Convention in 1990 without any reservations and subsequently, its two Optional Protocols. This was a demonstration of government commitment to protecting the rights of children who make up more than half of the population of Uganda. The Convention and its universal acceptance enhanced recognition of the fundamental human dignity of all children and the urgency to ensure their well-being and development. The Convention clearly provides that a basic quality of life is a right of all children not a privilege of a few. Therefore, the Uganda government, like all other States that ratified it, was obliged to institute all measures to ensure that children's rights are realised.

Some achievements have since been made in the protection of the rights of children, particularly in the legal and policy framework. However, much more still needs to be done to effectively prevent or rescue children from the shackles of poverty, abuse, neglect, preventable diseases and unequal access to the education and justice systems that do not recognise their special needs. It is in view of the need to identify the remaining gaps and how to address them that the Commission, supported by UNICEF, conducted an assessment of the legislation that facilitates the implementation of the convention in Uganda. The assessment covered 37 statutes in respect to Uganda's obligations under the convention and other related treaties, and recommendations were made to guide the required legislative and policy reforms.

It is our wish that all the government agencies to whom recommendations have been made take action accordingly so that Uganda's legislation can enhance the entrenchment of respect for human rights, particularly the protection of the rights of children. We appeal to you to ensure that the recommendations are fully implemented and that accountability for the required action is enforced.

Yours faithfully,



Med. S.K. Kaggwa  
Chairperson  
Uganda Human Rights Commission



## EXECUTIVE SUMMARY

Uganda became a party to the Convention on the Rights of the Child (CRC) in 1990, thereby assuming the obligation to undertake “all appropriate legislative measures for the implementation of the rights recognised in the Convention.” This report presents an assessment of the compatibility of the legislation of Uganda with the rights and principles recognised by the Convention and its two Optional Protocols to which Uganda became a party in 2001 and 2002 respectively.

The purpose of the assessment was two-fold: To identify legislative provisions that are incompatible with international standards, as well as the gaps where the legislation fails to recognise or does not adequately recognise or protect international human rights standards. The findings indicated that some legislations were compatible with the CRC including: those on nationality; child protection; alternative care; juvenile justice; crimes against children; and treatment of child victims in Uganda. However, some others, as this assessment revealed, had gaps and did not comply with some of the standards in the CRC and other international and regional human rights treaties.

The assessment covered legislation concerning key human rights issues such as: the right to identity, child protection, alternative care, juvenile justice, crimes against children, rights and treatment of child victims, health, education, children with disabilities and marriage, divorce and property. The compatibility of 37 statutes with Uganda’s obligations under the CRC and related treaties was assessed and 61 recommendations made.

In the report, the relevant provisions of the CRC on a given right are outlined and the provisions of the legislation in Uganda that provide for it identified. The compatibility of the Ugandan legislation on that particular right with the CRC was analysed; the gaps identified and appropriate recommendations made. In some few instances, the assessment went beyond the CRC to cover other international human rights instruments.

Highlights of the assessment, findings and the corresponding recommendations are presented below.

## Right to identity

Article 35 of the Registration of Persons Act (2015) prohibits registration of the name of the father unless he appears personally before the registrar with the mother of the newborn child or unless a court order or DNA test confirming paternity of the child is presented. This clearly puts the burden of proving paternity on the mother unless the father wishes to acknowledge it. The Registration of Persons Act (2015) does not have any provision on registration of children born of refugees in Uganda, which does not comply with Article 7(1) of the CRC, as well as Article 6(2) of the African Charter on the Rights and Welfare of the Child. The legislation concerning citizenship does not have any provisions specifically on children of aliens who require Ugandan nationality; thus it is not seen to give nationality to children of aliens who become citizens by registration. This may not be in tandem with the principle of family unity.

## Recommendations

1. The relevant legislation such as the Registration of Persons Act, the Refugee Act and the Children Act should be amended to recognise the obligation of authorities to register the birth, in Uganda, of children of refugees and asylum seekers.
2. Sections 1(2) (b), 14(2) (b) and 25(e) of the Registration of Persons Act (2015) should be amended to eliminate the provisions that discriminate against refugees.
3. The Constitution should be amended to recognise the right of children born in Uganda to Ugandan citizenship, if they would otherwise be stateless.
4. The Registration of Persons Act should be amended to provide that older children should have the right to decide whether to accept Ugandan nationality, when their parents acquire Ugandan nationality, in particular if doing so would require renunciation of their previous nationality.
5. The law should oblige hospitals to take measures to prevent the theft of newborns.

## Child protection

The Children Act (2015) provides that the Family and Children Court may adopt a supervision order or care orders not only when a child is suffering or likely to suffer significant harm because of the poor care being provided by parents, but also if the child is suffering significant harm or is likely to do so because the child is “beyond parental control”. There is no age limit for the imposition of one of these orders and no definition of the term ‘beyond parental control’.

## Recommendation

The Children Act should be amended to eliminate “beyond parental control” as a ground for the imposition of care orders.

## Alternative Care

Section 27 of the Children Amendment Act (2016) on care orders applies to both placement in an approved home and placement in foster care and does not indicate that institutional placement should be the last resort. The Act does not expressly note that institutional placement should only be ordered when foster care is not possible, which makes it incompatible with the principle of last resort outlined in Article 20 of the CRC.

The provisions of the Children Act (CAP 59) on adoption by foreigners do not recognise the principles set forth in the CRC. One is the principle that intercountry adoption should be the last resort. The Act also does not require a finding that intercountry adoption would ensure that the child enjoys safeguards and standards equivalent to those for national adoption.

## Recommendations

1. The Children Act should be amended to expressly provide that children should be placed in approved homes only if no other suitable form of alternative care is available in Uganda.
2. The provisions of the Children Act on intercountry adoption should be amended to provide that intercountry adoption may be authorised only if no suitable form of alternative care for the child is available in Uganda and only if the norms and standards concerning adoption in the other jurisdiction provide safeguards and guarantees equivalent or superior to those recognised by the law of Uganda.
3. The Children Act should be amended to prohibit guardians from taking children in their care out of the country in order to prevent circumvention of the provisions of the Act on intercountry adoption.
4. The process of ratification of the Hague Convention on Intercountry Adoption should be expedited.
5. The Refugee Act should be amended to recognise that temporary forms of care should be given priority over adoption as methods for protection of the rights of unaccompanied refugee children and unaccompanied child asylum seekers.
6. S.43 (1), 43A (2) and 43C (4) of the Children Act should be revised to ensure that provisions on temporary forms of alternative care take account of the special needs of unaccompanied refugee children.

## Juvenile justice

Section 104(3) of the Children Act provides vaguely that proceedings before the High Court involving a child are to have due regard to the child's age and the provisions of the law relating to the procedure of trials involving children. It is however not clear whether this requires the High Court to respect all the procedural norms provided for in the Children Act in cases involving a juvenile defendant.

Section 92(8) of the Children Act provides clearer guidance on which procedural norms set forth in the Act apply to procedures in Local Council Courts. They include closed hearings, but not the right to legal assistance. Since the orders these courts may adopt emphasise restorative justice and they cannot order detention, the lack of recognition of the right to legal representation does not seem incompatible with the CRC.

In contrast to the statutory norms on procedures and treatment of juveniles before and during judicial proceedings, statutory provisions on the rights and treatment of juveniles deprived of liberty are few. Section 59 of the Prisons Act, which allows infant children to remain with imprisoned mothers, is incompatible with General Comment on Article 30 of the African Charter on the Rights and Welfare of the Child, which prohibits imprisonment of a mother with a child.

The Children Act provides that "in any proceedings before the High Court in which a child is involved, the High Court shall have due regard to the child's age and to the provisions of the law relating to the procedure of trials involving children." However, this is not always interpreted to mean that they have the same procedural safeguards as juveniles tried by Family and Children Courts.

## Recommendations

1. The Supreme Court should adopt rules to ensure that juveniles tried in High Courts have the same rights as those tried by Family and Children Courts.
2. The Children Act should be amended to ensure that it recognises the fundamental rights of juveniles deprived of liberty (for instance, with regard to education and training, contact with families, and activities designed to reduce the risk of reoffending). It should prohibit the use of disciplinary measures incompatible with international standards (such as corporal punishment, solitary confinement and restrictions on diet or contact with families).
3. The Children Act should be amended to recognise aftercare as the right of children released from detention to any necessary assistance in reintegration into the family and community.
4. The Penal Code and the Prisons Act should be amended to bring them into harmony with Article 30 of the African Charter, concerning children of convicted and imprisoned mothers.

## Crimes against children

The Prevention of Trafficking in Persons Act falls short of meeting Uganda's obligations regarding the sale of children. The Act criminalises adoption for illicit purposes, but the Optional Protocol defines the act of improperly inducing consent to adoption as a form of sale, regardless of the purpose of the adoption.

The Anti-Pornography Act (2014) does not criminalise the possession of child pornography and this is not compatible with Uganda's obligation under Article 3.1(c) of the Optional Protocol to the CRC. The lack of a provision that expressly authorises the seizure of proceeds of child prostitution falls short of the obligation recognised by Article 7(a) (2) of the Optional Protocol.

## Recommendations

1. The Prevention of Trafficking in Persons Act should be amended to criminalise the act of improperly inducing consent to adoption, to bring Ugandan law into compliance with Article 3(1(a) (ii) of the Optional Protocol to the CRC on Sale of Children, Child Prostitution and Child Pornography.
2. The Prevention of Trafficking in Persons Act should be amended to authorise the seizure or confiscation of goods used to facilitate the commission of trafficking in persons and the closure of facilities used in the commission of trafficking, to bring Ugandan law into compliance with Article 7(a) (i) and (c) of the Optional Protocol to the CRC.
3. The Prevention of Trafficking in Persons Act should be amended to increase the sentence for sale of children.
4. The Anti-Pornography Act should be amended to criminalise the possession of child pornography, to bring Ugandan law into compliance with Article 3(1(c) of the Optional Protocol to the CRC.
5. The Anti-Pornography Act also should be amended to eliminate the possibility of punishing offences concerning child pornography by fines alone, when the offender is an adult, in order to bring Ugandan law into compliance with Article 3(3) of the Optional Protocol to the CRC.
6. Sections 131, 136 and 137 of the Penal Code, regarding procurement and exploitation of prosecution, should be amended to make the exploitation of children an aggravating factor, punishable by sentences consistent with the gravity of the child prostitution, as required by the Article 3(3) of the Optional Protocol to the CRC.
7. Section 8(3) of the Children Act should be amended to specify the sentence for the employment of children in harmful or hazardous work; Section 8(d) of the Prevention of Trafficking in Persons Act

should be amended to make it applicable to all children under the age of 18 years and the Employment Act should be amended to bring the minimum age for employment into harmony with the minimum age recognised by the Children Act and Prevention of Trafficking in Persons Act.

8. The International Criminal Court Act should be amended to criminalise the recruitment and use in hostilities of children under 18 years of age by non-governmental forces, in order to bring Ugandan law into compliance with Article 4(2) of the Optional Protocol to the CRC on Children and Armed Conflict.

## **Treatment of child victims of crime**

The Children Act does not recognise the right to procedures adapted to the special needs of child victims, such as being accompanied by support persons during hearings and trials; the use of testimonial aids; and measures that allow children to testify without direct contact with the accused.

Section 14(3) of the Prevention of Trafficking in Persons Act concerning the conditions in which alien victims of trafficking may be allowed to remain in Uganda is largely in harmony with its obligations under the Palermo Protocol. However, there is no requirement that the principles of family unity and the best interests of the child be taken into account when the victim of trafficking is a child.

The lack of any specific provisions in the Refugees Act concerning the right of unaccompanied children seeking or holding refugee status to special treatment in administrative proceedings under the Act – such as treatment that takes into account their age, sex, needs and experiences – does not seem to be fully compliant with the right to “appropriate protection” under Article 22 of the CRC.

## **Recommendations**

1. The Children Act or other relevant legislation should be amended to make the measures for protection of victims required by Part III of the Prevention of Trafficking in Persons Act applicable to all crimes of violence against children.
2. The Children Act, Prevention of Trafficking in Persons Act or other relevant legislation should be amended to recognise the right of all child victims of violent crime to be heard through procedures designed to meet their special needs as witnesses, for example through providing support persons, testimonial aids and measures that allow children to testify without direct contact with the accused.
3. The Children Act or other relevant legislation should be amended to recognise that all child victims of violent crime and their families where appropriate, have rights to restitution, the cost of reintegration and compensation for injuries and losses similar to those recognised by the Prevention of Trafficking in Persons Act.
4. Consideration should be given to amending the International Criminal Court Act to recognise that victims of the acts it criminalises have the same rights to reimbursement, rehabilitation and compensation as those recognised by the Prevention and Prohibition of Torture Act.
5. Section 14 of Trafficking in Persons Act, on repatriation of foreign victims, should be amended to specify the procedures to be followed when the foreign victim is a child, in order to balance the obligation to restore the child’s identity with the obligation to prevent future victimisation. This means investigating the family situation of the child, when possible, to determine the family’s complicity or responsibility in trafficking of the child and assessing the risks of returning the victim to his or her family in their country of nationality or residence; and identifying any humanitarian considerations that favour allowing the child’s family or some members of his or her family to join the victim in Uganda. The Act also should be amended to provide that, in appropriate circumstances, the Ministry of Internal Affairs’ discretion to facilitate the grant of residence and work permits extends to the family of a child victim of trafficking.



6. The Refugees Act should be amended to recognise special procedures and measures needed to enable unaccompanied children to be heard and have their views, needs and experiences taken fully into consideration in administrative proceedings under the Act.

## Right to health

The Ugandan legislation is largely silent on children's right to health. Indeed, there is little legislation on the right to healthcare for children or adults.

The HIV and AIDS Prevention and Control Act recognises the government's obligation to "provide universal HIV treatment to all persons on a non-discriminatory basis" and prohibits discrimination against children on grounds of HIV status by parents, guardians or custodians. However, it does not provide for prohibition of discrimination against HIV-positive children in other areas, especially education.

A proposed legislation, the Mental Health Bill, authorises the emergency admission of persons whose behaviour creates a risk of damage to property or reputation. Prevention of damage to reputation or to property does not seem to be a sufficient reason to deprive any person – child or adult, healthy or ill – of liberty. The Bill also indicates that when the police believe that a person arrested may suffer from mental illness, he or she shall be taken to a health unit for assessment within 24 hours. This does not provide sufficient protection against the risk of psychological harm and self-injury, especially where children are concerned.

## Recommendations

1. Article 16 of the Constitution recognises the right of Ugandans to health services in general terms; however, it would be desirable to enact legislation that specifies the health care services in a language that does not discriminate on ground of nationality, in addition to immunisation to which all children and expectant mothers are entitled. Services for children should include periodic medical examination, malaria prevention and treatment, treatment for pneumonia, diarrhoea and meningitis as well as nutritional supplements. Expectant mothers should be entitled to physical examinations, prevention and treatment of malaria and STDs, tetanus vaccination and nutritional supplements (for example iron, calcium and folic acid).
2. Legislation should be adopted to prohibit discrimination against expectant mothers.
3. The HIV and AIDS Prevention and Control Act should be amended to prohibit discrimination against HIV-positive children in other areas, especially education.
4. Legislation should require that all health-related decisions concerning children be based on the best interests of the child concerned, as a step towards the development of procedures and criteria for assessing the best interests of the child by health workers.
5. Section 12 of the HIV/AIDS Prevention and Control Act concerning mandatory testing should be amended to define the grounds for concluding when consent is being withheld unreasonably and when a person may be subjected to an HIV test under a court order. Section 18 on disclosure of HIV status should be amended in order to bring the Act into greater harmony with the recommendations of the Committee on the Rights of the Child and UNAIDS.
6. The Immunization Act should be amended to cover all children in Uganda, regardless of nationality, to bring it into harmony with section 4(1) (j) of the Children Act.
7. The Mental Health Bill should be reviewed to eliminate risk to reputation as grounds for emergency admission to mental health units and to eliminate risk of danger to property as a ground (or at least to restrict it to a grave and imminent risk of extensive danger to property). It should specify the procedure

for admission of children to residential care, and to require periodic review of the care provided to the child and other relevant circumstances. Procedures for the voluntary admission of children should comply with the principles concerning consent referred to in recommendation 4, and the appointment of a special guardian for purposes of decisions regarding mentally ill children should be required when there is reason to believe that the decisions of a parent may not be based on the best interests of a child.

8. Consideration also should be given to adjusting certain other proposals of the Bill to the special needs and circumstances of children. In particular:
  - a. Clauses 10(2) and 49(1) to indicate that an arrested child suspected of having mental illness should be taken to a health care centre for examination immediately, if possible;
  - b. The addition of a paragraph on mentally ill children to clause 11 on electroconvulsive therapy, to specify that this treatment may be used only as a last resort and in compliance with principles regarding the consent of children;
  - c. For clauses 12 and 13 to specify that seclusion and bodily restraint may be imposed on child patients only as a last resort, for the shortest necessary period and with prompt notification of a parent or guardian of the child patient;
  - d. The addition of a provision indicating that parents or guardians may not consent on behalf of a child to participation in medical experiments;
  - e. Clause 43 to provide for the reintegration of children into their families;
  - f. Clause 44 to provide for the right of children with mental illness to express views and wishes on matters affecting them and the duty of competent authorities to give due weight to their views and wishes.

## Right to education

By ratifying the CRC Uganda made a commitment to “progressively” guarantee the right to education. Making secondary education free was an important achievement. However, secondary education is not expressly recognised as a right.

Legislation does not contain any provisions specifically about the prevention of school-leaving. Other gaps in the legislation concern the provision of information and guidance on education and vocational training; making higher education available to all having the capacity to benefit from it; and the education of gifted children.

## Recommendations

1. The Education Act should be amended to include a section requiring schools to accommodate pregnant students and support them in completing primary and or secondary education to bring the Act in line with Article 11.6 of the African Charter.
2. A section on the aims of education should be added to the Education Act, in order to bring the Act into conformity with Article 29 of the CRC and Article 11 of the African Charter.
3. Secondary education should be recognised as a right in order to encourage adolescents to continue their education and promote social and economic development.
4. The Education Act should be amended to require schools to adopt measures to reduce school leaving (e.g. by the identification of children at risk of abandoning school and the factors that contribute to that risk, in order to take measures to assist the child and his or her family overcome such factors).

5. The Education Act should be amended to require schools to adopt measures to help children and their families to make informed decisions about the amount and kind of education and training they should seek to obtain (for example by the identification of the officials who should be given this responsibility, the methods that can be used and the persons to whom information and guidance should be made available).
6. A section on gifted children should be added to the Education Act, as a step towards developing a policy and programmes or activities for them. Section 57, which authorises the Minister to adopt regulations on “gender aspects and special needs education”, might be an appropriate place to address this issue.

## Rights of children with disabilities

The UHRC notes that one requirement of the Convention on Persons with Disabilities that does not seem to be met by the legislation in force is that of providing information, services and support to the families of children with disabilities, so as to prevent the concealment, abandonment, neglect or segregation of such children.

### Recommendations

1. The Persons with Disabilities Act should be amended to criminalise the concealment, abandonment, neglect or segregation of children with disabilities.
2. The Persons with Disabilities Act and the Children Act should be amended to require the Government to support information, awareness and support activities designed to prevent the concealment, abandonment, neglect or segregation of children with disabilities by their parents.
3. Section 24 of the Persons with Disabilities Act, which provides that “No person with disabilities shall be denied a driving permit by reason of his or her disability” should be amended by the addition of a clause to make an exception for measures necessary to protect the health or safety of persons, in order to bring this section into harmony with Section 9(e), which requires road safety policies to be strengthened.

## Marriage, divorce and property

The Customary Marriage Registration Act and The Hindu Marriage and Divorce Act authorise the marriage of girls under 18 years of the age, while the Marriage Act and The Marriage and Divorce of Mohammedans Act do not specify the minimum age for marriage. The express or tacit authorisation of the marriage of persons under the age of 18 years conflicts with the Constitution and the Children Act and is incompatible with Uganda’s obligation under Article 21 of the African Charter. Furthermore, establishing a lower minimum age for girls constitutes discrimination on grounds of sex.

The Customary Marriage Registration Act expressly authorises polygamous marriage and the Marriage and Divorce of Mohammedans Act allows polygamous marriage provided that all wives are Muslim. There are good reasons, as mentioned above, to consider polygamous marriage as a form of discrimination on grounds of sex, which can have adverse consequences for the development and well-being of children living in polygamous families.

Several provisions of the Divorce Act discriminate blatantly on grounds of sex, race or both. They include: the definition of minor children, the provision allowing only wives to seek alimony, and the grounds for divorce. The features of the Islamic law whose application is authorised by the Marriage and Divorce of Mohammedans Act are not known, but the lack of any express requirements that religious law be applied within parameters that guarantee fundamental human rights principles is not compatible with the essential obligations of Uganda under international human rights law.

No law prohibits the betrothal of children or provides that the betrothal of children has no legal effect, as required by CEDAW.

The proposals in the Marriage Bill would remedy many gaps between Ugandan law and Uganda's obligations under the CRC, CEDAW, the African Charter, the African Protocol and other relevant human rights treaties. The minimum age for marriage would be 18 years for all forms of marriage, for boys and girls. Limiting polygamous marriage to customary marriages would be a step towards compliance with the widely accepted position that such marriages discriminate against women.

Regarding property, the recognition in the Succession Act of equal rights of children born in or out of wedlock, and the equal rights of adopted children, is very positive. The power of courts to order maintenance payments for dependent children of a deceased parent whose testament does not provide for them is another positive measure for protecting the rights of children. The priority given to males in the order of succession must be considered discrimination on grounds of sex. It is not clear that the differential treatment of dependent sons and daughters regarding maintenance payments from the estate of a deceased parent puts daughters at a disadvantage.

## **Recommendations**

1. A comprehensive statute on marriage covering all forms of marriage considered appropriate for Ugandan society should be adopted. The approval of the Marriage Bill should be expedited.
2. The proposed legislation on marriage should set the minimum age for marriage at 18 years, as required by Article 34 the Constitution and Article 22(2) of the African Charter on the Rights and Welfare of the Child.
3. The proposed legislation on marriage should guarantee the equality of all children.
4. The proposed legislation should fully incorporate the principle that both parents have equal rights and responsibilities regarding the raising of their children born during their relationship.
5. The proposed law should recognise the principle that children of parents who are divorced or separated have the right to personal relations and direct contact with both parents.
6. Amendment of the Succession Act to eliminate the preference accorded to male relatives should be expedited.



## INTRODUCTION

Uganda became a party to the Convention on the Rights of the Child (CRC) in 1990. One of its obligations under the Convention is to undertake “all appropriate legislative measures for the implementation of the rights recognised in the Convention.”<sup>1</sup> This report assesses the compatibility of the legislation of Uganda with the rights and principles recognised by the Convention, as well as the first two Optional Protocols to the CRC, on sale of children, child prostitution and child pornography, and on the involvement of children in armed conflict. Uganda became a party to these Optional Protocols in 2001 and 2002, respectively.

This assessment is not a science; it provides findings that could solve the challenges in realising the rights of children. Legislation is not the only way to ensure enjoyment of the rights of children; policies, programmes, guidelines and protocols also help to ensure the enjoyment of rights. Whether or not legislation on a given issue is needed depends in part on other relevant standards that exist and how effective they are implemented. That kind of analysis is beyond the scope of this report. One thing that must be born in mind, however, is that the recognition of rights and principles by legislation has a unique value, because it allows the courts to play a more active role in enforcing and protecting them.

Ideally, an analysis of legislation would include how it is interpreted and applied by the courts; the extent to which it is implemented in practice; and how it affects the lives of the persons whose rights it is designed to protect. That kind of research is also beyond the scope of this report. Therefore, this report should be read together with other relevant reports and studies for a comprehensive, holistic vision of the state of children’s rights and what needs to be done in Uganda.

**1** Article 4 of the Convention on the Rights of the Child

The assessment covered legislation concerning key human rights issues and the compatibility of 37 statutes with Uganda’s obligations under the CRC and related treaties was assessed and 61 recommendations made. The focus was on existing legislation concerning issues considered of particular importance. The issues covered under the corresponding chapters of the report are:



As indicated, the report does not cover all the rights recognised under the CRC. The rights that are not comprehensively covered except for the extent to which they are linked to the areas mentioned above include: Freedom of expression, freedom of religion, freedom of association, the right to social security and adequate living conditions, the right to play and the rights of children belonging to minority communities.<sup>2</sup>

The structure of the report is such that the relevant provisions of the CRC on a given right are outlined and the provisions of the legislation in Uganda that provide for it identified. The compatibility of the Ugandan legislation on that particular right with the CRC is analysed; the gaps identified and appropriate recommendations made. In some few instances, the assessment went beyond the CRC to cover other international human rights instruments.

<sup>2</sup> The Children Act recognises the right to leisure and to participate in sports and ‘positive cultural and artistic activities’. (Art. 4(1)(h)) Freedom of expression, religion and association are recognised by Article 29 of the Constitution but are not recognised specifically as rights of children by any statute. Legislation on social security covers only retirement benefits for civil servants and persons employed in the formal sector and there is no legislation on benefits for needy families. [NB: The last sentence is based on Uganda’s 2013 report to the Committee on Economic, Social and Cultural Rights and the Committee’s 2015 concluding observations.]

The CRC, perhaps more than most human rights treaties, has links to other human rights instruments. This can be seen in its explicit or tacit references to international labour law, international refugee law, international humanitarian law, private international law and international criminal law, as well as the references to the CRC in the preambles of more recent treaties. Consequently, other treaties on human rights and rights of the child, such as the Convention on the Elimination of all forms of Discrimination against Women (CEDAW), the Convention on the Rights of Persons with Disabilities and the African Charter on the Rights and Welfare of the Child (African Charter), also have been taken into account.<sup>3</sup> The obligations set forth in different treaties on the rights of the child and human rights are complementary and cumulative. If the African Charter prohibits the marriage of children under 18 years of age, but the CRC has no similar provision, the lack of such a provision in the CRC does not discharge Uganda from its obligation under the African Charter.

One challenge is that the meaning or interpretation of international human rights treaties such as the CRC is constantly evolving. Most of the treaties mentioned in this report establish bodies of independent experts such as the Committee on the Rights of the Child that have a legal mandate to monitor implementation of the treaty. In addition to making recommendations to individual States, they also adopt General Comments to give all State Parties guidance on how the treaty should be interpreted and implemented. While such comments are not legally binding, States have an obligation to give due weight to them. The documents of this kind used in this analysis of Uganda's obligations under the CRC and related treaties are listed in Annex I.

The report analyses the compatibility of 37 statutes with Uganda's obligations under the CRC and related treaties and makes 61 recommendations.<sup>4</sup> The number of recommendations made for each chapter are indicated below.

1. The right to identity (5 recommendations)
2. Child protection (1 recommendation)
3. Alternative care (6 recommendations)
4. Juvenile justice (4 recommendations)
5. Crimes against children (8 recommendations)
6. Rights and treatment of child victims (6 recommendations)
7. Health (8 recommendations)
8. Education (5 recommendations)
9. Children with Disabilities (3 recommendations)
10. Marriage, divorce and property (6 recommendations)

**3** See Appendix 1 for the full list. Only treaties that Uganda is a Party to have been considered.

**4** As small number of bills and rules, regulations and guidelines also have been considered. Annex 2 lists all statutes, bills and other norms mentioned in the Report.



**THE RIGHT TO IDENTITY  
(NAME, NATIONALITY  
AND FAMILY TIES)**





## 1.1 CRC provisions

Article 7 of the Convention on the Rights of the Child (CRC) stipulates that the child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents.<sup>5</sup> Article 8 indicates that name, nationality and family relations form part of the right to identity. The State has an obligation to respect this right and to assist children who have been illegally deprived of any element of their identity to recover it.

A number of articles are in relation to family unity and the rights and responsibilities of parents with regard to their children. Article 16 of the CRC provides that children must be protected by law against arbitrary or unlawful interference in their family. Article 9 prohibits separation of children from their parents against their will, except when separation is necessary for the best interests of the child.<sup>6</sup> Children who are separated from one or both parents have a right to maintain personal relations and direct contact with both parents on a regular basis, even if they live in different countries.<sup>7</sup> The best interests of the child must prevail in custody proceedings and that “all interested parties shall be given an opportunity to participate and make their views known.”<sup>8</sup>

Parents “have the primary responsibility for the upbringing and development of the child” including the provision of living conditions adequate for healthy development.<sup>9</sup> States have an obligation to help parents meet their obligations of child-raising, to “use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development” of their children; to provide parents with guidance regarding child health, nutrition, hygiene and accident prevention and, when necessary, to provide material assistance and support regarding food, clothing and shelter.<sup>10</sup> They also have a particular obligation to assist the parents of children with disabilities.<sup>11</sup> States have an obligation to take all appropriate measures to ensure that parents meet their financial obligations regarding childcare.<sup>12</sup>

Measures must be taken to combat the illicit transfer and non-return of children abroad. The article stipulates that requests by children or parents to enter or leave a country for purposes of family reunification must be “dealt with [...] in a positive, humane and expeditious manner.”<sup>13</sup>

The obligation to take measures to ensure that children receive any financial support to which they are entitled includes parents who live abroad. The Convention encourages States to enter into international agreements for this purpose, and in order to resolve problems concerning custody involving other countries.<sup>14</sup>

- 5** Article 7(1) of the Convention on the Rights of the Child
- 6** Article 9(1) of the Convention on the Rights of the Child
- 7** Article 9(3) and 10.2 of the Convention on the Rights of the Child
- 8** Article 9.1 and 9.2 of the Convention on the Rights of the Child
- 9** Article 18(1) and 27(2) of the Convention of the Rights of the Child
- 10** Article 18(1), 18) 2 and 24)2(e) and (f) and 27.3 of the Convention of the Rights of the Child
- 11** Article 23.2 and 23.3 on the Convention of the Rights of the Child
- 12** Article (27)4 on the Convention of the Rights of the Child
- 13** Article (11)1 and 10)1, on the Convention of the Rights of the Child
- 14** Article (27)4 and 11.2 on the Convention of the Rights of the Child

## 1.2 Ugandan legislation on birth registration, parentage, custody and support

Article 18 of the Constitution of Uganda provides that every birth and marriage that occurs in Uganda shall be registered. The Registration of Persons Act (2015) provides for free and compulsory registration of every birth within Uganda.<sup>15</sup> The father and mother have an obligation to register the birth of a child “immediately”.<sup>16</sup> In the absence or incapacity of the parents, the occupant of the house where the birth takes place has the duty to register it.<sup>17</sup> The same duty lies with any person who finds a child.<sup>18</sup> When a child is born in a hospital or other public institution, the head of the institution must ensure that the person responsible for registering the birth does so.<sup>19</sup>

The information to be registered at birth includes the name and sex of the child and any evident disability.<sup>20</sup> It also includes the name, age, marital status, place of residence, nationality, identification number, level of education and profession or occupation of the father and mother.<sup>21</sup> Information concerning the father, however, cannot be registered unless he appears in person with the mother, or a court order or DNA test establishing paternity are presented. Children born outside Uganda having a Ugandan parent or guardian may be registered upon presentation of a birth certificate.<sup>22</sup>

In the event that a birth is not registered “immediately”, it cannot be registered until the registrar is “satisfied as to the truth of the particulars” and is ordered to register it by the Executive Director of the National Identification and Registration Agency. The Registration of Person Act does not apply to persons having refugee status in Uganda.<sup>23</sup>

The registered name of a child may be changed by a parent or guardian.<sup>24</sup> The registered sex of a child born a “hermaphrodite” may be changed on presentation of a medical certificate confirming the performance of a sex assignment operation.<sup>25</sup>

The Children Act recognises the duty of parents to maintain their children and provides that every parent has parental responsibility for his or her child.<sup>26</sup> A parent is defined as the biological or adoptive father or mother of a child. Parental responsibility is defined as “all rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child”.<sup>27</sup> The Act also recognises the right of children to live with their parents, unless a competent authority determines that it is “in the best interests of the child to separate him or her from his or her parent or parents”.<sup>28</sup> (The separation of children from parents for their protection is discussed in Chapter 2.)

- 15** The Registration of Persons Act (2015), Article 28
- 16** Sections 30(1) and 31(1)(a)
- 17** Sections 31(1)(b)
- 18** Sections 30(1)
- 19** Sections 31(2) (The other institutions include prison, orphanage or barracks.)
- 20** Section 32(2)(a)
- 21** The Registration of Persons Act (2015), Section 32(2) (b) and (e) the number of the mother’s previous births also is to be registered.
- 22** Section 34
- 23** Section 1(2)(b)
- 24** Section 37
- 25** Section 38 (The preferred term for a person having both male and female biological characteristics is ‘intersex person’.)
- 26** Children Act, Sections 4(1) and 6(1)
- 27** Section 1(n) and (o)
- 28** Section 5



The Children Act gives the Family and Children Court jurisdiction over applications for recognition of parentage (paternity or maternity). Applications may be made during pregnancy, or at any time before the child reaches the age of 18 years, by the mother, father or guardian of the child, or by the child himself or herself.<sup>29</sup> If the court finds that the alleged father or mother is the parent of the child, then the child has the same relationship to that person as if the child were born in a lawful marriage.<sup>30</sup>

The Family and Children Court has jurisdiction over custody orders, which are based primarily on the welfare of the child.<sup>31</sup> Custody orders may be conditional and may be revoked at any time.<sup>32</sup> Written agreements by the parents as to custody are legally enforceable, provided that they are not based on fraud or duress, and unless a court finds that enforcement would not be in the best interests of the child.<sup>33</sup> Removal of a child from the lawful custody of any person, institution or organisation is an offence.<sup>34</sup>

The Family and Children Court also has jurisdiction over child maintenance. A parent remains responsible for maintenance even in case of separation, divorce or nullity.<sup>35</sup> Any person who is mother, father or guardian of a child under 18 years of age may apply for a maintenance order against either parent of the child.<sup>36</sup> A child also may apply for a maintenance order, through a “next friend.”<sup>37</sup> Maintenance orders include the cost of food, clothing, education and the “general welfare” of the child, as well as the costs of the legal proceedings.<sup>38</sup> Legal fees and costs for maintenance actions must be returned to persons unable to afford them.<sup>39</sup> Misuse of maintenance payments is an offence.<sup>40</sup>

## 1.3 The compatibility of Ugandan law with the CRC and other international standards

Article 18 of the Constitution and Section 28 of the Registration of Persons Act are very progressive. Other provisions of the Act concerning birth registration are compatible with the CRC. Section 35, which prohibits registration of the name of a father unless he appears personally before the registrar with the mother of a newborn child, or unless a court order or DNA test confirming paternity of the child is presented, may be an exception. This puts the burden of proving paternity – unless the father wishes to acknowledge it - on the mother. This seem to give insufficient weight to the child’s right to know the identity of his or her father.

Section 1(2) (b) of the Act indicates that it does not apply to refugees and the Refugees Act does not have provisions on the registration of children born of refugees in Uganda. This gap seems inconsistent with Article 7(1) of the CRC, Article 6(2) of the African Charter, as well as Article 18 of the Constitution of Uganda which requires the registration of “every birth [...] occurring in Uganda.”

- 29** Children Act, Sections 67(a)-(d) and 68(1) (a)-(b) (A child may file an application through a ‘next friend’.)
- 30** Children Act, Section 72(1)
- 31** Section 73(1) and (3)
- 32** Section 73(1)-(2)
- 33** Section 73B
- 34** Section 73(4)
- 35** Section 84
- 36** Section 76(1) and (4)(b)
- 37** Section 76(2)
- 38** Section 76(7)(c) and 8
- 39** Section 83(2)
- 40** Section 81

Statutory provisions on the right of a child to a name seem to be inadequate. The Registration of Persons Act requires that the name of the child be recorded when birth is registered and allows a parent or guardian to change the registered name of a child.<sup>41</sup> Since the name of a child is a key part of the child's identity, parents should not have unlimited discretion to change the name of any child for any reason, especially without taking into account the wishes of children old enough to have an opinion on the matter.

The provisions of the Children Act on parental responsibility for children, the right of children to be raised by their parents and proceedings on parentage, custody and maintenance are largely compatible with the CRC, especially to the extent that they do not discriminate on the basis of sex or birth. Section 83 of the Children Act, provides that fees and costs of proceedings under the respective part of the Act should be remitted to persons unable to afford them. This is a positive measure to help protect the essential rights of poor children.

Most of the provisions of the Constitution and the legislation concerning the right to nationality are compatible with the CRC, in particular the provisions that apply specifically to children. There are however two exceptions. The first is that Ugandan law does not recognise the right of children born in Uganda to Ugandan citizenship if they would otherwise be stateless, which is incompatible with Article 6(4) of the African Charter. The second is the express exclusion of refugees from the provisions of the Registration of Persons Act on acquisition of nationality by registration. The CRC, the African Charter, the International Covenant on Civil and Political Rights and numerous other human rights treaties prohibit discrimination on grounds of "other status."<sup>42</sup> Refugee status is clearly an example of "other status." Only a compelling reason could justify the exclusion of refugees legally present in Uganda from entitlement to citizenship based on the same requirements that apply to other foreigners living in Uganda.

In addition, the legislation concerning citizenship does not contain any provisions specifically on children of aliens who acquire Ugandan nationality. Ugandan legislation thus does not seem to give Ugandan nationality to children of aliens that have obtained it by registration. This may not be in harmony with the principle of family unity.

## 1.4 Recommendations on the right to identity

1. The Registration of Persons Act, Refugee Act or Children Act should be amended to recognise the obligation of authorities to register the birth, in Uganda, of children of refugees and asylum seekers. In particular, sections 1(2) (b), 14(2) (b) and 25(e) of the Registration of Persons Act should be amended to eliminate the provisions that discriminate against refugees.
2. The Registration of Persons Act should be amended to provide that older children should have the right to decide whether to accept Ugandan nationality, when their parents acquire it, in particular if doing so would require renunciation of their previous nationality.
3. The Constitution or legislation should be amended to recognise the right of children born in Uganda to Ugandan citizenship, if they would otherwise be stateless.
4. The law should oblige hospitals to take measures to prevent the theft of newborn babies.

<sup>41</sup> The Registration of Persons Act, Section 32(2) (a) and 37

<sup>42</sup> Article 2.1, 3 and 2.1, respectively.



**02**

**CHILD PROTECTION**

## 2.1 Provisions of the CRC

The term “child protection” is used here to refer to mechanisms that aim to protect the lives of children whose living conditions put healthy development at risk. Child protection does not necessarily involve putting children in alternative care; indeed, separation of children from their families in order to protect them should be a last resort. Article 19 of the CRC provides that States must “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... while in the care of parent(s) or other caretakers.” It adds: “such protective measures should [...] include [...] social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up...”<sup>43</sup>

Article 20 of the CRC recognises the right of children removed from their homes - as well as abandoned children and others deprived of family care - to special protection and assistance and to alternative care.<sup>44</sup> Foster care, adoption and *kafalah*<sup>45</sup> are recognised forms of alternative care, as is institutional placement, “if necessary.”<sup>46</sup> Article 25 recognises the right of children “placed [...] for the purposes of care [or] treatment [...] to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.” The treatment of children removed from their homes for protection purposes is addressed.

Article 21 provides for a series of requirements concerning adoption that may be summarised as follows: Adoption must be authorised by the competent authorities in accordance with the applicable law, given a child’s legal relationship to his parents or family and if based on consent, the consent must be informed and freely given.<sup>47</sup> Intercountry adoption may be authorised only if foster care, adoption or another “suitable” solution is not possible within the child’s country of origin, provided that adoption does not result in “improper gain” for those involved and the applicable safeguards are equivalent to the safeguards applicable for adoption within Uganda.<sup>48</sup> The CRC encourages States that allow intercountry adoption to enter international agreements to ensure full compliance with appropriate standards and procedures.<sup>49</sup>

The general principles recognised by the CRC also must be born in mind; in particular, that the best interests of the child must be a primary consideration in all actions taken concerning children and that children have the right to be heard and to have their views taken into account in all matters that affect them.<sup>50</sup>

## 2.2 Ugandan legislation on child protection

The Children Act is the main law on protection of children. Section 3 of the Act sets forth the “welfare and guiding principles.” The welfare principle, which seems to be inspired by Article 3.1 of the CRC, requires the welfare of the child to be “of primary consideration” in all decisions concerning the upbringing or property of a child taken by the State, a court, a local authority, or any person. The scope of application of this principle is narrower than Article 3 of the CRC, which requires that the best interests of the child be a primary consideration in all actions taken by public or private social welfare institutions, courts and administrative authorities.

**43** The implications of Article 19 for crimes against children are considered in Chapter 5.

**44** Convention on the Rights of the Child, Article 20(1) 2); see also Article 25(1) of the CRC

**45** Kafalah of Islamic law is an alternative care option for children deprived of family option, as mentioned in Article 20 of the CRC.

**46** Children Act, Article 20(3); compare Convention on the Rights of the Child, Article 25(2)

**47** Article 21 (a); see also African Charter, Article 24(a)

**48** Convention on the Rights of the Child, Article 21 (b)-(d); see also the African Charter Article 24(b)-(d)

**49** African Charter, Article 21(e); see also Article 24(e)

**50** Convention on the Rights of the Child, Article 3.1 and Article 12



The third guiding principle recognised by the Children Act provides *inter alia* that the ascertainable wishes and feelings of the child must be considered in any decision regarding the upbringing of the child.<sup>51</sup> It also lists other considerations that should be taken into account in determining what is consistent with the welfare of a child, including: the child's age, sex, background and physical, emotional and educational needs; the harm that the child has suffered or risk suffering; the capacity of the child's parents or caretakers to meet his or her needs; and the likely effects of any change in the child's circumstances. The Committee on the Rights of the Child does not use the term child welfare, because it connotes treating children as objects rather than actors having rights.<sup>52</sup> However, the way welfare is defined by the Guiding Principles seems consistent with the meaning of "best interests" as used by the CRC.

The Children Act assigns responsibility for child protection to local government, Family and Children Courts and to "probation and social welfare officers."<sup>53</sup> Local councils have the responsibility to "safeguard and promote" the welfare of children and each must designate one member to be responsible for this task.<sup>54</sup> Any person having evidence that a child is being neglected or a child's rights are being violated has a duty to report the matter to the Local Council, which "shall mediate [...] especially with regard to the protection of a child."<sup>55</sup> The Secretary for Children's Affairs on the Local Council also may make a decision based on the best interests of the child concerned, after discussing the matter with the person allegedly responsible for neglect or infringement of the rights of the child.<sup>56</sup> If the decision is not complied with, then the matter shall be referred to the Local Council, and the Local Council Court may adopt an order, which may be appealed to a Family and Children Court.<sup>57</sup>

Members of Local Council Courts are not required to have any legal training and cases are heard in the local language.<sup>58</sup> The principles of natural justice apply (for example all parties have the right to be heard and members of the court having an interest in the case must not participate), but cases have to be handled "expeditiously and without undue regard for technical rules of evidence or procedure."<sup>59</sup> The orders that may be imposed consist mainly of restorative justice.<sup>60</sup> The Children Act provides that preventive and early intervention programmes should aim at preserving the family structure of children at risk.<sup>61</sup>

When a Local Council has "dealt with the matter without successes," a social welfare officer or other "authorised person" may ask a Family and Children Court to adopt a supervision order or care order.<sup>62</sup> These courts are composed of professional magistrates, but proceedings are too closed to the public and "as informal as possible," in order to avoid exposing children to adversarial procedures.<sup>63</sup> The child has a right to legal representation.<sup>64</sup>

A supervision order allows the child to remain in the care of his parents or relatives, under the supervision of a social welfare officer, while a care order places a child in the custody of an "approved home" or foster parent.<sup>65</sup> The standard for adopting either is a finding that the child "is suffering or is likely to suffer

**51** Children Act, Section 3(3)(a)

**52** See e.g. General Comment No.13 on Violence Against Children, *supra*, paras.13 and 59

**53** The term refers to officials that have both functions, but the separation of the two kinds of officers is being considered and this report uses the term 'probation officer' or 'social welfare officer' depending on the context.

**54** Children Act, section 10(1) (The designated member is called Secretary for Children's Affairs.)

**55** Sections 11(1) and 10(3) (This competence also applies to issues regarding inheritance.)

**56** Section 11(2)

**57** Sections 11(3), 12 and 105

**58** Local Council Courts Act, 2006, sections 6 and 21(1)

**59** Sections 23-24

**60** Section 13

**61** Section 42B

**62** Children Act, Section 22(a)

**63** Sections 13(2) and 16(1)(b)-(c)

**64** Section 16(1)(e)

**65** Section 19(a)

significant harm” due to care inferior to that which it is reasonable to expect a parent to provide, or a finding that the child is “beyond parental control.”<sup>66</sup> The finding of the court must be based on consideration of a report by a social welfare officer.<sup>67</sup> Supervision of a child involves being friendly to and assisting the child, advising the child and parents, and making plans for the child’s future in consultation with the child and his/ or parents or guardian and taking steps to reduce harm to the child.<sup>68</sup> Supervision orders are valid for one year and are renewable once.<sup>69</sup>

Care orders, which involve removal of the child from his or her home, may be made only when all possible alternative measures have been tried without success, or the danger to which the child is exposed is so severe as to require immediate removal.<sup>70</sup> They are valid for up to three years, but must be reviewed annually.<sup>71</sup> When a care order has been issued, a social welfare officer is responsible for working with the parents or other relatives to whom the child is expected to return and obtaining assistance from those in the community able to help in resolving the problems that led to the care order.<sup>72</sup> Foster parents have a duty to ensure the child’s development and to encourage contact between the child and his or her parents or family.<sup>73</sup> The head of an approved home has a duty to ensure the child’s development, to inform the parents of the child’s progress, and to arrange a trial return as soon as appropriate.<sup>74</sup>

In addition to supervision and care orders, the Family and Children Courts may impose an exclusion order prohibiting any specific person from having contact with the child.<sup>75</sup> The standard for imposition of an exclusion order is a finding that such a measure is “necessary for the protection of the child and to safeguard the child’s welfare.”<sup>76</sup>

In addition to the duties described above, regarding legal proceedings and assistance to children under supervision or care orders, social welfare officers have a duty to investigate any information suggesting that a child is suffering or is at risk of significant harm.<sup>77</sup> In an emergency, a social welfare officer or a police officer may remove a child to a place of safety for up to 48 hours and seek medical treatment or a medical examination.<sup>78</sup>

- 66** Children Act, Section 21(a)-(b)(i)
- 67** Section 20
- 68** Section 23(a)-(c) and (e)
- 69** Section 24(1) Interim orders valid for 3 months also may be adopted.
- 70** Section 27 (2)
- 71** Section 29 Interim orders valid for 3 months also may be adopted.
- 72** Section 32 (1)-(2)
- 73** Section 31(2)-(3)
- 74** Section 31(4)
- 75** Children Act, Section 34(1) (the order also may prohibit contact with the child’s caregivers.)
- 76** Section 34(2)
- 77** Section 40
- 78** Section 37





## 2.3 The compatibility of Ugandan legislation on child protection with the CRC

Most of the provisions of the Children Act concerning child protection are compatible with the CRC, particularly the provisions regarding the Family and Children Court supervision order or care orders. However, there is no age limit for the imposition of any of these orders and no definition of the term “beyond parental control.” The Act, as indicated above, provides that a care order separating the child from his or her family may be imposed only as a last resort and if the harm or risk of harm is “significant.”<sup>79</sup> Nevertheless, the vagueness of this term may entail a risk that children be separated from their families for conduct that is socially unacceptable, but does not involve a real and serious risk to the child’s well-being and development. That would not be compatible with the CRC.

## 2.4 Recommendation on child protection

1. Section 21 of the Children Act should be amended to remove “beyond parental control” as a ground for the imposition of care orders.

**79** See also African Charter on the Rights and Welfare of the Child, Article 25



**ALTERNATIVE CARE**



## 3.1 Provisions of the CRC

Article 20 of the CRC recognises the right of children removed from their homes, abandoned children and others deprived of family care to special protection, assistance and alternative care.<sup>80</sup> This chapter covers alternative care for children who have no family, or whose parents have abandoned them or have been deprived of paternal rights. It focuses on children in need of alternative care on a long-term or permanent basis. (Children removed from their homes temporarily as a result of child protection proceedings are covered in Chapter 2).

Article 20 identifies foster care, adoption and *kafalah* as acceptable forms of alternative care. Institutional placement is recognised as an appropriate form of alternative care only “if necessary.”<sup>81</sup> Article 25 recognises the right of children placed in an institutional setting “to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.”

Article 21 provides for requirements for adoption that may be summarised as follows: adoption must be authorised by the competent authorities in accordance with the applicable law, given child’s legal relationship to his parents or family and if based on consent, it must be informed and freely given.<sup>82</sup> Intercountry adoption may be authorised only if foster care, adoption or another “suitable” solution is not possible within the child’s country of origin, if international adoption does not result in “improper gain” for those involved and if the applicable safeguards are equivalent to the safeguards applicable for adoption within the country.<sup>83</sup> The CRC encourages States that allow intercountry adoption to enter international agreements to ensure full compliance with appropriate standards and procedures.<sup>84</sup> The UN Guidelines for the Alternative Care of Children, adopted in 2009, provide useful guidance on how the obligations should be interpreted and applied.<sup>85</sup>

## 3.2 Ugandan legislation on alternative care

Part VII of the Children Act is about “approved homes,” which are institutional placements of children in need of alternative care. The Act indicates that the purpose of such facilities is to provide care temporarily, until such a time that the child’s parents are able to provide suitable care.<sup>86</sup> The maximum period of placement is three years.<sup>87</sup> Where return to parental care is not possible, the alternatives are placement in foster care or development of the capacity to live independently.<sup>88</sup> The Act does not have standards on the rights or treatment of children in such institutions, other than those concerning children who “escape.” Such a child, when found, must be interviewed to discover the reason he or she left the facility. This helps in determining whether he or she should be returned to it nor not.<sup>89</sup> Rules governing approved homes were adopted in 2013.<sup>90</sup>

**80** Convention on the Rights of the Child, Article 20.1- 2; see also Art.25.1 of the African Charter

**81** Article 20.3; compare Art.25.2 of the African Charter

**82** Article 21 (a); see also Art.24(a) of the African Charter

**83** Article 21(b)-(d); see also Art.24(b)-(d) of the African Charter

**84** Article 21(e); see also Article 24(e) of the African Charter

**85** UNGA Resolution A/RES/64/142

**86** Children Act, Section 58(1); see also section 42C, which provides that child protection services should aim at the reunification of children in alternative care with their parents.

**87** *ibid*

**88** Section 58(4)

**89** Section 64(2)-(3)

**90** The Children (Approved Homes) Rules, 2013

The Act recognises three procedures for placement in foster care: a relative of a child who has neither parent nor guardian may foster that child, without any formalities;<sup>91</sup> the Family and Children Court may approve foster placement when removing a child from parental custody due to mistreatment or neglect;<sup>92</sup> and a child in institutional care may be placed in foster care by a social welfare officer, acting in conjunction with the head of the home where the child was placed.<sup>93</sup>

The sections of the Act concerning care orders recognise the duty of foster parents to ensure the development of a child and to encourage contact between the foster child and his or her parents.<sup>94</sup> They also provide that a social welfare officer facilitates contact between the foster child and his or her parents, with a view to returning the child to his or her home.<sup>95</sup> In addition, they indicate that, when found, children who escape from foster care should be asked why they left in order to decide whether or not they should be returned to the care of their foster parents.<sup>96</sup>

The second schedule of the Children Act provides Foster Care Placement Rules. Some of these rules / recognise principles set forth in the CRC and other international instruments, such as the obligation to take the views of the child into account before placing him or her with foster parents, or to place children with foster parents of the same religious and cultural background, when possible.<sup>97</sup> The Rules however apply only to foster placement by social welfare officers.<sup>98</sup>

Jurisdiction over adoption does not lie with Family and Children Courts, but with higher ordinary courts.<sup>99</sup> A child may be adopted by a single person or a married couple. The adoptive parent, or one spouse of a couple that wishes to adopt, must be 25 years of age and 21 years older than the child to be adopted.<sup>100</sup> A single person may not adopt a child of the opposite sex.<sup>101</sup> Only persons who have fostered the child they wish to adopt for 12 months under the supervision of a social welfare officer are eligible to adopt.<sup>102</sup>

The consent of the parents of the child to be adopted, if known, is required.<sup>103</sup> The consent of children who are 14 years old is required and the views of younger children must be taken into account, if they are able to understand the nature of adoption.<sup>104</sup> In order to approve an adoption, the court must find that the parents have given informed consent; that adoption will be for the welfare of the child, having given due consideration to the views of the child; and that no payment has been given or promised to the child's parent, guardian or caretaker, nor to the applicant.<sup>105</sup> The finding on whether adoption would be in the best interests of the child must be based on a report by a social welfare officer.<sup>106</sup>

- 91** Children Act, Section 43(2)
- 92** Sections 27-29
- 93** Section 43(1)
- 94** Section 31(2)-(3)
- 95** Section 32(4)
- 96** Children Act, Section 64(2)-(3)
- 97** Rules 6(1)(f) and 7-8
- 98** Rule 3
- 99** Children Act, Section 44 (A Magistrates Court presided by a chief magistrate or, if the child or prospective adoptive parent is a foreigner, High Court.)
- 100** Section 45(1)(a)
- 101** Section 45(3)(a)
- 102** Section 45(4)
- 103** Section 47(1)
- 104** Section 47(5)-(6)
- 105** Section 48
- 106** Section 49(2)(c)



Adopted children have the same right to care and maintenance, and to inherit, as other children.<sup>107</sup> The adopted child has the right to learn the identity of his or her biological parents at an appropriate age.<sup>108</sup>

Persons who are not citizens of Uganda may adopt only in exceptional circumstances, if they have resided in Uganda for one year and fostered the child under the supervision of a social welfare officer for 12 months.<sup>109</sup> They must not have a criminal record and their suitability for adoption must be certified by a social welfare agency of their country.<sup>110</sup> Uganda however is not a Party to the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, the main multi-lateral treaty on this subject.<sup>111</sup> In addition, no bilateral treaty concerning adoption is in force with the country of most foreign adoptive parents.<sup>112</sup>

A study on Legal Guardianship and Adoption Practices published in 2014 indicated that guardianship was “widely abused to facilitate [the] migration [of children] abroad or overseas for purposes of adoption.”<sup>113</sup> Therefore, the Children (Amendment) Act 2016 provided for guardianship in Part vi A, which was previously unregulated. Three forms of guardianship are recognised: legal, customary and by agreement. The High Court has jurisdiction over applications for legal guardianship.<sup>114</sup> The prerequisites for the appointment of a guardian are that the child have no known relatives or known relatives are unwilling or unable to take parental responsibility for the child; that the child is suffering or likely to suffer significant harm in his or her existing situation; and that all alternative care options have been exhausted.<sup>115</sup> Only Ugandan citizens may apply for legal guardianship.<sup>116</sup> Children over 12 years of age must consent and the views of younger children must be considered.<sup>117</sup> In addition, the court must be satisfied that the applicant has not made, given or agreed to make any payment in consideration of guardianship.<sup>118</sup>

In principle, guardianship orders remain in effect until the child reaches the age of 18 years, but they can be revoked if the court finds that it was obtained by fraud or misrepresentation, or the guardian has neglected parental responsibilities or has not complied with conditions imposed by the court.<sup>119</sup> The Act does not indicate what conditions may be imposed on guardians.

The amended Act also covers foreign child placement organisations, which seems to be tacit recognition of the practice of using guardianship to facilitate adoption of Ugandan children abroad.<sup>120</sup> Section 43J requires such organisations to submit annual reports on Ugandan children’s adaptation to their new environment and any changes in the guardian’s “living status” or address. Such reports are to be forwarded to the court that made the guardianship order and the Ministry of Gender, Labour and Social Development.

**107** Children Act, Section 51(b), 52 and 53

**108** Section 55

**109** Section 46(1) (a)-(b) (Before amendment of the Act in 2016, the requirements were three years and 36 months, respectively.)

**110** Section 46(1)(c)-(d)

**111** Hague Conference on Private International Law, Status Table, available at [www.hcch.net/en/instruments/conventions/status-table/?cid=69](http://www.hcch.net/en/instruments/conventions/status-table/?cid=69), listing 98 Parties

**112** US Department of State Bureau of Consular Affairs, Intercountry Adoption website, [travel.state.gov/content/adoptionsabroad/en/country-information/learn-about-a-country/uganda.html](http://travel.state.gov/content/adoptionsabroad/en/country-information/learn-about-a-country/uganda.html)

**113** Study on Legal Guardianship and Adoption Practices in Uganda, Dr. H. Among, Ministry of Gender, Labour and Social Development and UNICEF, p.1

**114** Children (Amendment) Act, Section 43B(b)

**115** Section 43F(1)(a)-(d)

**116** Sections 43A(2)

**117** Children Act, Section 43F(1)(e)-(f)

**118** Section 43F(3)

**119** Section 43K(2)

**120** The United States Department of State warns prospective adoptive parents that the legality of “proxy fostering” is unclear. Adoption Alert: Uganda’s Residency and Fostering Requirement, on the website cited above

Regarding customary adoption, the family members of a child may appoint a guardian in accordance with their customs, culture or tradition when both parents of the child are deceased or missing, or a child's surviving parent is incapacitated and no other person has responsibility for the child.<sup>121</sup> The parents of a child also may appoint "any person" to be guardian of the child, by an agreement or deed that must be witnessed by a social welfare officer and a member of the Local Council.<sup>122</sup>

### 3.3 The compatibility of Ugandan legislation on alternative care with the CRC

The Children Act recognises three kinds of alternative care: foster care, adoption and institutional placement. *Kafalah* is not recognised.

The Act provides that placement of a child in an approved home is intended to be temporary, until his or her parents are able to care for him or her.<sup>123</sup> This is in accordance with the principle that institutional care should be used only "if necessary" and with the State fulfilling its obligation to support families, as set forth in Articles 20 and 18.2 of the CRC. However, Section 27 of the Act, on care orders, applies to both placement in an approved home and placement in foster care and does not indicate that institutional placement should be the last resort. The failure to expressly provide that institutional placement should not be ordered unless foster care is not possible is not compatible with the last resort principle of Article 20.

The Act has few provisions on the treatment of children placed in approved homes, such as Section 60 on contact between the child and his or her family, and Section 64, which requires children who run away from a home to be interviewed as to the reasons before they are returned to the home. Nonetheless, they are compatible with the CRC.

The provisions of the Act concerning foster placement and foster care are, in general, compatible with the CRC. However, it does not seem appropriate to have standards that differ in function based on the placement mechanism used. Some of the existing standards apply to foster care ordered by a court, others apply to placement by social welfare officers and there are no standards for foster care by relatives.

Section 32 of the Refugee Act, provides that every refugee child is entitled to the rights and freedoms provided for in the Children Act.<sup>124</sup> Section 27(5) of the Refugee Act provides that the Commissioner for Refugees, after investigation of the family situation of a child who arrives in Uganda unaccompanied and who wishes to remain as a refugee, may recommend that the child be adopted. It is unclear whether the aim is to allow for adoption by refugees of the same background or by Ugandans or by other foreigners. The Refugee Act does not mention the other forms of temporary care recognised by the Children Act, such as foster care or guardianship and the mechanisms for foster placement recognised by the Children Act are not designed for application to unaccompanied refugee children. This is not in harmony with Article 23.3 of the African Charter, which provides that: "where no parents, legal guardians or close relatives can be found, the child [refugee or asylum seeker] shall be accorded the same protection as any other child permanently or temporarily deprived of his family environment for any reason."

**121** Children (Amendment) Act, Section 43C(1)

**122** Section 43D

**123** Children Act, Section 58; see also section 28(b)

**124** Section 32(2) (a) it also provides that they enjoy the rights recognised by the CRC, the African Charter and the Convention on the Status of Refugees.



The provisions of the Children Act on national adoption are consistent with the CRC. However, the provisions of the Act on adoption by foreigners do not recognise two principles set forth in the CRC. One is the principle that intercountry adoption should be the last resort;<sup>125</sup> the other is that a finding is not required that intercountry adoption would ensure that the child enjoys safeguards and standards equivalent to those for national adoption.<sup>126</sup>

The CRC has many references to guardians on whom it confers the same rights and responsibilities as parents. It does not provide for norms specifically on the appointment or role of guardians.<sup>127</sup> Most of the provisions of the Children Act on legal guardianship are in harmony with the CRC. However, some seem to allow foreigners to be appointed guardians in order to circumvent the requirements on adoption by foreigners, by taking Ugandan children out of the country to be adopted in a foreign jurisdiction. Allowing guardians to take children abroad for this purpose also circumvents the requirements of intercountry adoption stipulated in the CRC.

### 3.4 Recommendations on alternative care

1. The Children Act should be amended to expressly provide that children should be placed in approved homes only if no other suitable form of alternative care is available in Uganda.
2. The provisions of the Children Act on intercountry adoption should be amended to provide that intercountry adoption may be authorised only if no suitable form of alternative care for the child is available in Uganda and only if the norms and standards concerning adoption in the other jurisdiction provide safeguards and guarantees equivalent or superior to those recognised by the law of Uganda.
3. The Children Act should be amended to prohibit guardians from taking children in their care out of the country, in order to prevent circumvention of the provisions of the Act on intercountry adoption.
4. The process of ratification of the Hague Convention on Intercountry Adoption should be expedited.
5. The Refugee Act should be amended to recognise that temporary forms of care should be given priority over adoption as methods for protection of the rights of unaccompanied refugee children and unaccompanied child asylum seekers.
6. Sections 43 (1), 43A (2) and 43C (4) of the Children Act should be amended to ensure that provisions on temporary forms of alternative care take account of the special needs of unaccompanied refugee children.

**125** Children Act, Article 21(b)

**126** Article 21(c)

**127** Articles 2-5, 14, 18-19, 21 and 40



**JUVENILE JUSTICE**





## 4.1 Provisions of the CRC

Article 40 of the CRC provides standards on the rights of children accused or convicted of a criminal offence. It states: "...every child alleged as, accused of, or recognised as having infringed the penal law [has the right] to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society."<sup>128</sup>

It also lists a number of procedural guarantees similar to those that adults have under international human rights law.<sup>129</sup> The main differences are the right of an accused juvenile to privacy during criminal proceedings and the right to have his or her parents or guardians present.<sup>130</sup> However, the article provides for a vague obligation to create a special system of justice for juvenile offenders, in particular a minimum age for prosecution as juveniles and diversion.

Article 37 also recognises some rights and principles concerning juvenile justice, including:

- Prohibition of capital punishment, life sentences and arbitrary or illegal deprivation of liberty;<sup>131</sup>
- The principle that deprivation of liberty shall be "used only as a measure of last resort and for the shortest appropriate period of time" (widely known as "the last resort principle");<sup>132</sup>
- If deprived of liberty, to humane treatment, separation from adults and treatment takes into account the needs of persons of his or her age;<sup>133</sup>
- The right to challenge the legality of deprivation of liberty and to prompt access to legal assistance<sup>134</sup>

In 2007 the Committee on the Rights of the Child adopted a General Comment on Juvenile Justice in which it interprets some provisions and makes recommendations on their implementation. The Committee indicated that the lowest acceptable age for the prosecution of juveniles was 12 years.<sup>135</sup> It also stated that a child "must have access to legal or other appropriate assistance" whenever he or she is being questioned, to ensure that any information or evidence the child provides is given voluntarily and not coerced.<sup>136</sup> In addition, it indicated that all juvenile justice professionals should have special training in child rights and child development, in order to ensure that juvenile justice embodies the values described in Article 40(1) of the CRC.<sup>137</sup>

**128** Compare Article 17(1) of the African Charter

**129** They include the right to be presumed innocent, the right to be tried by an independent and impartial court or other authority, the right not to be compelled to give evidence, the right to legal or other assistance in preparing and presenting a defence, the right to equality before the court and the right to appeal if found guilty or responsible for a crime. Compare Article 17(2)(c) of the African Charter.

**130** Charter on the Rights of the Child, Article 40 (2) (b) (iii) and (vii)

**131** Article 37 (a) and (b)

**132** Article 37 (b)

**133** Article 37 (c)

**134** Convention on the Rights of the Child, Article 37 (d)

**135** General Comment No.10, Children's Rights in Juvenile Justice, UN doc. CRC/C/GO/10, para.32

**136** General Comment No.10, Children's Rights in Juvenile Justice, UN doc. CRC/C/GO/10, para.32, para.58

**137** General Comment No.10, Children's Rights in Juvenile Justice, UN doc. CRC/C/GO/10, para.32, para.40

## 4.2 Ugandan legislation on juvenile justice

According to the Children Act, the age of criminal responsibility in Uganda is 12 years<sup>138</sup> while the age of majority for purposes of criminal responsibility is 18 years.<sup>139</sup> Juveniles accused of a capital crime or tried jointly with an adult co-defendant are to be tried before the High Court. The procedures of the High Court are defined primarily by the Criminal Procedure Act and the Trial by Indictment Act, which do not require special treatment of defendants under 18 years of age. The Children Act however, expressly requires that the High Court “shall have due regard to the child’s age and to the provisions of the law relating to the procedure of trials involving children.”<sup>140</sup>

The Family and Children Courts have jurisdiction over most juveniles of 12 to 18 years accused of an offence. The exceptions are those mentioned above, where serious offences are tried by a High Court and certain offences that are tried by Local Council Courts. The Children Act, as amended by the Local Council Court Act 2006 gives Local Council Courts competence over seven misdemeanours and offences, namely: affray (fighting), being idle or disorderly, common assault, causing bodily harm, theft, criminal trespass and malicious damage to property.<sup>141</sup>

The Children Act gives the police broad discretion to caution and release arrested children “under justifiable circumstances.”<sup>142</sup> This is in line with the classical form of diversion, recognised by the Beijing Rules on the Administration of Juvenile Justice.<sup>143</sup>

The parents of a child who is arrested and the local authority responsible for children must be informed of the arrest “as soon as possible.”<sup>144</sup> Children who are arrested do not have the right to legal assistance, but should not be questioned unless a parent or guardian is present.<sup>145</sup> If a parent or guardian cannot be contacted, a probation/social worker or other “authorized person” should be present.<sup>146</sup> If the child cannot be “immediately taken before a court”, after arrest and a preliminary inquiry into the case, the police should release the child unless the charge is a serious one or there is reason to believe that the release will defeat the ends of justice or that removal of the child from association with some person is necessary to protect the child’s best interests.<sup>147</sup> A child who is arrested must be brought before a court within 24 hours.<sup>148</sup> Children may not be detained with adults and detained girls must be under the care of a woman officer.<sup>149</sup> When an accused child is brought before a court, the court shall release the child on recognizance or bond unless “there is a serious danger to the child.”<sup>150</sup> If bail is not granted, the reason must be stated.<sup>151</sup> The maximum length of remand is three months for children charged with a capital offence and 45 days for all other offences.<sup>152</sup> Children charged with offences brought before Local Council Courts may not be detained on remand.<sup>153</sup>

**138** Children Act, Section 88(1)

**139** Section 88(4)

**140** Section 104(3)

**141** Children Act, Sections 79, 167, 235-236, 254, 302 and 335 of the Penal Code (Section 106 of the Children Act decriminalises subsection (b) of Section 167 of the Penal Code, begging, but not subsection (a), prostitution)

**142** Section 89(1) and (2)

**143** Rule 11.2

**144** Section 89(3)

**145** Section 89(4)

**146** Section 89(5)

**147** Section 89(6)

**148** Section 89(7)

**149** Section 89(8)-(9)

**150** Section 90(1)

**151** Section 90(2)

**152** Section 91(5) as amended by section 20 of the Children (Amendment) Act (S.99 of the Act was not amended to bring it into conformity this amendment but in practice S.91 (5) is followed.)

**153** Section 92(7) as amended by section 49 of the Children (Amendment) Act



Family and Children Courts are established by the Children Act, which provides that all proceedings (civil and criminal) shall be *in camera* and in the presence of the child's parents or guardian.<sup>154</sup> The child has the right to legal representation and "proceedings shall be as informal as possible and by inquiry rather than by exposing the child to adversarial procedures."<sup>155</sup> Cases involving accused children "shall be handled expeditiously and without unnecessary delay."<sup>156</sup> Cases before the Family and Children Court must be dismissed if not resolved within three (3) months and cases before the High Court must be dismissed if not resolved with 12 months.<sup>157</sup> The Children Act recognises the child's right to privacy during court proceedings and criminalises the publication of the name or address of the child or his/her school, a photo of the child, or any other matter likely to lead to the identification of the child.<sup>158</sup> The terms "conviction" and "sentence" are not used when the offender is under the age of 18 years.<sup>159</sup>

The proceedings of Local Council Courts concerning juvenile offenders are regulated in part by the Children Act and in part by the Executive Committees (Judicial Powers) Act, 1964.<sup>160</sup> They must be closed to the public and the child's parents should be present, but the participation of a legal representative is not required.<sup>161</sup> If the Local Council Court finds that a child has committed one of the offences it has competence over, it may order reconciliation, compensation, restitution, community service, apology, caution and supervision for a period up to six months.<sup>162</sup>

When charges have been proven or admitted in a case before a Family and Children Court, a social background report must be prepared.<sup>163</sup> After considering the report, the Court may:

- Caution the offender
  - Discharge the offender unconditionally, or conditionally for a period not to exceed 12 months
1. Bind the offender over to be of good behaviour for a maximum of 12 months, or place the offender on probation for up to 12 months
    - Impose a fine
    - Order compensation or restitution<sup>164</sup>

The court also may order "detention" for up to three months if the offender is under the age of 16 years; six months if the offender is over the age of 16 years; or three years if the offender committed a capital offence.<sup>165</sup> The Act expressly provides that a custodial order "shall be a matter of last resort and shall only be made after careful consideration and after all other reasonable alternatives have been tried and where the gravity of the offence warrants the order."<sup>166</sup> Confinement in an adult prison is expressly prohibited, unless the offender is over the age of 18 years at the time of sentencing.<sup>167</sup> The Act expressly prohibits corporal punishment.<sup>168</sup> Section 98 of the Act concerns aftercare for children released from detention. It

**154** Children Act, Sections 15 and 16 (1)(b) and (d)

**155** Section 16 (1)(c)-(e)

**156** Section 99(1)

**157** Section 99(2) and (4)

**158** Section 102(2)

**159** Section 101

**160** Section 92(8) of the Children Act

**161** Ibid and Section 16(1) of the Children Act

**162** Section 92(4)-(6)

**163** Section 95(1)

**164** Children Act, Sections 95(1) and 94(1) (a)-(f)

**165** Section 94(1)(g) (An amendment to S.104(2) provides that cases are no longer sent to Family and Children Courts for orders to be imposed, but the High Court that tried the case imposes the kind of order authorized by S.94(1). Imposing an order is the equivalent to sentencing, a term that is not used for juvenile offenders, as per S.101 of the Act.)

**166** Section 94(4)

**167** Section 94(6) and (6a)

**168** Section 94(9)

limits the duration of aftercare to 12 months and requires consultation between the staff of the detention facility and the probation and social work office. However, it does not identify aftercare as a right nor describe its aims or methods.

Decisions of Local Council Courts may be appealed to Family and Children Court and decisions of Family and Children Court may be appealed to a Chief Magistrate's Court and eventually to higher courts.<sup>169</sup>

Statutory provisions on the rights and treatment of juveniles deprived of liberty are few. The Children Act requires the appointment of a "committee of visitors" to visit centres for juveniles deprived of liberty and implies that aftercare should be provided to children after release.<sup>170</sup> In instances where a girl is issued a detention order, she is to be detained in a separate wing of a juvenile facility.<sup>171</sup> The only section of the Prisons Act that applies specifically to juveniles states that they shall not be admitted to a facility for adults.<sup>172</sup> Section 59 of the Act, on female prisoners with infants, provides that infants of female prisoners may stay in prison with their mothers until they reach the age of 18 months.<sup>173</sup>

### 4.3 The compatibility of Ugandan legislation on juvenile justice with the CRC

Ugandan legislation regarding child offenders is largely in harmony with the CRC and related international standards. The minimum age for criminal responsibility complies with the recommendations of the Committee on the Rights of the Child. Diversion by referral to programmes for the prevention of reoffending does not exist, but police have a broad mandate to divert offenders by cautioning them. Most provisions of the Children Act regarding confinement of accused juveniles and those found responsible for an offence are in harmony with the last resort principle. The procedures of Family and Children Courts for cases involving accused juveniles generally meet international standards.

The same cannot be said of statutory norms concerning the trial of juveniles by High Court. Section 104(3) of the Children Act vaguely provides that proceedings before the High Court involving children "shall have due regard to a child's age and the provisions of the law relating to the procedure of trials involving children". It is not clear whether this requires the High Court to respect all the procedural norms provided for in the Children Act in cases involving a juvenile defendant. The Children Act provides that "in any proceedings before the High Court in which a child is involved, the High Court shall have due regard to the child's age and to the provisions of the law relating to the procedure of trials involving children." However, this is not always interpreted to mean that they have the same procedural safeguards as juveniles tried by Family and Children Courts.

Section 92(8) of the Children Act provides clearer guidance on which procedural norms set forth in the Act apply to procedures in Local Council Courts. They include closed hearings, but not the right to legal assistance. Since the orders that these courts may adopt emphasise restorative justice and therefore do not constitute detention, the lack of recognition of the right to legal representation does not seem incompatible with the CRC.<sup>174</sup>

**169** Children Act, Section 105

**170** Sections 97-98

**171** Section 96(3)

**172** Prison's Act, Section 58(7)

**173** Prison's Act, Section 59(4)

**174** This seems to be a situation in which 'other' assistance in the negotiating the justice process is sufficient to meet the requirement of Art.40.2 (b)(ii) of the CRC.



In contrast to the statutory norms on procedures and treatment of juveniles before and during judicial proceedings, statutory provisions on the rights and treatment of juveniles deprived of liberty are few. Section 59 of the Prisons Act 2006 which allows infant children to remain with imprisoned mothers, is incompatible with General Comment on Article 30 of the African Charter on the Rights and Welfare of the Child, which prohibits imprisonment of a mother with a child.

## 4.4 Recommendations on juvenile justice

1. The Judiciary should adopt rules to ensure that juveniles tried in High Court all have the same rights as those tried by Family and Children Court.
2. The Children Act should be amended to recognise the most important rights of juveniles deprived of liberty (for example with regard to education and training, contact with families and activities designed to reduce the risk of reoffending) and to prohibit the use of disciplinary measures incompatible with international standards (such as corporal punishment, solitary confinement and restrictions on diet or contact with families).<sup>175</sup>
3. The Children Act should be amended to recognise aftercare as the right of children released from detention to any necessary assistance in reintegration into the family and community.
4. The Penal Code and the Prisons Act should be amended to bring them into harmony with Article 30 of the African Charter, concerning children of convicted and imprisoned mothers.

**175** Rule 67 of the UN Rules on the Protection of Juveniles Deprived of Liberty, General Assembly Resolution 45/113 of 14 December 1990



**05**

**CRIMES AGAINST CHILDREN**



## 5.1 Provisions of the CRC and related treaties

The CRC does not expressly require States to criminalise violations of the rights of children. Only two Articles allude to the possibility of criminal responsibility. Article 32, on child labour, requires States to “provide for appropriate penalties or other sanctions” for the economic exploitation of children and Article 19, on the right to protection against violence, abuse and exploitation, states:

“...protective measures should, as appropriate, include effective [...] for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore and, as appropriate, for judicial involvement.”

The Committee on the Rights of the Child has interpreted this to mean that “Criminal law [...] must be strictly applied in order to abolish [...] impunity.”<sup>176</sup> In 2014, the Committee, together with the Committee on the Elimination of All Forms of Discrimination against Women, adopted a statement on harmful traditional practices that calls on States to “explicitly prohibit by law and adequately sanction or criminalise harmful practices.”<sup>177</sup> In 2006, the Committee adopted a comment on corporal punishment stating that “explicit prohibition of corporal punishment [...] in civil or criminal legislation, is required in order to make it absolutely clear that it is as unlawful to hit or “smack” or “spank” a child [...] and that the criminal law on assault does apply equally to such violence.”<sup>178</sup>

Uganda is a Party to the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography, which expressly requires States Parties to criminalise these practices. Article 3 of the Protocol defines the practices to which this obligation applies. Sale means offering, delivering or accepting a child for the purpose of sexual exploitation, forced labour, or transfer of organs for profit, as well as improperly inducing consent for the adoption of a child.<sup>179</sup> Child prostitution means “offering, obtaining, procuring or providing a child for child prostitution;” that is, “the use of a child in sexual activities for remuneration or any consideration.”<sup>180</sup> In so far as pornography is concerned, States have an obligation to criminalise the production, distribution, dissemination, import, export, offer, sale and possession of “any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes.”<sup>181</sup>

Article 3 of the Protocol requires States Parties to criminalise attempts to commit any of these crimes and complicity or participation in any of them. Article 4 further stipulates that these crimes must be “punishable by appropriate penalties that take into account their grave nature.”<sup>182</sup> Uganda is also a party to the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict, which obliges States to criminalise the recruitment and use of children in hostilities by non-governmental armed groups.<sup>183</sup> Article 7 obliges parties to seize and confiscate instruments used to commit the crimes prohibited by the treaty, to close premises used to commit them and to seize the profits obtained from the crimes.

**176** General Comment 13 (2011), The right of the child to freedom from all forms of violence, UN doc. CRC/C/GC/13, para.55(c) See also para.56 and footnote 9, stating that sexual abuse of children by adults should be criminalised.

**177** UN doc. CEDAW/C/GC/31-CRC/C/GC/18, para.13 (l); see also paras. 55(l) and 71

**178** General Comment No.8, The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment, UN doc. CRC/C/GC/8, para. 34

**179** Convention on the Rights of the Child, Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, Article 3(1(a))

**180** Articles 3(1(b) and 2(c)

**181** Article 3(1(c)

**182** Convention on the Rights of the Child, Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, Paras. 2 and 3

**183** Article 4(2)

Uganda is also a party to other treaties that expressly recognise the obligation to criminalise certain human rights violations. They include:

- a. The Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (“Palermo Protocol”), which obliges Parties to criminalise trafficking in persons.<sup>184</sup> The definition of trafficking in children is similar to that of the Optional Protocol to the CRC: “The recruitment, transportation, transfer, harbouring or receipt of persons [...] for the purpose of exploitation,” which in turn is defined as “prostitution [...] or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”<sup>185</sup> Trafficking in children differs from trafficking in adults essentially because the means of trafficking is irrelevant, since children can never voluntarily or willingly enter into an arrangement that resulted in trafficking, even if the parents give their consent. Additional obligations include the criminalisation of attempt and complicity.<sup>186</sup>
- b. ILO Convention No.182 on Worst Forms of Child Labour, which recognises an obligation to adopt and apply “penal sanctions or, as appropriate, other sanctions” against trafficking and sale of children, child prostitution and pornography, use of children in armed conflict and other harmful forms of child labour.<sup>187</sup>
- c. The Geneva Conventions on international humanitarian law, particularly the Fourth Convention in relation to the Protection of Civilian Persons, which is most relevant for children. Each of the Conventions requires States Parties to criminalise and prosecute “grave breaches,” such as intentional killing or injury, torture or ill treatment and unlawful displacement or detention.<sup>188</sup>
- d. The Convention against Torture, which provides for an obligation to criminalise torture, regardless of the context in which it occurs.<sup>189</sup>

## 5.2 Ugandan legislation on violations of the rights of children

With respect to trafficking and sale of children, the Prevention of Trafficking in Persons Act 2009 criminalises trafficking in persons, which is defined in terms identical to those used by Article 3(a) of the Palermo Protocol.<sup>190</sup> It also provides for a wider definition of trafficking in children, identical to that of the Palermo Protocol.<sup>191</sup> The definition of “exploitation” in the Act is almost identical to that of the Protocol; it does not mention removal of organs even though it mentions forced or arranged marriage.<sup>192</sup> The selling or buying of children is expressly criminalised, as is attempt and a number of acts that can be considered complicity.<sup>193</sup>

The trafficking of a child is punishable by a life sentence.<sup>194</sup> Certain aggravating factors make trafficking of children subject to the death penalty. They include use of the victim in armed conflict or crime, abandonment of the victim outside of Uganda and the use the victim’s body for witchcraft or human sacrifice.<sup>195</sup> The sale

**184** Protocol to the UN Convention against Transnational Organized Crime, UNGA resolution 55/25 of 15 Nov. 2000, Art.5

**185** Article 3 (a) and (c)

**186** Article 5.2 (a) and (b)

**187** Article 3 and 7.1

**188** See e.g. Art.146-147 of the Fourth Convention. (This obligation applies to international armed conflicts.)

**189** Convention Against Torture, Article 4

**190** Prevention of Trafficking in Persons Act, Section 3(1)(a)

**191** Section 3(3) (When the victim is a child, the means used are immaterial.)

**192** Section 3(1)(b)

**193** Section 7(g) and 8(a)-(b)

**194** Section 4(a)

**195** Section 5





of a person, removal of a child from parental care and complicity in trafficking are punishable by up to seven years in prison.<sup>196</sup>

The Act recognises extraterritorial jurisdiction over crimes against Ugandan citizens and crimes committed by citizens or permanent residents of Uganda, as well as crimes having substantial effects in Uganda.<sup>197</sup> It also requires the confiscation of proceeds and properties derived from the trafficking or sale of persons.<sup>198</sup>

Regarding child prostitution and pornography, the Anti-Pornography Act of 2014 defines pornography in terms similar to the Optional Protocol to the CRC.<sup>199</sup> It applies to all pornography, whether the persons depicted are children or adults. The production, publication, broadcasting, import, export and “procuring” of pornography depicting children is criminalised, but the possession of child pornography is not.<sup>200</sup> The acts criminalised are punishable by a fine or a prison sentence of up to 15 years or both.<sup>201</sup> Section 19 of the Act recognises the criminal responsibility of corporate bodies and their officers or owners. Section 20 provides for the seizure and destruction of materials and objects used in the commission of the acts criminalised, but not the seizure of proceeds. The Computer Misuse Act 2011 also criminalises the production, distribution and possession of child pornography on or through a computer, as well as the use of a computer to make requests, suggestions or proposals that are obscene, lewd, lascivious or indecent.<sup>202</sup> The sentence is up to 15 years in prison for offences concerning child pornography and up to 3 years for offences involving illegal messages.<sup>203</sup>

The Penal Code has several sections concerning prostitution.<sup>204</sup> All of these offences are punishable by a sentence of seven years in prison and none carry a heavier sentence when the victim is a child. The offence of procuring applies only to the procuring of women or girls and conviction requires corroboration by a second witness or other evidence.

On child labour and other economic exploitation, the Employment Act of 2006 prohibits the employment of children under 12 years of age and the employment of any child in night work or work that is hazardous, dangerous or “otherwise unsuitable.”<sup>205</sup> Children of 12 to 14 years of age may perform light work.<sup>206</sup> The Act does not recognise child labour as a criminal offence, but continued violation of the provisions on child labour after a written caution is punishable by a fine and/or prison sentence of up to one year and repeat offences are punishable by a prison sentence of up to two years.<sup>207</sup>

Other laws that prohibit child labour include the Children Act, as amended, which provides that the minimum age for employment is 16 years.<sup>208</sup> It also provides that no child shall be “employed or engaged in any activity that may be harmful or hazardous to his or her health” and contains a broad definition of harmful or hazardous work.<sup>209</sup> It however does not provide any sentence or sanction for violations of these

**196** Prevention of Trafficking in Persons Act, Section 7 and 8

**197** Section 19 (Section 19(2) fills a gap in jurisdiction pointed out by the Committee on the Rights of the Child in its comments on Uganda’s first report on implementation of the Optional Protocol on Sale of Children in 2008.)

**198** Prevention of Trafficking in Persons Act, Section 22(1)

**199** Anti-Pornography Act, Section 2

**200** Section 14(1)

**201** Ibid

**202** Computer Misuse Act, Section 23(1) and 24(1)-(2)(a) (The latter is called ‘cyber harassment’)

**203** Section 23(4)

**204** Penal Code, Section 131, Procuration; 134, Detention with sexual intent; 136, Person living on the earnings of prostitution; 137, Brothels; and 139, Prohibition of Prostitution

**205** Employment Act, Section 32(1) and (3)-(5)

**206** Section 32(2)

**207** Employment Act, Section 96(2) and (3)

**208** Children (Amendment) Act, Section 7 replacing section 8 of the principal Act.

**209** Section 8(3)

provisions.<sup>210</sup> Another provision of this Act criminalises the employment of children in work that exposes them to activity of a sexual nature and makes this offence punishable by a prison sentence of up to five years.<sup>211</sup> The Prevention of Trafficking in Persons Act also makes the recruitment of a person under the age of 16 years of age for “any form of employment for purposes of exploitation” punishable by imprisonment for up to five years.<sup>212</sup> The Act provides for a broad definition of exploitation that includes sexual exploitation, harmful labour, servitude and use in illegal activities. Section 167(b) of the Penal Code criminalises causing, procuring or encouraging a child to beg, a form of exploitation punishable by a fine or imprisonment for up to three months.

Regarding harmful traditional practices, the Prohibition of Female Genital Mutilation Act of 2010 criminalises them with a sentence of up to 10 years in prison, or life imprisonment if aggravating factors are proven.<sup>213</sup> Procuring, aiding, abetting and facilitating female genital mutilation is punishable by a sentence of up to five years, or eight years if the guilty party is the parent or guardian of the victim.<sup>214</sup> Discrimination against girls or women who have not undergone genital mutilation is punishable by a prison sentence of up to five years.<sup>215</sup>

The Children Act, as amended, criminalises all “customary or cultural practice[s] that [are] harmful to [the] health, well-being, education or social-educational development” of children, referring to “any activity that is mentally, physically, socially or morally harmful to a child”; or interferes with the education or social development of a child.<sup>216</sup> Violations of this section are punishable by up to seven years imprisonment.<sup>217</sup> A section of the Act on the protection of children from violence also recognises the right of children to protection from certain harmful traditional practices, including child sacrifice, child marriage and female genital mutilation.<sup>218</sup> New sections 42A, 42B and 42C do not criminalise these practices, but focus on prevention, reporting, investigation and the protection of victims. Another new section criminalises the use of corporal punishment in schools, making it punishable by a sentence of up to three years imprisonment.<sup>219</sup>

With respect to torture, war crimes and crimes against humanity, the Prevention and Prohibition of Torture Act 2012, which is compliant with the Convention against Torture, provides that the torture of persons under the age of 18 is punishable by imprisonment for life.<sup>220</sup> The Geneva Conventions Act 1964 criminalises grave breaches of the Geneva Conventions and incorporates the definitions of the Conventions into the national law of Uganda.<sup>221</sup> Under this Act, grave breaches involving wilful killing are punishable by imprisonment for life and others such as torture, are punishable by a prison sentence of up to fourteen years.<sup>222</sup>

The International Criminal Court Act 2010 criminalises genocide, war crimes and crimes against humanity, incorporating the definitions of these crimes in the Statute of the International Criminal Court (ICC Statute) into the domestic law of Uganda.<sup>223</sup> The term “war crimes” in the ICC Statute includes grave breaches of the Geneva Conventions and other serious violations of customary international law, including the

- 210** Ibid.
- 211** Section 8A(1)-(2)
- 212** Section 8(d)
- 213** The Prohibition of Female Genital Mutilation Act, 2010, sections 2 and 3
- 214** Sections 7-8
- 215** Sections 11-12
- 216** Children Act, Section 6, amending section 7 of the Children Act, 1996
- 217** Subsection (3) of section 7
- 218** New section 45A (1)
- 219** Section 106A
- 220** Prevention and Prohibition of Torture Act, Section 5(h)
- 221** Geneva Conventions Act, Section 2
- 222** Ibid
- 223** ICC Statute, Section 7-9



recruitment of children under 15 years of age.<sup>224</sup> It also prohibits war crimes committed in the context of non-international armed conflicts, including murder, torture, mutilation, rape, sexual slavery and forced pregnancy and the recruitment or use in hostilities of children under 15 years of age.<sup>225</sup> The criminalisation of war crimes committed in non-international conflicts is particularly important in a country where such conflicts have taken place. The crimes against humanity prohibited by the ICC Statute include acts such as murder, forced disappearance, torture, rape and other sexual violence, enslavement, illegal deprivation of liberty and forcible population transfers, when committed as part of a widespread or systematic attack directed against a civilian population. All such crimes are punishable by a maximum sentence of life imprisonment under this Act.

Offences concerning identity and family unity relate to Section 4 of the Children Act, which recognises the right of every child to live with his or her parent or guardian, the right to be registered at birth and to name and nationality. Violations of these rights are punishable by imprisonment for up to five years.<sup>226</sup> Failure on the part of a public official to assist a child in re-establishing his or her identity is punishable by up to one year in prison.<sup>227</sup> In the same spirit, the Penal Code provides for criminalisation of crimes against family unity. Section 159 criminalises “child stealing,” defined as forcibly or fraudulently taking or enticing a child under the age of 14 from the possession of parents or guardians, or receiving, harbouring or detaining a child under age 14 who has been removed from the possession of parents or guardians. Section 126(b) criminalises the abduction of children, that is “unlawfully taking another person under the age of eighteen years out of the custody of any of the parents or of any other person having lawful care or charge over that person.” Section 240 also criminalises kidnapping from lawful guardianship, defined as taking or enticing a boy under the age of 14 or girl under the age of 16 from the “keeping” of a lawful guardian, without the consent of the guardian. The first two offences are punishable by a maximum sentence of 7 years imprisonment while the third is punishable by a maximum sentence of 10 years.<sup>228</sup>

The Prevention of Trafficking Act criminalises the abandonment of a child “in circumstances likely to cause fear, isolation, pain or other harm.”<sup>229</sup> This applies to all children under the age of 18 years and is punishable by a prison sentence of five years.<sup>230</sup>

Other offences relate to violation of Section 4 of Children Act, which lists the rights of a child that include: the right to live with his or her parents; to express his or her views, beliefs and opinions; to information; to name and nationality; to privacy; to inherit property; to legal aid; to access basic social services; to leisure; to participate in sports and cultural activities; and to be treated without discrimination.<sup>231</sup> Violation of any of these rights is punishable by a fine or imprisonment for up to five years.<sup>232</sup> In addition, the Domestic Violence Act 2010 covers violence by one family member against another (as well as violence against house servants).<sup>233</sup>

**224** Art. 8.2(a) and (b), in particular Art. 8.2 (b) (xxvi)

**225** Art.8.2(c) and (e)

**226** Children Act, Section 4(3)

**227** Section 4(4) and (6)

**228** The punishment for the offence defined in section 240 is set forth in section 242.

**229** Prevention of Trafficking Act, Section 7(i)

**230** Sections 2 (a) and 7 (i)

**231** Children Act, Section 4(1)

**232** Section 4(3)

**233** Section 3.1(b) and (d)

## 5.3 The compatibility of Ugandan legislation on crimes against children with international standards

The Prevention of Trafficking in Persons Act substantially complies with Uganda's treaty obligations to criminalise the sale and trafficking of children, as well as its obligations regarding extraterritorial jurisdiction, the criminalisation of attempt and complicity and the confiscation of proceeds from trafficking. In a few instances, it falls short of meeting Uganda's obligations regarding the sale of children. The Act criminalises adoption for illicit purposes, but the Optional Protocol defines improperly inducing consent to adoption as a form of sale, regardless of the purpose of adoption.<sup>234</sup> The Act requires courts to confiscate the proceeds of sale, but not goods used to facilitate the commission of this crime, nor does it require closure of facilities used in the commission of this crime.<sup>235</sup> International bodies have not yet clarified what sentences should be considered "appropriate," given the gravity of the trafficking and sale of children. The sentences that the Act provides for trafficking of children are very serious and no doubt comply fully with this obligation. The sentences for attempted trafficking and conspiracy under section 8 of the Act (seven years) also appear to be appropriate. However, the sentence of five years for sale, under section 7(g), seems light, compared to the life sentence for trafficking without aggravating factors.

The Anti-Pornography Act of 2014 fulfils many of Uganda's obligations under the Optional Protocol to the CRC. The failure however to criminalise the possession of child pornography is not compatible with Uganda's obligation under Article 3(1)(c) of the Optional Protocol to the CRC. The lack of a provision expressly authorising the seizure of proceeds of child prostitution falls short of the obligation recognised by Article 7(a)(2) of the Optional Protocol. The Optional Protocol not only obliges States to criminalise child prostitution and child pornography, but to make these offences "punishable by appropriate penalties that take into account their grave nature". The competent international bodies have not yet adopted any guidelines on what sentences satisfy this obligation. The duration of the prison sentence that may be imposed under the Anti-Pornography Act (fifteen years) seems appropriate. However, leaving courts discretion to punish this offence by a fine with no prison sentence does not seem to satisfy this obligation.<sup>236</sup>

The sentences for offences involving prostitution under the Penal Code (seven years) are significantly lighter than the maximum sentence for child pornography. They are also lighter than the sentences for many other sexual offences recognised by the Penal Code. Indecent assault, for example, carries a prison sentence of fourteen years; attempted defilement of a girl under 18 years of age carries a sentence of eighteen years; and defilement is punishable by a life sentence. The exploitation of a child is an aggravating factor for some other offences, such as trafficking, but sentences for offences concerning prostitution are the same, whether the person exploited is a child or an adult.

Ugandan legislation concerning child labour is largely compliant with its obligations under the CRC and related instruments, but there are gaps and discrepancies between provisions of the three relevant statutes. The Children Act provides that the minimum age for employment is 16 years and the Prevention of Trafficking in Persons Act criminalises the recruitment of children under the age of 16 years for purposes of labour that involves exploitation.<sup>237</sup> Under the Children Act, work that exposes any child under 18 years of age to sexual activity is punishable by a prison sentence of five years. The Prevention of Trafficking Act provides for sentences of 5 years for recruitment to employment involving exploitation, but this provision applies only to children under the age of 16. The Children Act also provides a broad prohibition of harmful labour that covers children of all ages, but the punishment for violation of this prohibition is not specified.

**234** Compare Article 3.1(a)(ii) with Section 8(g)

**235** Compare section 22(1) with Article 7 of the Optional Protocol

**236** Anti-Pornography Act, Article 3.3

**237** Sections 8 and 8(3), respectively.



Consequently, under section 109 of the Act the maximum punishment would be a prison sentence of six months.<sup>238</sup> Under the Employment Act, disobedience to an order to cease illegal practices involving child labour is punished by a prison sentence of one year.

The provisions of the Prohibition of Female Genital Mutilation Act and the recent amendments to the Children Act criminalising harmful traditional practices appear to meet Uganda's obligations under the CRC and African Charter.

The Domestic Violence Act 2010 defines domestic violence as physical, sexual, emotional, verbal, psychological, emotional or economic abuse that harms, injures or endangers the health, safety or well-being of (inter alia) a family member.<sup>239</sup> The Act focuses mainly on rapid interventions to protect the victim.<sup>240</sup> First offences may be handled by local council courts, whose competence is basically limited to restorative justice measures, such as warnings, apologies, compensation, reconciliation and the like.<sup>241</sup> Repeated offences, cases where repeat offending seem likely, or more serious cases are referred to a magistrates court, which may impose a fine and or a sentence of imprisonment for up to 2 years.<sup>242</sup>

Regarding torture, war crimes and crimes against humanity, the sentences provided for by the Geneva Conventions Act are lighter than the sentences for the same acts committed in other contexts. The punishment of rape and torture by sentences of imprisonment for up to 14 years would be an aberration, especially when the victim is a child. The International Criminal Court Act has resolved this issue by making all war crimes and crimes against humanity punishable by sentences of life imprisonment.

However, the International Criminal Court Act does not fully resolve the issue of the recruitment and use in hostilities of all children under 18 years by non-governmental forces. The Optional Protocol to the CRC requires Parties to criminalise the recruitment and use in hostilities of all children under 18 years of age by non-governmental forces. The International Criminal Court Act defines war crimes as grave breaches of the Geneva Conventions and other war crimes recognised by the Statute of the ICC, which only criminalises the conscription or recruitment of children under 15 years of age.<sup>243</sup>

States do not have an obligation to criminalise all violations of the rights of children, although an obligation to provide an effective remedy for all violations exist. However, States have the discretion as to whether to treat violations of any right as a crime. Section 4 of the Children Act, which criminalises violation of a series of civil, social, cultural and economic rights, goes beyond Uganda's express obligations under the CRC. It is, however, a positive step in fulfilment of the general obligation of States under Article 4 of the CRC to "undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the present Convention." Nevertheless, criminalisation alone cannot solve social problems, prevent injustice or protects rights; it is only part of a comprehensive protection strategy.

**238** Children Act, Section 109

**239** Domestic Violence Act, Section 2 and 3(1)(b)

**240** Section 7, 10-13, 16

**241** Section 6(5)

**242** Section 4(2) and 6(6)

**243** ICC Act, Article 8.2(b)(xxvii) and 8.2(e)(vii)

## 5.4 Recommendations on legislation concerning crimes against children

1. The Prevention of Trafficking in Persons Act should be amended to criminalise improperly inducing consent to adoption, to bring Ugandan law into compliance with Article 3(1(a)(ii) of the Optional Protocol to the CRC on Sale of Children, Child Prostitution and Child Pornography.
2. The Prevention of Trafficking in Persons Act should be amended to authorise the seizure or confiscation of goods used to facilitate the commission of trafficking in persons and the closure of facilities used in the commission of trafficking, to bring Ugandan law into compliance with Article 7(a)(i) and (c) of the Optional Protocol to the CRC.
3. The Prevention of Trafficking in Persons Act should be amended to provide for an appropriate and longer sentence for sale of children.
4. The Anti-Pornography Act should be amended to criminalise the possession of child pornography, to bring Ugandan law into compliance with Article 3(1(c) of the Optional Protocol to the CRC.
5. The Anti-Pornography Act should be amended to eliminate the possibility of punishing offences concerning child pornography by fines alone, when the offender is an adult, in order to bring Ugandan law into compliance with Article 3(3) of the Optional Protocol to the CRC.
6. Sections 131, 136 and 137 of the Penal Code, regarding procurement and exploitation of prosecution, should be amended to make the exploitation of children an aggravating factor and punishable by sentences consistent with the gravity of the child prostitution, as required by the article 3.3. Optional Protocol to the CRC.<sup>244</sup>
7. Section 8(3) of the Children Act should be amended to specify the sentence for the employment of children in harmful or hazardous work, while Section 8(d) of the Prevention of Trafficking in Persons Act should be amended to make it applicable to all children under the age of 18 years. The Employment Act should be amended to bring the minimum age for employment into harmony with the minimum age recognised by the Children Act and Prevention of Trafficking in Persons Act.
8. The International Criminal Court Act should be amended to criminalise the recruitment and use in hostilities of children under 18 years by non-governmental forces, in order to bring Ugandan law into compliance with Article 4(2) of the Optional Protocol to the CRC on Children and Armed Conflict.

**244** This would seem to require prison sentences at least as long as those for indecent assault.



**06**

**THE RIGHTS AND  
TREATMENT OF CHILD  
VICTIMS OF CRIME**

## 6.1 Provisions of the CRC

The CRC does not specifically recognise the rights of children who are victims of crime, but it does recognise the obligation of the State to “take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts.”<sup>245</sup> Most of these practices are criminal. This obligation thus implies a right on the part of child victims of crimes (in particular crimes of violence) to assistance in recovering from the crime.

Article 12(2), which recognises the right of children to be heard in judicial proceedings that affect them, applies to child victims of crime.<sup>246</sup> Article 20 provides that children “in whose own best interests cannot be allowed to remain in that [family] environment, shall be entitled to special protection and assistance provided by the State.”<sup>247</sup> Such children are victims of neglect, exploitation, or abuse, which may constitute crimes. Article 9 of the CRC recognises the right of children to information about members of their family from whom they have been separated due to death, deprivation of liberty or other State action.<sup>248</sup> In some cases, this applies to children who are the indirect victims of crimes committed by public officials.

Furthermore, Article 38 obliges States to ensure the protection and care of children “affected by an armed conflict”; many of whom will be victims of war crimes.<sup>249</sup> Article 22 recognises the right of child refugees and children seeking refugee status to “appropriate protection and humanitarian assistance.” Refugee status is based on flight from a “well-founded fear of persecution” on certain grounds.<sup>250</sup> Persecution on those grounds is a crime against humanity and those who have experienced such persecution are therefore victims of crime.<sup>251</sup> Child victims of crime have different kinds of rights, including rights concerning: their treatment during criminal proceeding; their protection; recovery from the consequences of the crimes they have experienced; and compensation or other remedies.

Article 8 of the Optional Protocol to the CRC on Sale of Children, Child Prostitution and Child Pornography lists rights that must be respected “in all stages of the criminal justice process” including the right to:

- Procedures adapted to the special needs of child victims, including their special needs as witnesses;
- Be informed about their rights and their role in proceedings, the scope, timing and progress of proceedings and the disposition of their case;
- Have their views, needs and concerns presented and considered;
- Appropriate support services throughout the legal process;
- Privacy and confidentiality of information regarding their identity;
- Protection from intimidation and retaliation;
- The prompt disposition of cases and execution of orders or decrees; and
- Recognition of the primacy of the child’s best interests.

**245** Convention on the Rights of the Child, Article 39

**246** African Charter, Article 4(2)

**247** Article 25(1)

**248** Article 19(3)

**249** Compare Article 22(3)

**250** Convention on the Status of Refugees, Article 1A(2)

**251** Statute of the International Criminal Court, Article 7(1)(h) and 7(2) (g)





The Palermo Protocol on Trafficking in Persons also recognises some of these rights; in particular, the right of victims of trafficking to be informed about relevant judicial and administrative proceedings and to assistance in presenting their views and concerns during criminal proceedings against offenders.<sup>252</sup>

In 2005, the United Nations adopted Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime ('Guidelines on Child Victims' or 'Guidelines').<sup>253</sup> The Guidelines are not a legally binding instrument, but the Committee on the Rights of the Child recommends that Parties to the CRC take them into account in the development of child-friendly procedures.<sup>254</sup> They recognise all the rights provided for under Article 8 of the Optional Protocol and other instruments. The right to be protected from direct contact with accused perpetrators during criminal proceedings is one example.<sup>255</sup> An important feature of this instrument is that it applies to all crimes against children. The Committee on the Rights of the Child emphasises that the justice process must be "child-friendly" for all cases involving violence against children.<sup>256</sup>

Child victims of crime have a right to protection against continued victimisation, especially when the victim and perpetrator have a relationship that facilitates repeated or continuous victimisation, such as domestic violence or institutional exploitation. Protective orders and care orders are used for this purpose. Protection in this sense is covered in Chapter 2.

The term protection also applies to situations where an alien child victim is given permission to remain in a country where she or he has found safety and security. The Palermo Protocol provides for protection in this broader sense, requiring States to "consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases [...giving] consideration to humanitarian and compassionate factors."<sup>257</sup>

Article 39 of the CRC is the key international norm on the right to assistance in recovering from the consequences of violence and exploitation. The Optional Protocol to the CRC on Sale of Children, Child Prostitution and Child Pornography has a provision that echoes Article 39.<sup>258</sup> The Optional Protocol to the CRC on Children and Armed Conflict provides for the treatment of children who have been illegally recruited or used in hostilities. It provides that they shall be demobilised and, when necessary, provided with "all appropriate assistance for their physical and psychological recovery and their social reintegration."<sup>259</sup> The Palermo Protocol provides that Parties "shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking..." In addition to medical and psychological services, the kinds of assistance mentioned include legal assistance, education and training, employment and housing.<sup>260</sup> The article also provides that the special needs of children must be taken into account in areas such as housing, education and care.<sup>261</sup>

**252** Palermo Protocol on Trafficking of Persons, Article 6(20)

**253** UN Economic and Social Council Resolution 2005/30

**254** Indeed, it made such a recommendation in its Concluding Observations on Uganda's first report on implementation of the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography. UN doc. CRC/C/OPSC/CO/1, 2008, para.28.

**255** Optional Protocol, Para. 34(a). See also para.31(b)

**256** General Comment No.13, supra, para.54 (b)

**257** Palermo Protocol, Article 7

**258** CRC Optional Protocol on Sale of Children, Child Prostitution and Child Pornography, Article 9.3

**259** CRC Optional Protocol on Children and Armed Conflict, Article 6.3 (Art.7.1 requires States Parties to the Optional Protocol to cooperate with one another in the rehabilitation and social reintegration of child victims.)

**260** Ibid

**261** Article 6(4)

Neither the CRC nor the Optional Protocols to the CRC expressly recognises the right of child victims to compensation or other remedies for the damages or injuries suffered. The Committee on the Rights of the Child, however considers that the right to a remedy is implicit in the CRC and “where rights are found to have been breached, there should be appropriate reparation, including compensation.”<sup>262</sup> The Palermo Protocol provides that parties shall ensure that their domestic law “offer[s] victims of trafficking [...] the possibility of obtaining compensation for damage suffered.”<sup>263</sup> The Guidelines on Child Victims indicate that “child victims should, wherever possible, receive reparation in order to achieve full redress, reintegration and recovery” and “procedures for obtaining and enforcing reparation should be readily accessible and child-sensitive.”<sup>264</sup> Reparation may take the form of: compensation by the offender ordered as part of criminal proceedings; damages ordered in civil proceedings; mediation or traditional restorative justice measures; and victim compensation programmes or funds.<sup>265</sup>

## 6.2 Ugandan legislation regarding the rights and treatment of child victims

Four kinds of courts have competence over criminal offences in Uganda. Offences punishable by death, such as aggravated defilement, are tried by the High Court. Adults accused of other crimes against children are tried by Magistrates Courts. The Criminal Procedure Act and the Magistrate’s Court Act have few provisions concerning the treatment of child victims or child witnesses during criminal proceedings. Most juveniles accused of criminal offences are tried by Family and Children Courts while Local Council Courts have competence over juveniles charged with certain offences, including some crimes of violence.<sup>266</sup> The procedures in both courts are regulated by the Children Act.<sup>267</sup>

The Children Act does not provide for a comprehensive set of standards on the rights and treatment of child victims of crime, but has some important provisions. The list of the rights of children that was added when the Act was amended in 2016 recognises a broad right to effective legal aid including representation in all civil, criminal and administrative proceedings.<sup>268</sup> Another new subsection states that protection services include the “protection of children at all stages of the justice process, before, during and after trial and holding proceedings *in camera* during trial for child offenders and child victims and witnesses.”<sup>269</sup> This provision also appears to apply to proceedings in any court. An amendment to the Penal Code in 2007 gave courts discretion to order that convicted offenders compensate victims of defilement.<sup>270</sup>

The Prevention of Trafficking in Persons Act 2009 provides for the protection of all victims including children and adults, whether the trafficking is at the international level or not. The Act recognises in Part III the victims’ right: to be informed about their rights and proceedings in a language they understand; to assistance in presenting their views and concerns; to medical care, social services, counselling and psychological assistance; and the right to privacy and confidentiality.<sup>271</sup> It provides that victims “shall be considered” for safe accommodation and material assistance “where necessary and possible” and the protection, assistance and support provided to child victims “shall be provided in accordance with their

**262** General Comment No.5, *supra*, para.24

**263** Palermo Protocol, Article 6(6)

**264** Guidelines on Child Victims, Para.35

**265** Para.36-37

**266** Section 49 of the Local Council Court Act, 2006, amending section 92 of the Children Act. (Local Council Courts are composed of members of the local government, rather than professional judges. See section 4 of the Local Council Court Act)

**267** Section 16 of the Children Act and 50 of the Regulations of Local Council Courts

**268** Children Act, Section 4(1)(k)

**269** Section 42C (3)(b)(xi)

**270** Section 129B

**271** Section 12 (2), (3), (6), (10) and (11) and Section 13.



special needs.”<sup>272</sup> “When a perpetrator is convicted of trafficking, the court shall order him or her to pay restitution for the cost of medical and psychological treatment or physical or occupational therapy received by the victim, the cost of transportation, shelter and child care received, as well as the costs of reintegration into society.”<sup>273</sup> In addition, the court may order the perpetrator to compensate the victim for physical injury, emotional distress, pain and suffering and loss or damage suffered.<sup>274</sup>

When the victim is a foreigner, the Act provides that the Minister of Internal Affairs “may facilitate” the extension of residence and work permits and maintenance, if repatriation is likely to compromise the safety of the victim or the presence of the victim is necessary for court proceedings.<sup>275</sup> The Minister may also facilitate the repatriation of victims in other countries who are Ugandan citizens or permanent residents, or negotiate for the regularisation of their stay abroad, if repatriation would compromise their safety.<sup>276</sup>

The Prohibition of Female Genital Mutilation Act of 2010 does not contain any provisions on the protection or treatment of victims but gives the courts discretion to order a convicted perpetrator to compensate the victim.<sup>277</sup>

The International Criminal Court Act, which criminalises war crimes and crimes against humanity, does not provide for the protection, treatment or compensation of victims, whether children or adults. In contrast, the Prevention and Prohibition of Torture Act 2012 recognises the right of victims to reimbursement of expenses related to the crime, compensation for physical and mental harm, loss of earnings and rehabilitation.<sup>278</sup> This Act also provides in general terms that the State has responsibility to protect victims of torture against ill treatment and intimidation.<sup>279</sup> No provisions of the Act call for special treatment of child victims.

The Refugee Act has a section on the rights of refugee children.<sup>280</sup> It also has a subsection indicating that the family situation of unaccompanied children who wish to remain in Uganda as refugees shall be investigated, but does not provide for the treatment of children during such investigation nor during the process of refugee status determination.<sup>281</sup>

- 272** Prevention of Trafficking in Persons Act, Section 12 (7) and (9)
- 273** Section 15
- 274** Section 16 (Victims also have the right to file a civil case for damages, without payment of filing fees.)
- 275** Section 14 (3)
- 276** Prevention of Trafficking in Persons Act, Section 14 (2) and (4)
- 277** Prohibition of Female Genital Mutilation Act, Section 13
- 278** Prevention and Prohibition of Torture Act, Section 6
- 279** Section 21
- 280** Refugee Act, Section 32
- 281** Section 27(5)

## 6.3 The compatibility of Ugandan legislation on child victims of crime with the CRC

The Children Act recognises one of the basic principles that applies to all justice processes concerning children: that time is of the essence and delay is likely to be prejudicial to the child.<sup>282</sup> The provisions of the Children (Amendment) Act on the right to legal aid and representation in criminal (and other) proceedings as well as the right of child victims to protection in all stages of the justice process also recognise fundamental rights.

The Children Act recognises only one specific component of the right of victims to special treatment during proceedings and that is the right to a trial closed to the public. This is in contrast to the Prevention of Trafficking in Persons Act, which in Part III recognises an array of victims' rights as earlier outlined. These are some, but not all, of the rights recognised by the Palermo Protocol and by the Optional Protocol to the CRC on Sale of Children, Child Prostitution and Child Pornography.<sup>283</sup> In particular, it fails to recognise the right to procedures adapted to the special needs of child victims, such as being accompanied by support persons during hearings and trials, the use of testimonial aids and measures that allow children to testify without direct contact with the accused.<sup>284</sup>

The provisions of the Prevention and Prohibition of Torture Act on the right of victims to reimbursement of costs of rehabilitation and compensation by perpetrators of torture satisfy and indeed exceed the obligations recognised by Article 14 of the Convention against Torture. International law does not expressly recognise the right of victims of war crimes and crimes against humanity to compensation or reparations although, if the material offence is torture, the victim has rights under the Convention against Torture. This is an aberration and it would seem logical to infer that the victims of war crimes and crimes against humanity should have the same rights, regardless of whether they have been victims of torture or some other form of violence.

The provisions of the Prevention of Trafficking in Persons Act concerning the payment by convicted perpetrators of restitution, the costs of reintegration and compensation for injuries and losses surpass the obligations of Uganda under Article 6 of the Palermo Protocol. Section 14(3) of Prevention of Trafficking in Persons Act, concerning the conditions in which alien victims of trafficking may be allowed to remain in Uganda, is largely in harmony with its obligations under the Palermo Protocol. There is however, no requirement that the principles of family unity and the best interests of the child be taken into account, when the victim of trafficking is a child.

The lack of any specific provisions in the Refugees Act concerning the right of unaccompanied children seeking or holding refugee status to special treatment that takes into account their age, sex, needs and experiences, in administrative proceedings under the Act, is not compliant with the right to "appropriate protection" under Article 22 of the CRC. However, the Refugee Act does provide that every refugee child has all the rights recognised by the Children Act that, as indicated above, recognises some key rights of children involved in legal proceedings.

**282** Children Act, Section 3

**283** The right to be informed about their rights and the proceedings and to assistance in presenting their views and concerns.

**284** UN Guidelines on Justice involving Child Victims, paras. 23, 30(a), 30(d) and 31(a)-(b)



## 6.4 Recommendations on legislation regarding the treatment of child victims

1. The Children Act should be amended to make the measures for protection of victims required by Part III of the Prevention of Trafficking in Persons Act applicable to all crimes of violence against children.
2. The Children Act and the Prevention of Trafficking in Persons Act should be amended to recognise the right of all child victims of violent crime to be heard through procedures designed to meet their special needs as witnesses, for example: support persons, testimonial aids and measures that allow children to testify without direct contact with the accused.
3. The Children Act should be amended to recognise that all child victims of violent crime and their families where appropriate, have rights to restitution, the cost of reintegration and compensation for injuries and losses similar to those recognised by the Prevention of Trafficking in Persons Act.
4. The International Criminal Court Act should be amended to recognise that victims have the same rights to reimbursement, costs rehabilitation and compensation as recognised under provisions of the Prevention and Prohibition of Torture Act.
5. Section 14 of the Trafficking in Persons Act, on repatriation of foreign victims, should be amended to specify the procedures to be followed when the foreign victim is a child, in order to balance the obligation to restore the child's identity with the obligation to prevent future victimisation. This procedure may include investigating the family situation of the child, when possible, to determine the family's complicity or responsibility in trafficking of the child, and assessing the risks of returning the victim to his or her family in their country of nationality or residence, and to identify any humanitarian considerations that favour allowing the child's family or some members of his family to join the victim in Uganda. The Act should also be amended to provide that, in appropriate circumstances, the Ministry's discretion to facilitate the grant of residence and work permits extends to the family of a child victim of trafficking.
6. The Refugees Act should be amended to recognise special procedures and measures needed to enable unaccompanied children to be heard and have their views, needs and experiences taken fully into account in administrative proceedings under the Act.<sup>285</sup>



**THE RIGHT TO HEALTH**



## 7.1 Provisions of the CRC and other international instruments

Article 24 of the CRC recognises “the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health.”<sup>286</sup> It further recognises six corresponding obligations of the State namely:

- a. To diminish infant and child mortality;<sup>287</sup>
- b. To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;<sup>288</sup>
- c. To combat disease and malnutrition, including within the framework of primary health care through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution;<sup>289</sup>
- d. To ensure appropriate pre-natal and post-natal healthcare for mothers;<sup>290</sup>
- e. To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents;<sup>291</sup> and
- f. To develop preventive healthcare, guidance for parents and family planning education and services.<sup>292</sup>

States have the obligation to combat harmful traditional practices, as already expounded on in Chapter 5.

Article 25 of the CRC further indicates that children placed in healthcare facilities have a right to periodic review of the treatment provided, while Article 39 recognises the right of child victims of violence to assistance in physical and psychological recovery.<sup>293</sup> Practices harmful to health – such as employment in dangerous or unhealthy conditions, drug use, sexual exploitation, torture or ill treatment and violence – are also prohibited under the CRC.<sup>294</sup> Article 23, on the rights of children with disabilities (as will be covered in Chapter 9) also has provisions on healthcare.

The Committee on the Rights of the Child has adopted three General Comments concerning children’s right to health and health care: General Comment 3 on HIV/AIDS and the rights of the child; General Comment 4 on Adolescent health and development in the context of the CRC; and General Comment 15 on the right of the child to the enjoyment of the highest attainable standard of health.<sup>295</sup> They make observations that have implications for law reform.

**286** Convention on the Rights of the Child, Article 24(1); see also Article 14(1) of the African Charter

**287** African Charter, Article 14(2)(a)

**288** Article 14(2)(b)

**289** Compare Article 14(2)(c)-(d) of the African Charter

**290** Compare Article 14(2)(e) of the African Charter

**291** Compare Article 14(2)(h) of the African Charter

**292** African Charter, Article 14(2)(f)

**293** This obligation also is recognised by Art.9.3 of the Optional Protocol on Sale of Children, Child Prostitution and Child Pornography and Art.6.7 of the Optional Protocol on Children in Armed Conflict.

**294** Arts.32-34, 37(a) and 19, respectively

**295** CRC/C/GC/3, 2003; CRC/C/GC/4, 2003 and CRC/C/GC/15, 2013

General Comment 15 suggests that Article 24 of the CRC should be interpreted in light of the World Health Organisation's (WHO) list of essential interventions for maternal, newborn and child health.<sup>296</sup> This includes immunisation for polio, hepatitis B, measles-mumps-rubella, influenza, rotavirus, yellow fever, typhoid, cholera, meningococcal, diphtheria-pertussis-tetanus and HPV, as well as periodic medical exams, malaria prevention and treatment, treatment for pneumonia, diarrhoea, meningitis and other serious childhood diseases and any necessary nutritional supplements.<sup>297</sup> Services to which pregnant women should be entitled include: physical examinations, prevention and if necessary treatment of malaria and STDs, tetanus vaccination, and any necessary nutritional supplements (e.g. iron, calcium and folic acid).<sup>298</sup>

General Comment 15 further observes that "Children's right to health contains a set of freedoms and entitlements" and "core obligations, under a child's right to health, include: reviewing the national [...] legal and policy environment and, where necessary, amending laws and policies."<sup>299</sup> The General Comment further elaborates:

"National laws should place a statutory obligation on the State to provide the services, programmes, human resources and infrastructure needed to realize children's right to health and provide a statutory entitlement to essential, child sensitive, quality health and related services for pregnant women and children irrespective of their ability to pay [...] Legislation should fulfil a number of additional functions in the realization of children's right to health by defining the scope of the right and recognising children as rights-holders; clarifying the roles and responsibilities of all duty bearers; clarifying what services children, pregnant women and mothers are entitled to claim..."<sup>300</sup>

International Guidelines on HIV/AIDS and Human Rights were adopted in 1996 and amended in 2002 through international consultations organised by the United Nations.<sup>301</sup> The Guidelines do not expressly indicate that HIV testing must be voluntary, but the UN publication commenting on them indicates that "public health legislation should ensure that HIV testing of individuals should only be performed with the specific informed consent of that individual. Exceptions to voluntary testing would need specific judicial authorisation..."<sup>302</sup> In addition, the Guidelines do not specify when the interests of third parties may override the confidentiality of information about HIV status, but the commentary indicates that "public health legislation should ensure that information relative to the HIV status of an individual be protected from unauthorized [...] disclosure [...] and that the use of HIV-related information requires informed consent."<sup>303</sup>

Similarly, the Committee on the Rights of the Child has indicated that "states parties must refrain from imposing mandatory HIV/AIDS testing of children in all circumstances and ensure protection against it."<sup>304</sup> It has also indicated that information on the HIV status of a child may not be disclosed to third parties, including parents, without the child's consent.<sup>305</sup>

**296** General comment 15 para.37, citing *Essential Interventions, Commodities and Guidelines for Reproductive, Maternal, Newborn and Child Health*, WHO and Agha Khan Foundation, 2011.

**297** *Essential Interventions: Child Health*, WHO and Agha Khan Foundation, 2011 and *Summary of WHO Position Papers - Recommended Routine Immunizations for Children*.

**298** *Essential Interventions*, supra.

**299** General Comment 15, Para.24 and 73; see also paras.27-28, 92, 97

**300** Ibid, paras. 94-95

**301** *International Guidelines on HIV/AIDS and Human Rights, 2006 Consolidated Version*, UNAIDS, 2006

**302** *International Guidelines on HIV/AIDS and Human Rights, 2006 Consolidated Version*, UNAIDS, 2006 para.20(b)

**303** Ibid, para. 20(f) Indeed, the commentary indicates that even sexual partners of a person who is HIV positive should be informed of the HIV-positive partner's status only if his or her health care provider decides that this is appropriate, in the circumstances. para.20(g)

**304** Para.23 (Parents or guardians may, of course, consent on behalf of children too immature to consent.)

**305** Committee on the Rights of the Child, Para.24





## 7.2 Ugandan legislation on the right to health

National Objectives and Directive Principles of State Policy XX, XX1 and XX11 on General Social and Economic Objectives recognise the right of all Ugandans to health services, as well as to clean and safe water and food security. Article 34(3) on Rights of Children, provides that “no child shall be deprived by any person of medical treatment [...] by reason of religious or other beliefs.”<sup>306</sup>

The statutory framework for healthcare includes the Public Health Act 1935 and Mental Treatment Act 1938. The only reference to children in the Public Health Act authorises (but does not require) the Minister of Health to adopt rules for clinics or institutions for the care of children or pregnant or lactating women.<sup>307</sup> The Mental Treatment Act has no provisions specifically on the mental health of children.

The Children Act states that the duty of parents to the maintenance of their children gives latter a right to immunisation and medical attention, but does not recognise a right of access to healthcare services or the obligation of the State to provide them.<sup>308</sup> The Immunization Act 2017 requires parents to ensure that every child between the age of 1 and 5 years gets immunised against illnesses listed in Schedule 2 of the Act.<sup>309</sup> These include several, but not all the vaccinations listed in the WHO list of essential interventions for maternal, newborn and child health.<sup>310</sup> Parents also must ensure that children of 10 to 12 years of age are vaccinated against Human Papilloma Virus and girls 15 to 17 years of age are vaccinated against tetanus.<sup>311</sup> The State is obliged to provide all Ugandans with vaccines and related services free of charge.<sup>312</sup> Failure of parents to comply with their obligations under the Act is punishable by a fine or imprisonment for up to 6 months.<sup>313</sup>

Another important statute concerning health is the HIV and AIDS Prevention and Control Act adopted in 2014. The Act requires pre-test counselling to be provided to persons who wish to be tested for HIV, as well as counselling for persons who test positive.<sup>314</sup> Children under the age of 12 years are incapable of giving consent, but a parent or guardian may consent on their behalf.<sup>315</sup> Anonymous testing is also provided for.<sup>316</sup>

Consent may be dispensed with if “it is unreasonably withheld,” or when testing is ordered by a court, or if the person to be tested is apprehended for a sexual offence.<sup>317</sup> The Act does not specify possible grounds for concluding that consent is being withheld unreasonably, or for ordering an HIV test. It is provided that pregnant women and their partners, as well as victims of sexual offences, are tested “routinely,” and testing is required for children born to HIV-positive mothers.<sup>318</sup>

**306** National Objectives and Directive Principles of State Policy, Article 34(3)

**307** Public Health Act, Section 117

**308** Children Act, Section 5(1) (b) and (f) (See below for an exception concerning children with disabilities.)

**309** Immunization Act, Sections 3

**310** Polio, hepatitis B, measles, influenza, meningococcal and pertussis, but not mumps-rubella, rotavirus, yellow fever, typhoid, cholera and diphtheria. See Essential Interventions, Commodities and Guidelines for Reproductive, Maternal, Newborn and Child Health, WHO and Agha Khan Foundation, 2011.

**311** Sections 4-5

**312** Sections 7 (see also section 8)

**313** Sections 9(1)

**314** HIV and AIDS Prevention and Control Act, Sections 5-7

**315** Section 10

**316** Section 31

**317** Sections 11(a), 12 and 14

**318** Sections 13 and 16(1) (Routine testing means that, although informed consent is not required, testing is not mandatory and persons who object are exempt.)

The identity of persons tested and test results are confidential as a rule.<sup>319</sup> Exceptions are recognised for persons exposed to the blood or bodily fluids of a person tested, including sexual partners or any other person in contact with the tested person, if a qualified official considers that the nature of the contact poses a clear and present danger of HIV transmission, and any other person whom a court authorises to be notified.<sup>320</sup> It is a requirement that children under 12 years who test positive are notified by a parent or guardian after the child receives counselling.<sup>321</sup>

Pregnant women who are HIV positive and children born to them have a right to treatment, care and medication.<sup>322</sup> More generally, the Act recognises government's obligation to "provide universal HIV treatment to all persons on a non-discriminatory basis [...] to provide care and support to persons living with HIV and AIDS as appropriate" and "to give priority to most-at-risk population."<sup>323</sup> The Act prohibits discrimination in the workplace on grounds of HIV status; discrimination in access to healthcare services on the grounds of actual, perceived or suspected HIV status; and discrimination against children by parents, guardians or custodians on similar grounds.<sup>324</sup>

A Mental Health Bill was published in 2014, but has not yet been enacted. Clause 5 of the Bill indicates that, in principle, treatment of mental illness at a primary health centre requires the consent of the patient.<sup>325</sup> Exceptions are made for mentally ill persons released from prison or from a mental health facility on condition that they continue to receive treatment and emergency admission.<sup>326</sup>

The Bill does not provide specifically for the admission of mentally ill children.<sup>327</sup> Three procedures for admission are defined: Voluntary, emergency and involuntary. Emergency admission is defined broadly to include not only admission due to behaviour that represents a risk of serious self-harm or harm to a third person, but also damage to property or serious damage to the reputation of the mentally ill person or someone related to him or her.<sup>328</sup> Involuntary admission could be authorised at the request of a relative or concerned person when the conditions required for emergency admission do not exist and it is not possible to obtain an examination by a qualified health care practitioner before admission.<sup>329</sup> The Bill indicates that it should be a last resort "when it is the only means by which the person may be provided with care, treatment and rehabilitation that will benefit him or her."<sup>330</sup> Admission would be valid for 6 months, which could be extended for a second period of six months.<sup>331</sup>

The Food and Nutrition Bill 2009 states that "every person has a right to food and to be free from hunger and under nutrition;"<sup>332</sup> and that "the right to food shall be enjoyed without discrimination." It proposes an obligation on the State to provide food to persons suffering or at risk of suffering hunger or malnutrition.<sup>333</sup> The Bill requires the Ministry of Health to "establish measures to ensure that the special nutrition needs of pregnant and nursing women are met and assist mothers to provide adequate care for their infants; promote and protect the right of infants to breast milk and to appropriate weaning foods after six months of age and adopt appropriate measures to ensure the enjoyment of the right to food for children of five years or less; adopt provide for food and nutrition needs of orphaned and vulnerable children."<sup>334</sup>

**319** HIV & AIDS Prevention & Control Act (2014), Sections 8(2), 18(1) and 19

**320** Section 18(2)(c), (g) and (h)

**321** Section 18(3) and (4)

**322** Section 15(1) and (3) and 16(2)

**323** Section 24(1)(b), (i) and (k)

**324** HIV and AIDS Prevention and Control Act, Sections 32, 38, 37 and 39, respectively

**325** Mental Health Bill, Clause 5(1); see also clause 9(2)

**326** Clauses 5(3)-(6) and 7

**327** Indeed, the only provisions that specifically mention children concern child detainees and prisoners.

**328** Clause 7(1) (b) (ii)-(iv) Emergency admission is limited to 5 days. Clause 9(6)-(9)

**329** Clause 9(1)(a) and (2)-(6)

**330** Clause 9(8)

**331** Clause 9(9)

**332** Food and Nutrition Bill, Clause 5(1)

**333** Clause 5(2) and (4)

**334** Food and Nutrition Bill, Clause 34(1)(a)-(c)



## 7.3 The compatibility of Ugandan law with the CRC and other international standards

Article 16 of the Constitution of Uganda, which recognises the right to health services, falls short of Uganda's obligation under the CRC because it applies only to citizens.<sup>335</sup> Furthermore, it recognises the right of Ugandans to health services in general terms. Article 34(3) on denial of medical treatment also falls short of Uganda's obligations under the CRC, because it prohibits denial on one specific ground only.

The Immunisation Act 2017 brings Ugandan legislation into greater compliance with its obligations under Article 24 of the CRC. Uganda's obligations under the CRC however apply to all children in Uganda, regardless of citizenship. Furthermore, the compulsory vaccinations do not include all those that WHO considers essential for children.<sup>336</sup>

With the exception of the Immunization Act and the HIV and AIDS Prevention and Control Act, the legislation of Uganda is largely silent on children's right to health. Indeed, there is little legislation on the right to healthcare for children or adults. In 2015, the Committee on Economic, Social and Cultural Rights recommended that Uganda "include the right to health in its Bill of Rights and in relevant laws, as necessary."<sup>337</sup>

While many provisions of the HIV/AIDS Prevention and Control Act are in harmony with international human rights standards, the provisions concerning mandatory HIV testing of perpetrators of sexual offences, the routine testing of pregnant women and their partners and victims of sexual offences, and the testing of persons who unreasonably withhold consent, are not in harmony with International Guidelines on HIV/AIDS and Human Rights, as interpreted by UNAIDS. The vague, general subsection authorising courts to disclose HIV status is not compatible with the relevant international standards. In addition, some provisions of the Act are not compatible with the Committee on the Rights of the Child's strict interpretation of the principles that testing should be voluntary and HIV status should be confidential.<sup>338</sup>

The Mental Health Bill, though not yet law, is in greater harmony with international standards on human rights than the Mental Treatment Act of 1938. Some provisions nevertheless are not fully compliant with international standards;<sup>339</sup> for instance, the provision that would authorise the emergency admission of persons whose behaviour creates a risk of damage to property or reputation. Prevention of damage to reputation or to property does not seem to be a sufficient reason to deprive any person (child or adult, healthy or ill) of liberty. The Human Rights Committee recently stated that "the existence of a disability shall not in itself justify a deprivation of liberty but rather any deprivation of liberty must be necessary and proportionate, for the purpose of protecting the individual in question from serious harm or preventing injury to others."<sup>340</sup>

The Bill also indicates that when the police believe that a person arrested may suffer from mental illness, he or she shall be taken to a health unit for assessment within 24 hours.<sup>341</sup> This does not provide sufficient protection against the risk of psychological harm and self-injury, especially where children are concerned.

**335** Most obligations of states under international human rights law apply to all persons within their territory or under their jurisdiction, regardless of their nationality. See e.g. Art. 2.1 of the CRC and Arts. 3.3 and 12 of the International Covenant on Economic, Social and Cultural Rights.

**336** It covers polio, tuberculosis, hepatitis B, measles, influenza, meningococcal and pertussis, but not rotavirus, yellow fever, typhoid, cholera or diphtheria.

**337** E/C.12/UGA/CO/1, 2015, para.32

**338** In particular, sections 16(1) and 18(2)

**339** In 2016, the Committee on the Rights of Persons with Disabilities urged Uganda to 'Review and revise the Mental Health Act to ensure compliance with the Convention' on the Rights of Persons with Disabilities. CRPD/C/UGA/CO/1

**340** General Comment 35, Article 9 (Liberty and Security of Person), UN doc. CCPR/C/GC/35, para.19.

**341** Mental Health Bill, Clause 10.2

## 7.4 Recommendations on legislation on the right to health

1. Legislation should be enacted that specifies the healthcare services provided for in the Constitution of Uganda in addition to immunisation (to which all children and expectant mothers are entitled), in a language that does not discriminate on ground of nationality.<sup>342</sup> Services for children should include periodic medical exams, malaria prevention and treatment, treatment for pneumonia, diarrhoea, meningitis and nutritional supplements and expectant mothers should be entitled include physical examinations, prevention and treatment of malaria and STDs, tetanus vaccination and nutritional supplements (e.g. iron, calcium and folic acid).<sup>343</sup>
2. Legislation should be adopted to prohibit discrimination against expectant mothers.
3. The HIV and AIDS Prevention and Control Act, which recognises the government's obligation to provide universal HIV treatment to all persons on a non-discriminatory basis and prohibits discrimination against children on grounds of HIV status by parents, guardians or custodians,<sup>344</sup> should be amended to prohibit discrimination against HIV-positive children in other areas, especially education.
4. Legislation should require that all health-related decisions concerning children be based on the best interests of the child concerned, as a step towards the development of procedures and criteria for assessing the best interests of the child by health workers.<sup>345</sup>
5. Section 12 of the HIV/AIDS Prevention and Control Act concerning mandatory testing should be amended to define the grounds on which to conclude that consent is being withheld unreasonably and for a court to order testing. Section 18 on disclosure of HIV status should be amended in order to bring the Act into greater harmony with the recommendations of the Committee on the Rights of the Child.
6. The Immunization Act should be amended to cover all children in Uganda, regardless of nationality, to bring it into harmony with section 4(1) (j) of the Children Act.
7. The Mental Health Bill should be reviewed to eliminate risk to reputation as a ground for emergency admission to mental health units and to eliminate risk of danger to property as a ground (or at least to restrict it to a grave and imminent risk of extensive danger to property).<sup>346</sup>
8. The Mental Health Bill should be reviewed to specify the procedure for admission of children to residential care and to require periodic review of the care provided to the child and other relevant circumstances. Procedures for the voluntary admission of children should comply with the principles concerning consent referred to in recommendation 4, and the appointment of a special guardian for purposes of decisions regarding mentally ill children should be required when there is reason to believe that the decisions of a parent may not be based on the best interests of a child.

**342** In addition to the treatment for HIV.

**343** Essential Interventions: Child Health, WHO and Agha Khan Foundation, 2011 and Summary of WHO Position Papers - Recommended Routine Immunizations for Children

**344** HIV and AIDS Prevention and Control Act, Sections 32, 38, 37 and 39, respectively

**345** See Committee on the Rights of the Child, General Comment 15, para.12 and 14

**346** Recommendations concerning this Bill concern only provisions that seem particularly relevant to children.



Other proposals of the Bill should be adjusted to the special needs and circumstances of children including:

- Clauses 10(2) and 49(1) to indicate that an arrested child suspected of having mental illness should be taken to a healthcare centre for examination immediately, if possible;
- Clause 11 on electroconvulsive therapy to include a paragraph on mentally ill children and to specify that this treatment may be used only as a last resort and in compliance with principles regarding the consent of children;
- Clauses 12 and 13 to include provisions specifying that seclusion and bodily restraint may be imposed on child patients only as a last resort, for the shortest necessary period and with prompt notification of a parent or guardian of the child patient;<sup>347</sup>
- A provision indicating that parents or guardians may not consent on behalf of a child to participation in medical experiments;<sup>348</sup>
- Clause 43 to include a provision concerning the reintegration of children into their families;
- Clause 44 to include a provision concerning the right of children with mental illness to express views and wishes on matters affecting them and the duty of competent authorities to give due weight to their views and wishes.<sup>349</sup>

**347** World Health Organisation's *Mental Health Care Law: Ten Basic Principles*, recommends that the need for physical restraint should be reassessed every 30 minutes. Principle 4.3(e)

**348** Mental Health Bill, Clause 31(2)(b)

**349** Other clauses in Part IV also might benefit from modifications that take into account the special circumstances of children with mental illness.



**THE RIGHT TO EDUCATION**



## 8.1 Provisions of the CRC

Article 28 of the CRC recognises the right of the child to education.<sup>350</sup> The main obligations of States are:

- To make primary education compulsory and available free to all;<sup>351</sup>
- To make secondary education (including general and vocational education) available and accessible to every child, by the introduction of free education or the provision of financial assistance to needy students;<sup>352</sup> and
- To take measures to encourage regular school attendance to reduce school leaving.<sup>353</sup>

Other obligations recognised by Article 28 include making educational and vocational information and guidance available and accessible to all children; making higher education accessible to all on the basis of capacity by every appropriate means; and ensuring that school discipline is administered in a manner consistent with the child's rights and dignity.<sup>354</sup> The CRC provides that the right to education shall be implemented "on the basis of equal opportunity." Similarly, the African Charter recognises an obligation to "take special measures in respect of female, gifted and disadvantaged children, to ensure equal access to education for all sections of the community."<sup>355</sup> The Charter also has an important provision indicating that "children who become pregnant before completing their education shall have an opportunity to continue with their education on the basis of their individual ability."<sup>356</sup>

Article 29 of the CRC defines the aims of education as:

- a. To develop the child's personality, talents and mental and physical abilities to their fullest potential;<sup>357</sup>
- b. To develop respect for human rights and fundamental freedoms;<sup>358</sup>
- c. To develop respect for the child's parents, cultural identity, language and values, as well as respect for the national values of the country where the student lives, his or her country of origin and other civilizations;<sup>359</sup> and
- d. To prepare the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin.<sup>360</sup>

Similarly, Articles 19, 24 and 32 of the CRC and Article 9 of the Optional Protocol on Sale of Children, Child Prostitution and Child Pornography indicate that children's education should make them aware of the risks of violence, drug use and exploitation and how to protect their health and safety.<sup>361</sup> The African Charter provides that education should promote respect for the environment and natural resources.<sup>362</sup>

The right to education also is recognised by Article 23 of the CRC, on children with disabilities. The rights of children with disabilities are covered in Chapter 9.

**350** African Charter, Article 11.1

**351** Convention on the Rights of the Child, Article 28.1(a); see also Art.11.3(a) of the African Charter

**352** Article 28.1(b); compare Art.11.3(b) of the African Charter

**353** Article 28.1(e); see also Art.11.3(d) of the African Charter

**354** Article 28.1(c)-(d) and 2; Art.11.5 of the African Charter, on discipline.

**355** Article 28. and Art.11.3(e), respectively

**356** African Charter, Article 11.6

**357** Article 11.2(a)

**358** Article 11.2(b)

**359** Compare Article 11.2(c) and (e) of the African Charter, which indicate that education should promote 'positive African morals, traditional values and cultures' and 'national independence and territorial integrity.

**360** See also Article 11.2(d) of the African Charter

**361** Compare Article 11.2(h) and 16.1 of the African Charter

**362** African Charter, Article 11.2(g)

The right to establish private schools is recognised by Article 29.2 of the CRC. The Government has an obligation to regulate and supervise all independent schools (and other institutions) that provide services to children in order to ensure that the rights of children are respected.<sup>363</sup>

## 8.2 Ugandan legislation on the right to education

Article 30 of the Constitution recognises in general terms the right of all persons to education. Article 34, further stipulates that “a child is entitled to basic education which shall be the responsibility of the State and the parents of the child.”

The most relevant legislation is The Education (Pre-primary, Primary and Post-Primary) Act of 2008, which provides that “basic education shall be provided and enjoyed as a right by all persons” and that “provision of education and training to the child shall be a joint responsibility of the State, the parent or guardian and other stakeholders.”<sup>364</sup> The Act recognises four categories of educational institutions: Public (i.e. Government-funded); private; and Government grant-aided, in addition to non-formal education centres designed to meet the demands and lifestyles of indigenous communities.<sup>365</sup> The ‘basic’ education to which all are entitled includes primary and non-formal education.

The law bestows on parents the responsibility to register children of school-going age at a school and to provide transportation.<sup>366</sup> It makes primary education, which begins at the age of 6 years, compulsory for a cycle of seven years;<sup>367</sup> with secondary education a cycle of four years for “Ordinary” and two years for “Advanced” levels;<sup>368</sup> while providing for both primary and secondary education to be provided free of charge.<sup>369</sup>

The Education Act recognises the responsibility of the Government to set the aims of education, but the Act itself does not do so. It also recognises the responsibility of the Government to ensure that private schools “conform to the rules and regulations governing the provision of educational services.” All teachers must be registered and only persons having completed a recognised training course may be registered.<sup>370</sup> Furthermore, it provides that teachers convicted of a crime of moral turpitude or found guilty of conduct prejudicial to the physical, mental or moral welfare of any pupil (for example a primary school student) may be deprived of their licence to teach, after a hearing.<sup>371</sup> The Children Act also criminalises the use of corporal punishment in schools, as indicated in Chapter 5.

The Act calls for the establishment of a Directorate responsible for setting standards regarding educational practice and monitoring compliance with them.<sup>372</sup> District and Municipal Councils are required to have Standing Committees on Education responsible for developing three-year plans for the provision of educational services.<sup>373</sup> Student councils are also to be established in secondary schools.<sup>374</sup>

- 363** Article 3.3
- 364** Education Act, Section 4(1)-(2)
- 365** Sections 2, 5(6)
- 366** Section 5(2)(a)(and (c)
- 367** Section 10(3)
- 368** Section 10(4)(a)
- 369** Section 9 (Parents must pay for books, uniforms and meals.)
- 370** Sections 12-13
- 371** Sections 20; see also sections 22-23
- 372** Section 46-48
- 373** Sections 26-27
- 374** Section 30





The law prohibits private schools applying discriminatory admissions policies.<sup>375</sup> Refusal to enrol a child in a primary school, deterring a child from enrolling or charging unauthorized fees is a criminal offence.<sup>376</sup>

The Business, Technical, Vocational Education and Training (BTJET) Act 2008 aims to establish a system to provide knowledge and skills that enhance the individual's capacity to find employment or earn a living through self-employment.<sup>377</sup> The Act also specifically aims to increase equitable access to such training for disadvantaged groups such as women and people with disabilities and out-of-school children.<sup>378</sup> The Universities and other Tertiary Institutions Act 2001 is relevant in as far as the many children who complete secondary education before reaching the age of 18 years are concerned. However, the Act has few provisions directly related to the obligations recognised by the CRC even though it states that public universities aim to provide access to higher education for all persons, without discrimination based on race, colour, political opinion, religion or sex.<sup>379</sup>

## 8.3 The compatibility of Ugandan law with the CRC

Several provisions of the Education Act 2008 are in harmony with Uganda's obligations under the CRC, including those that provide that:

- Primary education is mandatory;
- Primary and secondary education are free of charge;
- Teachers must be qualified and registered;
- Teachers may be dismissed for conduct prejudicial to students or pupils;
- The right to establish private schools is recognised, provided that they comply with national regulations and standards and do not discriminate;
- Secondary schools have student council, which is a step towards recognising the right of children to be heard.

The provisions of the BTJET Act on equitable access for disadvantaged groups such as women, persons with disabilities and out-of-school children, and the provisions of the Universities and Tertiary Institutions Act on non-discrimination, are also in harmony with Uganda's obligations under the CRC and other human rights treaties.

Some rights, principles and obligations recognised by the CRC and African Charter are not recognised by the legislation mentioned above. Even though primary education is compulsory and the legislation has some provisions about out-of-school children, it does not provide specifically for the prevention of school-leaving.<sup>380</sup> Other gaps in the legislation are with regard to the provision of information and guidance on education and vocational training, making higher education available to all having the capacity to benefit from it, and the education of gifted children. Legislation is not the only way of addressing issues such as these and may not be the most effective way to do so. It can, however, be a useful part of a comprehensive approach.

**375** Education Act, Section 31.3(f)

**376** Section 51

**377** BTJET Act, Section 3(a) and (e)

**378** Sections 4(h) and 6 (concerning community polytechnics)

**379** Section 24(2)(b); see also section 28(2)-(3)

**380** Section 10(3) (c) of the Education Act concerns the education of school-leavers.

## 8.4 Recommendations concerning legislation of the right to education

1. The Education Act should be amended to add a requirement for schools to accommodate pregnant students and support them in completing primary and or secondary education to bring the Act in line with Article 11(6) of the African Charter.
2. Secondary education should be recognised as a right in accordance with Uganda’s commitment to “progressively” guarantee the right to education when it ratified the CRC. Recognising secondary education as a right would encourage adolescents to continue their education and promote social and economic development.
3. The Education Act should be amended to require schools to adopt measures to reduce school leaving, for instance by the identification of children at risk of abandoning school and the factors that contribute to that risk, in order to take measures to assist the child and his or her family overcome such factors.
4. The Education Act should be amended to require schools to adopt measures to help children and their families to make informed decisions about the amount and kind of education and training they should seek to obtain (for instance by the identification of the officials who should be given this responsibility, the methods that can be used and the persons to whom information and guidance should be made available).<sup>381</sup>
5. The Education act should be amended to include a section on gifted children as a step towards developing a policy and programmes or activities for them. Section 57, which authorises the Minister to adopt regulations on “gender aspects and special needs education,” might be an appropriate place to address this issue.

**381** This refers to post-primary education, which is not compulsory.



# THE RIGHTS OF CHILDREN WITH DISABILITIES

## 9.1 Provisions of the CRC and the Convention on the Rights of Persons with Disabilities

The CRC indicates that children with physical or mental disabilities “should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child’s active participation in the community.”<sup>382</sup> Consequently, they have the right to special care and States have an obligation to provide such children and their parents or caretakers with assistance designed to ensure effective access to education, training, health care, rehabilitation services and recreation opportunities, with a view to achieving the fullest possible social integration and personal development.<sup>383</sup> The CRC requires that assistance shall be provided free of charge when possible and appropriate.<sup>384</sup>

Uganda is also a party to the Convention on the Rights of Persons with Disabilities (CRPD), which recognises some rights and obligations complementary to those recognised by the CRC. In so far as education is concerned, the CRPD provides that children with disabilities should not be excluded from free and compulsory primary education, or from secondary education, by reason of their disability and should have access to “inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live.”<sup>385</sup> They should also have access to vocational training, without discrimination.<sup>386</sup> To this end, they should be provided with support and “reasonable accommodation,” which means modifications and adjustments designed to ensure access to education on an equal basis with other children, which do not impose a disproportionate or undue burden.<sup>387</sup>

Regarding healthcare, the CRPD recognises the importance of early diagnosis and treatment, decentralisation of services needed by persons with disabilities, and access to the devices and technologies that allow persons with disabilities to participate fully in “all aspects of life.”<sup>388</sup> Another obligation recognised by this treaty is that of providing information, services and support to the families of children with disabilities, so as to prevent the concealment, abandonment, neglect or segregation of such children.<sup>389</sup> The CRPD also requires parties to take measures to ensure the access of persons with disabilities to schools, medical facilities, public transportation and other public facilities and services.<sup>390</sup>

**382** Convention on the Rights of the Child, Article 23.1; compare Article 13.1 of the African Convention

**383** Article 23.2-3 (This right is conditioned by the availability of resources, the circumstances of the parents or caretakers and the making of an application for assistance.) Compare Article 13.2 of the African Convention.

**384** Article 23.3

**385** Convention on the Rights of Persons with Disabilities, Article 24.2(a) and (b)

**386** Article 24.4

**387** Article 24.2(c)-(d) and Article 2

**388** Convention on the Rights of Persons with Disabilities, Article 25(b) and 26.3

**389** Article 23.3

**390** Article 9



## 9.2 Ugandan legislation on the rights of children with disabilities

Article 35 of the Constitution provides generally that “Persons with disabilities have a right to respect and human dignity and the State and society shall take appropriate measures to ensure that they realise their full mental and physical potential.”<sup>391</sup>

The Persons with Disabilities Act 2006 is aimed at the promotion of the participation of persons with disabilities in all aspects of life on an equal basis and eliminating all discrimination based on disability.<sup>392</sup> The Act obliges the Government to promote the prevention of disabilities, *inter alia* through health education, a system for early identification of disabilities in children, the enforcement of labour safety regulations and road safety policies and land-mine clearance.<sup>393</sup> It also obliges the Government to provide rehabilitation measures to help persons with disabilities to regain functional abilities and enhance participation in social and economic life, to establish rehabilitation sections or departments in hospitals and to train persons with disabilities and their families in rehabilitation techniques.<sup>394</sup> The Children Act also indicates that parents and the State shall take steps to assess disabilities as early as possible and provide treatment and rehabilitation.<sup>395</sup>

The Persons with Disabilities Act provides detailed norms on education<sup>396</sup> including: the obligation to encourage inclusive education; establish special schools and units with curricula adapted to the needs of students with disabilities when inclusive education is not possible; train and recruit special education teachers; structural adaptations of all schools to the needs of persons with disabilities; and to adopt policies that give children with disabilities access to relevant education at all levels. Other norms are paying particular attention to the requirements of the girl child and children in rural areas, and to commit not less than 10% of all educational expenditure to the educational needs of persons with disabilities at all levels.<sup>397</sup> The Government is also required to provide vocational training designed to develop the skills of persons with disabilities to enable them to compete in the labour market.<sup>398</sup>

Part IV on accessibility requires features that facilitate access by persons with disabilities and to reduce the risk of accidents in buildings where the public is invited, as well as features that facilitate access to public transport, reduce the risk of road accidents involving pedestrians with disabilities and facilitate access to information by person with visual or hearing disabilities.<sup>399</sup> Part V prohibits discrimination in commercial activities.<sup>400</sup>

The Act imposes an obligation on the Government to take measures to enable persons with disabilities to participate in recreational, leisure and sporting activities.<sup>401</sup> Parents with disabilities have the right to care for and raise their children and children with disabilities are not to be separated from their families except in accordance with the law.<sup>402</sup> The Act also recognises the right of persons with disabilities to support,

**391** Article 35(1)

**392** Persons with Disabilities Act, Section 3(a) and (d)

**393** Section 9

**394** Section 10(a), (c) and (d)

**395** Section 9

**396** See also section 9(c) of the Children Act.

**397** Persons with Disabilities Act, Section 5

**398** Section 1

**399** Sections 19-24; see also sections 26 and 29

**400** Sections 25 and 31

**401** Sections 27 and 30

**402** Section 36

including childcare services for parents with disabilities.<sup>403</sup> The Act defines and prohibits discrimination against persons with disabilities in access to education and in employment.<sup>404</sup> Discrimination in education, employment and political activities, or denial of any of the rights recognised by the Act, is an offence.<sup>405</sup>

The Children Act, as amended, also criminalises discrimination against children on the basis of disability.<sup>406</sup> Section 9 of the Act provides that children with disabilities and special needs shall have access to suitable education, and more generally that the Government shall afford them any facilities necessary to meet their special needs.<sup>407</sup> Under this Act, Local Government Councils have an obligation to maintain registers of children with disabilities and give them the assistance needed to grow up with dignity and develop their potential and self-reliance.<sup>408</sup>

The Education Act makes no references to pupils or students with disabilities, although it provides that private schools must make a commitment to providing an environment conducive for pupils with special needs.<sup>409</sup> 'Special needs' is not defined, but may include conditions (such as learning disorders) that do not amount to disabilities. The BTVET Act recognises the aim of providing training to persons with disabilities, as mentioned in Chapter 8. The Uganda National Institute of Special Education Act 1995 established an institute to: train special education teachers; to design and develop educational materials and aids for teaching persons with disabilities; to promote greater awareness among teachers, parents and the public about persons with disabilities and special learning needs; and to promote partnership and collaboration among agencies involved in disabilities.<sup>410</sup>

### 9.3 The compatibility of Ugandan legislation with the CRC and the Convention on the Rights of Persons with Disabilities

Article 35 of the Constitution of Uganda and Article 3 of the Persons with Disabilities Act are in harmony with the general provisions on the rights of children with disabilities as provided for in Article 23(1) and 23(2) of the CRC. Section 28 of the Act, on the right of persons with disabilities to supportive services, and section 9 and 10 of the Children Act, seem to satisfy the obligation under Article 23 of the CRC to recognise the right of children to special care assistance. The Persons with Disabilities Act also recognises the right of persons with disabilities to effective access to education and vocational training, health care and rehabilitation and recreational opportunities, as required by Article 23 of the CRC.

The provisions of the Persons with Disabilities Act on education seem to satisfy the obligations of Uganda under the CRPD. The Act also requires the introduction of a system for the early identification of disabilities, which complies with another obligation recognised by the CRPD. Similarly, the Persons with Disabilities Act and Children Act both envisage decentralisation of services for children with disabilities. The Persons with Disabilities Act also requires that measures are taken to give persons with disabilities access to public facilities and transportation, as required by the Convention.

**403** Persons with Disability Act, Section 28

**404** Sections 6 and 12; see also sections 13-18 on the employment of persons with disabilities

**405** Section 43

**406** Children Act, Sections 4(1)(j) and (3) and 9(4)-(5)

**407** Children Act, Section (9)(2)-(3) ('special needs' is not defined)

**408** Section 10(5)

**409** Section 31(3)(g)

**410** Sections 4-5



One requirement of the CRPD that does not seem to be met by the legislation in force is that of providing information, services and support to the families of children with disabilities, so as to prevent the concealment, abandonment, neglect or segregation of such children. Even though the legislation recognises the right of parents of children with disabilities to assistance, it does not specifically authorise outreach designed to prevent the concealment, abandonment, neglect or segregation of children with disabilities. Other provisions of the legislation in force, such as the criminalisation of discrimination against persons/children with disabilities and prevention of disability, surpass the obligations of Uganda under the CRC and CRPD.

## 9.4 Recommendations concerning legislation on the rights of children with disabilities

1. The Persons with Disabilities Act should be amended to criminalise the concealment, abandonment, neglect or segregation of children with disabilities.
2. The Persons with Disabilities Act should be amended to require the Government to support information, awareness and support activities designed to prevent the concealment, abandonment, neglect or segregation of children with disabilities by their parents.
3. Section 24 of the Persons with Disabilities Act, which provides that “no person with disabilities shall be denied a driving permit by reason of his or her disability” should be amended by the addition of a clause to make an exception for measures necessary to protect the health or safety of persons, in order to bring this section into harmony with Section 9(e), which requires road safety policies to be strengthened.<sup>411</sup>

**411** Similar to section 25(3)(a).



# MARRIAGE, DIVORCE AND PROPERTY





## 10.1 Provisions of the CRC and other international human rights standards

The right to marry and found a family is one of the few rights recognised by the International Bill of Rights that is not recognised by the CRC.<sup>412</sup> This is because it is a right vested only in persons “of full age.”<sup>413</sup> The Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) provides that: “the betrothal and the marriage of a child shall have no legal effect and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.”<sup>414</sup>

The CRC Committee and CEDAW Committee define child marriage as “any marriage where at least one of the parties is under 18 years of age.”<sup>415</sup> However, “the marriage of a mature, capable child below 18 years of age may be allowed in exceptional circumstances, provided that the child is at least 16 years of age and that such decisions are made by a judge based on legitimate exceptional grounds defined by law and on the evidence of maturity, without deference to culture and tradition.”<sup>416</sup> This exception is intended to accommodate “the child’s evolving capacities and autonomy in making decisions.”<sup>417</sup> This applies to “cases in which guardians [...] consent to marriage of girls in accordance with customary or statutory law and in which girls are thus married contrary to the right to freely enter into marriage.”<sup>418</sup> The Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa (African/Maputo Protocol) expressly prohibits the marriage of persons under 18 years of age, without exception.<sup>419</sup>

The International Covenant on Civil and Political Rights provides that Parties “shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.”<sup>420</sup> The CRC provides that parents “have common responsibilities for the upbringing and development” of children, regardless of whether they are or ever were married.<sup>421</sup> It also provides that if a child’s parents do not live together, the child has the right “to maintain personal relations and direct contact with both” of them.<sup>422</sup> Similarly, CEDAW provides that men and women have “the same rights and responsibilities during marriage and at its dissolution” and “the same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children.”<sup>423</sup> The African/Maputo Protocol provides “in case of separation, divorce or annulment of marriage, women and men shall have reciprocal rights and responsibilities towards their children”, including “the right to an equitable sharing of the joint property deriving from the marriage.”<sup>424</sup>

The United Nations human rights treaties do not expressly prohibit polygamy, but the bodies responsible for monitoring compliance with such treaties consider polygamy discrimination. In 2000, the Human Rights Committee declared that “polygamy violates the dignity of women [...] is an inadmissible discrimination

**412** Compare Article 16.1 of the Universal Declaration and 23(2) of the Covenant on Civil and Political Rights. (The term International Bill of Human Rights refers to the Universal Declaration and the two International Covenants).

**413** Universal Declaration, Article 16.1

**414** Article 16.2

**415** Joint General Comment 18 of the CRC and General Recommendation 31 of the Committee on the Elimination of all forms of Discrimination against Women on harmful practices, para.20

**416** As above

**417** As above

**418** Joint General Comment 18 of the CRC and General Recommendation 31 of the Committee on the Elimination of all forms of Discrimination against Women on harmful practices para.21

**419** African Charter on Human and Peoples Rights, Article 21.2

**420** International Covenant on Civil and Political Rights, Article 23.4. Uganda became a Party to this Covenant in 1995.

**421** Convention on the Rights of the Child, Article 18.1

**422** Article 9.3 (An exception is made for situations when contact would be contrary to the best interests of the child.)

**423** CEDAW, Article 16.1(c)-(d) Uganda became a Party to CEDAW in 1985.

**424** Article 7(c)-(d) Uganda became a Party to the African Protocol in 2010.

against women [and] should be definitely abolished wherever it continues to exist.”<sup>425</sup> The CEDAW Committee has declared that “polygamous marriage contravenes a woman’s right to equality with men and can have such serious emotional and financial consequences for her and her dependents that such marriages ought to be discouraged and prohibited.”<sup>426</sup>

The right to own property is recognised by Article 17 of the Universal Declaration of Human Rights, but not by the CRC nor the International Covenant on Economic, Social and Cultural Rights. CEDAW recognises the right to property as it provides that both spouses have “the same rights [...] in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property...”<sup>427</sup> The Committee on Economic, Social and Cultural Rights has declared that “women have equal rights to marital property and inheritance upon their husband’s death.”<sup>428</sup> This report focuses exclusively on the rights of children, but the rights of women who are mothers are inextricably linked to the rights of their children.

Discrimination on grounds of birth is categorically prohibited by the CRC and many other international human rights treaties.<sup>429</sup> The CRC Committee has indicated that discrimination against children born out of wedlock with regard to the right to inherit violates this prohibition.<sup>430</sup>

## 10.2 Ugandan legislation on marriage, divorce and property

Article 31 of the Constitution of Uganda recognises the right to marry and found a family in terms similar to international standards:

“Men and women of the age of eighteen years and above have the right to marry and to found a family and are entitled to equal rights in marriage, during marriage and at its dissolution [...] Marriage shall be entered into with the free consent of the man and woman intending to marry.”<sup>431</sup>

Article 32 requires marriages to be registered and Article 31(3) requires the Parliament to adopt “appropriate laws for the protection of the rights of widows and widowers to inherit the property of their deceased spouses...” The Children Act recognises the right of children to protection against child marriage, defined as “any union whether formal or informal involving any person below the age of 18 years for the purpose of living as husband and wife.”<sup>432</sup>

The main statute on marriage in force is The Marriage Act of 1904. The Marriage Act is complementary to it and applies to Africans who are both Christian.<sup>433</sup> It provides that sections 6 to 16 of the Marriage Act do not apply and are replaced by the usual or customary rules of the religion of the parties.<sup>434</sup> The sections

**425** General Comment 28 (Article 3) The equality of rights between men and women, para.24

**426** General Recommendation 21, Equality in marriage and family relations, 1994, para.14. The recommendation that polygamy be prohibited was repeated in 2013, in para.21 of General Recommendation 29, Economic consequences of marriage, family relations and their dissolution.

**427** CEDAW, Article 16.1(h). Uganda became a Party to CEDAW in 1985.

**428** General Comment No.16, The equal right of men and women to the enjoyment of all economic, social and cultural rights (Article 3), 2005, para.27.

**429** Convention on the Rights of the Child, Art.2; see also Article 2 of the Universal Declaration, Article 2.1 of the Covenant on Civil and Political Rights, Art.2.2 of the Covenant on Economic, Social and Cultural Rights and Art.3 of the African Charter.

**430** Concluding Observations on the Second and Third Report of Gambia, 2015, para.29(a)-(b), Concluding Observations on the Third and Fourth Report of Philippines, 2009, para.29 and Concluding Observations on the Third Report of Maldives, 2007, para.33.

**431** Constitution of Uganda, Paras. (1) and (3)

**432** Children Act, Sections 1 and 42A(1)

**433** Marriage Act, Section 1

**434** Section 4



of the Marriage Act that are not applicable under this Act include the minimum age for marriage and a requirement that the parties be unmarried.<sup>435</sup>

The Customary Marriage Registration Act 1973 authorises the celebration of customary marriages, defined as marriages celebrated according to the rites of an African community of which one of the parties is a member and requires that they be registered.<sup>436</sup> The minimum age of marriage under this Act is 16 years for a bride and 18 years for a groom.<sup>437</sup> The Act expressly authorises polygamous marriages.<sup>438</sup>

The Marriage and Divorce of Mohammedans Act 1906 recognises marriages “celebrated [...] according to the rites and observances of the Mohammedan religion, customary and usual among the tribe or sect in which the marriage or divorce takes place” and requires such marriages be registered.<sup>439</sup> Polygamous marriages are recognised, provided that all the wives are Muslim.<sup>440</sup>

The Hindu Marriage and Divorce Act of 1961 regulates the marriage of Hindus, Jains, Sikhs and “Buddhists of Indian origin.”<sup>441</sup> It applies whether the parties are practising Hindus, Jains, Sikhs or Buddhists, or simply belong to a family that identifies with one of these religions.<sup>442</sup> Polygamous marriages are not authorised.<sup>443</sup>

The minimum age for marriage under the Marriage Act is 21 years; under the Hindu Marriage Act is 18 years for the man and 16 years for the girl.<sup>444</sup> The Marriage of Africans Act does not specify a minimum age for marriage, but tacitly recognises that minors may be married with the consent of a parent or guardian, or consent of the minister if he or she is “satisfied, after due inquiry, that the marriage is a proper one.”<sup>445</sup> The Marriage and Divorce of Mohammedans Act has no provision on the minimum age for marriage.

The Divorce Act 1904, having been adopted in the colonial period, has numerous provisions that are blatantly discriminatory. The definition of minor children is one example:

In this Act, “minor children” means – in the cases of Africans, Indians and Pakistanis – boys who have not attained the age of fifteen years and girls who have not attained the age of thirteen years; in other cases, it means unmarried children who have not attained the age of eighteen years.<sup>446</sup>

The grounds for separation are broader and the same regardless of whether the husband or wife seeks separation.<sup>447</sup> At any stage of divorce proceedings, the courts may “make such order as it thinks fit” regarding the custody, maintenance and education of the minor children of the marriage.<sup>448</sup>

**435** Section 10(1)2 and 4

**436** Customary Marriage Registration Act, Sections 1.2, 4.1 and 6(1)2; see also Part III authorizing customary marriages of persons not belonging to any indigenous tribe of Uganda.

**437** Section 11.1-2 (But under section 25(1)2. the minimum age is 21 for customary marriages of persons not belonging to the African community whose marriage rites are applied.)

**438** Section 4.2

**439** Marriage and Divorce of Mohammedans Act, Section 2

**440** Section 1

**441** Hindu Marriage and Divorce Act, Section 1.2 and 2(1)

**442** Section 1(2)

**443** Sections 2(1)2, 6 and 8(2)

**444** Marriage Act, Section 10(1)2; Section 2(1)3;

**445** Section 5

**446** Section 2

**447** Section 14 (The grounds include cruelty and desertion.)

**448** Section 29

The sections of the Hindu Marriage and Divorce Act are complementary to the provisions of the Divorce Act of 1904.<sup>449</sup> Additional grounds for divorce are recognised, including conversion to another religion and “renouncing the world” to enter a religious order.<sup>450</sup> In contrast to the Hindu Marriage and Divorce Act, the Marriage and Divorce of Mohammadans Act is not complementary to the Divorce Act, but recognises the applicability of religious norms and procedures to all divorces from marriages celebrated according to Islamic law.

The Marriage and Divorce Bill of 2009 was drafted to replace the Acts mentioned above, but this has not been enacted into law.<sup>451</sup> It proposes to recognise five kinds of marriages: Civil, Christian, Hindu, Bahai and Customary, Polygamous marriages;<sup>452</sup> and to put the minimum age for marriages at 18 years.<sup>453</sup> The Bill expressly indicates that consent of both parties is required for civil, Christian, Customary and Bahai marriages, but not Hindu marriage.<sup>454</sup> Marriage between persons of the same sex is neither authorised nor recognised; and<sup>455</sup> “widow inheritance” is proposed to be prohibited.<sup>456</sup> The sole grounds for divorce would be irretrievable breakdown of the marriage.<sup>457</sup> Orders concerning the custody and maintenance of children made in divorce or separation proceedings would be governed by the Children Act.<sup>458</sup>

The Children Act, as amended, recognises the right of children “to inherit property where applicable.”<sup>459</sup> The Succession Act does not discriminate between legitimate children and illegitimate children recognised or accepted by a deceased parent as being his or her child, nor between biological children and adopted children.<sup>460</sup> It does provide that, amongst living relatives of the same degree, male relatives “shall be preferred to” females.<sup>461</sup> Only fathers may, in a testament, appoint guardians for minor children.<sup>462</sup>

Dependent relatives, including children, may not be disinherited; if a testament does not provide for the maintenance of a dependent relative of the deceased, a court may order reasonable maintenance payments.<sup>463</sup> Interim orders may be made in case of urgent need.<sup>464</sup> Court ordered maintenance payments to a dependent son cease when he reaches the age of 21, and those to a dependent daughter cease on her marriage.<sup>465</sup>

The Divorce Act provides that the needs of children shall have priority in orders concerning the assignment of property.<sup>466</sup> The Marriage and Divorce Bill indicates that matrimonial property would be owned in common by the husband and wife, and each spouse would have equal access and use of such property.<sup>467</sup>

- 449** Section 8.1
- 450** Section 8.2
- 451** Marriage and Divorce Bill, Clause 178(1)
- 452** Clause 12
- 453** Clauses 15, 37, 58, 82(1), 97(1)(c)
- 454** Clauses 16, 38, 59, 97(1)(a)
- 455** Clause 12(2)
- 456** Clause 13
- 457** Clause 145
- 458** Clause 145
- 459** Children Act, Section 4(f)
- 460** Section 2.2, 2.6 and 2.7, 2.7(l) and 87. (Under sections 5-6 the domicile of a legitimate child depends on the domicile of the father and the domicile of an illegitimate child on that of his or her mother, but it is not clear that this distinction amounts to discrimination.)
- 461** Section 2.7 (n)(ii)
- 462** Section 43
- 463** Section 37-38
- 464** Section 42
- 465** Section 38.2(a)(ii)-(iii)
- 466** Divorce Act, Section 18, 27
- 467** Sections 116 and 124



In principle, common property could only be disposed of by the agreement of both spouses.<sup>468</sup> Either spouse would have the right to acquire separate property during any recognised form of marriage.<sup>469</sup>

The Constitution recognises four land-tenure systems: Customary, freehold, “mailo” and leasehold.<sup>470</sup> Customary tenure applies to a specific area of land and specific class of persons, governed by customary rules recognised as binding by such persons.<sup>471</sup> The Land Act provides for the establishment of Communal Land Associations for the management of communally-owned land through common land management schemes.<sup>472</sup> The Act provides expressly that any decision taken in respect of communal land under the customs or traditions of the community shall be null and void if it “denies women or children or persons with disabilities access to ownership, occupation or use of any land...”<sup>473</sup>

The Land Act also provides that no person may make any transaction concerning “land on which he or she ordinarily resides with his or her spouse and from which they derive their sustenance” without the written consent of the spouse.<sup>474</sup> Similarly, no transaction concerning land on which a person ordinarily resides with his or her minor children, or land on which minor orphans reside, may be made without the written consent of the local Land Committee.<sup>475</sup> Transactions concerning family land may not be made without the written consent of the spouse of the person making the transaction.<sup>476</sup> Consent by spouses – or the Land Committee in cases involving orphans – may not be withheld unreasonably and the Act establishes procedures for determining when this is the case.<sup>477</sup> The Act requires that one of the five members of the Land Commission, the highest administrative authority, be a woman, that one-third of the members of each District Land Board be women and that one of the four members of local Land Committees be a woman.<sup>478</sup>

## 10.3 The compatibility of Ugandan legislation on marriage, divorce and property with the CRC and other relevant international standards

The constitutional and statutory requirements that all marriages be registered comply with the requirement of CEDAW. The Customary Marriage Registration Act and The Hindu Marriage and Divorce Act authorise the marriage of girls under 18 years of the age, while the Marriage of Africans Act and The Marriage and Divorce of Mohammedans Act specify no minimum age for marriage. The express or tacit authorisation of the marriage of persons under the age of 18 years conflicts with the Constitution and the Children Act, and is incompatible with Uganda’s obligation under Article 21 of the African Charter. Furthermore, establishing a lower minimum age for girls constitutes sexual discrimination.

**468** Section 129

**469** Section 132

**470** Constitution of Uganda, Article 237 (3) (‘Mailo’ is a form of tenure where ownership of the land may be separate from ownership of infrastructure on it. The Land Act, section 4(4).)

**471** The Land Act 1998, section 4 (Sections 10-15 establish a procedure for the conversion of customary tenure into freehold tenure.)

**472** Sections 16-28

**473** Section 28

**474** Section 40(1)(c)

**475** Section 40(1)(c)(iv)

**476** Section 39(1) (as amended in 2004) (Subsections 5- provide that consent may not be withheld unreasonably and establish a procedure to determine whether this is the case.)

**477** Sections 39(5)-(6) and 40(5)-(6)

**478** Land Act, Sections 48(4), 58(3) and 66(2)

The Customary Marriage Registration Act expressly authorises polygamous marriage and the Marriage and Divorce of Mohammedans Act allows polygamous marriage provided that all wives are Muslim. There are good reasons, as mentioned above, to consider polygamous marriage as a form of sexual discrimination, which can have adverse consequences for the development and well-being of children living in polygamous families.

International norms on divorce are few, but it seems clear that the limited and sensitive grounds for divorce under the Divorce Act, as well as the recognised reasons for denying a divorce petition, make divorce proceedings a potential risk to the emotional well-being of the children concerned and for their continuing relationship with their parents. Therefore, such legislation is not in harmony with the principle that the best interests of children shall be a primary concern in all matters that affect them. Indeed, the Act largely ignores the need to take into account the interests of children affected by divorce.

Several provisions of the Divorce Act discriminate blatantly on grounds of sex, race or both. They include: the definition of minor children; the provision allowing only wives to seek alimony; and the grounds for divorce. The features of the Islamic law whose application is authorised by the Marriage and Divorce of Mohammedans Act are not known, but the lack of any express requirements that religious law be applied within parameters that guarantee fundamental human rights principles is not compatible with the essential obligations of Uganda under international human rights law. No law prohibits the betrothal of children or provides that the betrothal of children has no legal effect, as required by CEDAW.

The Marriage and Divorce Bill could provide a remedy for the many gaps between Ugandan law and Uganda's obligations under the CRC, CEDAW, the African Charter, the African Protocol and other relevant human rights treaties. It proposes the minimum age to be 18 years for all forms of marriage, for boys and girls. Limiting polygamous marriage to customary marriages would be a step towards compliance with the widely accepted position that such marriages discriminate against women.

In so far as the right to property is concerned, the recognition under the Succession Act of the equal rights of children born in or out of wedlock and the equal rights of adopted children, are very positive. The power of courts to order maintenance payments for dependent children of a deceased parent whose testament does not provide for them is another positive measure for protecting of the rights of children. The priority given to males in the order of succession must be considered discrimination on grounds of sex. It is not clear that the differential treatment of dependent sons and daughters regarding maintenance payments from the estate of a deceased parent puts daughters at a disadvantage.

Recognition by the Divorce Act that priority should be given to the needs of children in decisions on the distribution of property is in harmony with the principle of best interests. However, the provisions of the Marriage and Divorce Bill concerning property and the dissolution of marriage or cohabitation are largely silent on the rights of children and this principle of best interests. The Marriage and Divorce Bill does seem to improve the property rights of married women and women affected by divorce, which is important for children who are in the custody of divorced women. Moreover, the proposals of the Bill on property also apply to couples terminating cohabitation, which expands protection of the rights of children.

The provisions of the Land Act mentioned above also seem well designed to protect the property rights of women and children.



## 10.4 Recommendations on legislation on marriage, divorce and property

1. A comprehensive statute on marriage, covering all forms of marriage considered appropriate for Ugandan society, should be adopted. The approval of the Marriage Bill should be expedited.
2. The proposed legislation on marriage should set the minimum age for marriage at 18 years, as required by Article 34 the Constitution and Article 21(2) of the African Charter on the Rights and Welfare of the Child.
3. The proposed legislation on marriage should guarantee the equality of all children even after separation or divorce of their parents.
4. The proposed legislation should fully incorporate the principle that both parents have equal rights and responsibilities regarding the raising of their children born during the relationship.
5. The proposed law should recognise the principle that children of parents who are divorced or separated have the right to personal relations and direct contact with both parents.
6. Amendment of the Succession Act to eliminate the preference accorded to male relatives should be expedited.

# CONCLUSION

This assessment of the compatibility of Ugandan legislation with the CRC was based on a comparison of the letter of the law with the obligations of Uganda under the CRC and other international treaties relevant to the rights of children. From this perspective, law reform is more needed in some areas than others. Not surprisingly, the recommendations regarding the two areas where significant new legislation has been adopted recently (child protection and children with disabilities) are few.

Ultimately, Uganda should strive to bring all its legislation into full compliance with its international obligations concerning the rights of children. This cannot be done overnight – nor should it be. Law reform processes that are participatory require more time, but if such time is invested wisely, the resulting laws make implementation smoother and more expeditious.

UHRC believes that the recommendations in this report will help guide required legislative and policy reforms. In setting priorities for interventions, it is important to ask two questions. How many children are affected by a given issue? How profoundly does the issue impact the lives of those affected? In effect, what is needed is a strategy for bringing legislation into greater harmony with the CRC; one that does not see law reform as an end in itself, but as an integral part of a holistic approach to promoting and protecting the rights of all children in Uganda. The strategy should identify and take into account the needs of the most vulnerable sectors of the child population; identify all relevant and interested governmental and non-governmental actors as well as the appropriate mechanisms for facilitating their participation and cooperation; and regard children not merely as beneficiaries, but as protagonists whose voices should be heard and whose evolving capacities enable them to make useful contributions.

Based on the analysis and recommendations in this report, UHRC plans to closely engage with all other stakeholders to develop a strategy for bringing legislation into greater harmony with the CRC and ultimately strengthening the protection of the rights of children in Uganda.





## ANNEXES

### Annex I: List of acronyms

<b>CEDAW</b>	Convention on the Elimination of All forms of Discrimination Against Women
<b>CRPD</b>	Convention on the Rights of Persons with Disabilities
<b>CRC</b>	Convention on the Rights of the Child
<b>HIV/AIDS</b>	Human Immunodeficiency Virus / Acquired Immunodeficiency Syndrome
<b>ILO</b>	International Labour Organisation
<b>UHRC</b>	Ugandan Human Rights Commission
<b>UN</b>	United Nations
<b>WHO</b>	World Health Organisation

## Annex II: List of Ugandan Statutes, Bills and other normative instruments

1. The Constitution of Uganda

### Legislation

1. The Marriage Act (1904)
2. The Marriage of Africans Act (1904)
3. The Divorce Act (1904)
4. The Marriage and Divorce of Mohammedans Act (1906)
5. The Succession Act (1906)
6. The Evidence Act (1909)
7. The Public Health Act (1935)
8. The Mental Treatment Act (1938)
9. The Penal Code (1950)
10. The Criminal Procedure Act (1950)
11. The Hindu Marriage and Divorce Act (1961)
12. The Executive Committees (Judicial Powers) Act (1964)
13. The Geneva Conventions Act (1964)
14. The Magistrate's Court Act (1971)
15. The Customary Marriage Registration Act (1973)
16. The Uganda National Institute of Special Education Act (1995)
17. The Children Act (1996)
18. The Land Act (1998)
19. The Universities and Other Tertiary Institutions Act (2001)
20. The Employment Act (2006)
21. The Local Council Courts Act (2006)
22. The Persons with Disabilities Act (2006)
23. The Prisons Act (2006)
24. The Refugees Act (2006)

25. The Penal Code (Amendment) Act (2007)
26. The Business, Technical, Vocational Education and Training Act (2008)
27. The Education (Pre-primary, Primary and Post-Primary) Act (2008)
28. The Prevention of Trafficking in Persons Act (2009)
29. The Domestic Violence Act (2010)
30. The International Criminal Court Act (2010)
31. The Prohibition of Female Genital Mutilation Act (2010)
32. The Computer Misuse Act (2011)
33. The Prevention and Prohibition of Torture Act (2012)
34. The Anti-Pornography Act, 2014
35. HIV and AIDS Prevention and Control Act (2014)
36. The Registration of Persons Act (2015)
37. The Immunization Act (2017)

### Bills

1. The Food and Nutrition Bill (2009)
2. The Marriage and Divorce Bill (2009)
3. Mental Health Bill (2014)

### Rules, regulations and guidelines

1. Foster Care Placement Rules
2. The Children (Approved Homes) Rules (2013)
3. Regulations of Local Council Courts
4. The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013
5. Beijing Rules on the Administration of Juvenile Justice

## **Annex III: List of treaties and other international instruments, comments and recommendations**

### **Treaties**

1. Convention on the Rights of the Child (CRC)
2. Option Protocol to the CRC on Sale of Children, Child Prostitution and Child Pornography
3. Option Protocol to the CRC on the Involvement of Children in Armed Conflict
4. African Charter on the Rights and Welfare of the Child
5. International Covenant on Civil and Political Rights
6. Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption
7. Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children ('Palermo Protocol')
8. International Labour Convention No.182 on Worst Forms of Child Labour
9. IV Geneva Convention relative to the Protection of Civilian Persons
10. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
11. Statute of the International Criminal Court
12. International Covenant on Economic, Social and Cultural Rights
13. Convention on the Rights of Persons with Disabilities
14. Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa

### **General Comments of the Committee on the Rights of the Child**

1. General Comment 3, HIV/AIDS and the rights of the child, CRC/C/GC/3, 2003
2. General Comment 4, Adolescent Health and Development, CRC/GC/2003/4
3. General Comment 8, The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment, CRC/C/GC/8
4. General Comment 10, Children's Rights in Juvenile Justice, CRC/C/GO/10
5. General Comment 13 (2011), The right of the child to freedom from all forms of violence, CRC/C/GC/13
6. General Comment 15, The right of the child to the enjoyment of the highest attainable standard of health, CRC/C/GC/15, 2013
7. Joint General Comment 18 of the CRC and General Recommendation 31 of the Committee on the Elimination of all forms of Discrimination against Women on harmful practices, CEDAW/C/GC/31-CRC/C/GC/18

### **General comments and recommendations of other UN bodies**

1. Human Rights Committee, General Comment 35, Article 9 (Liberty and Security of Person), CCPR/C/GC/35
2. Human Rights Committee, General Comment 28 (Article 3) The equality of rights between men and women, 2000
3. Committee on Economic, Social and Cultural Rights, General Comment 14, The right to the highest attainable standard of health, 2000

4. Committee on Economic, Social and Cultural Rights, General Comment No.16, The equal right of men and women to the enjoyment of all economic, social and cultural rights (Art.3), 2005
5. CEDAW Committee, General Recommendation 21, Equality in marriage and family relations, 1994
6. CEDAW Committee, General Recommendation 29, Economic consequences of marriage, family relations and their dissolution, 2013
7. Summary of WHO Position Papers - Recommended Routine Immunizations for Children

### **Other international standards**

1. UN Guidelines for the Alternative Care of Children
2. UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime
3. Refugee Children: Guidelines on Protection and Care, UNHCR, 1994
4. International Guidelines on HIV/AIDS and Human Rights, 2006
5. World Health Organisation, Essential Interventions, Commodities and Guidelines for Reproductive, Maternal, Newborn and Child Health, 2011
6. Mental Health Care Law: Ten Basic Principles, World Health Organisation

## Annex IV: Other documents

1. Committee on the Rights of the Child, Concluding Observations on Uganda's first report on implementation of the Optional Protocol on Sale of Children, Child Prostitution and Child Pornography, CRC/C/OPSC/CO/1, 2008
2. Committee on the Rights of Persons with Disabilities, Concluding Observations on Uganda's first report on implementation of the Convention on the Rights of Persons with Disabilities, CRPD/C/UGA/CO/1
3. Study on Legal Guardianship and Adoption Practices in Uganda, Dr. H. Among, Ministry of Gender, Labour and Social Development and UNICEF
4. Hague Conference on Private International Law, Status Table for the Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption
5. Adoption Alert: Uganda's Residency and Fostering Requirement, US Department of State Bureau of Consular Affairs
6. CRC Committee, Concluding Observations on the Second and Third Report of Gambia, 2015
7. CRC Committee, Concluding Observations on the Third and Fourth Report of Philippines, 2009
8. CRC Committee, Concluding Observations on the Third Report of Maldives, 2007, para.33







**THE RIGHT TO IDENTITY  
(NAME, NATIONALITY  
AND FAMILY TIES)**



**CHILD PROTECTION**



**ALTERNATIVE CARE**



**JUVENILE JUSTICE**



**CRIMES AGAINST  
CHILDREN**



**THE RIGHTS AND  
TREATMENT OF CHILD  
VICTIMS**



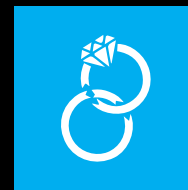
**THE RIGHT TO HEALTH**



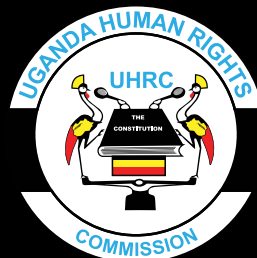
**THE RIGHT TO  
EDUCATION**



**THE RIGHTS OF  
CHILDREN WITH  
DISABILITIES**



**MARRIAGE, DIVORCE  
AND PROPERTY**



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