

**ACCESS TO JUSTICE IN CIVIL MATTERS: A CRITICAL ANALYSIS OF LEGAL
REPRESENTATION OF MINORS UNDER GUARDIANSHIP IN RWANDA**

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Declaration

I, **Christine Umubyeyi** declare that the work presented in this dissertation is original. It has never been presented to any other university or institution. Where other works have been used, references have been provided. It is in this regard that i declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements for the award of the LLM degree in human rights and democratisation in Africa.

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Dedication

This dissertation is dedicated to my adorable husband for his patience in being home alone during my one year absence. I also dedicate this dissertation to my late father Rugiramaza Léopold, my mother Mukakarara Dernes, my sister, my brothers, my lovely niece SHIMWA Marie Prielle and other members of my family. This dissertation is also dedicated to all orphans and children deprived of family environment.

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List of abbreviations

ACHPR	African Charter on Human and Peoples' Rights
ACRWC	African Charter on the Rights and Welfare of the Child
AIDS	Acquired Immunodeficiency Syndrome
AJB	Access Justice Bureau
AU	African Union
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CRMW	Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CSO	Civil Society Organisation
GRL	Ghana Law Report
HIV	Human Immunodeficiency Virus
ICCPR	International Covenant on Human and Peoples' Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
MIGEPROF	Ministry of Gender and Family promotion
MINIJUST	Ministry of Justice
NCHR	National Commission for Human Rights
NGO	Non Governmental Organisation
OAU	Organisation of African Union
OCR	Observatory of Child's Rights
OFJC	Organic law No 51/2008 of 09/09/2008 determining organization, functioning and jurisdiction of courts
OG	Official Gazette
OVC	Orphans and Other Vulnerable Children
UDHR	Universal Declaration of Human Rights
UN	United Nations

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Chapter 1

Introduction

1.1 Background

Every person is entitled to all the rights and freedoms set forth in international human rights instruments without distinction of any kind: this includes race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹ In particular, every person is entitled to access justice to vindicate his or her rights. Although age is not expressly mentioned as one of the prohibited grounds of discrimination, particular provisions provide for special legal protection for minors.² In addition, other particular instruments have been adopted to protect the rights of minors.³ The right to an effective judicial remedy for acts violating fundamental rights is guaranteed to minors by human rights instruments.⁴ In reality, the effective enjoyment of rights is not possible when the holders of the rights have limited access to justice, i.e. access to judicial remedies in cases where their rights have been violated.

The notion of 'access to justice' is used here in reference to an individual's opportunity to enjoy equal access to legal services necessary for the protection of one's rights and interests regardless of one's means. It also implies the mechanism by which an individual may seek legal assistance including, among other things, drafting formal documents (wills, contracts),

¹ See art 2 of the Universal Declaration of Human Rights (UDHR) (1948) and art 2 of the International Covenant on Civil and Political Rights (ICCPR) (1966).

² See for example art 25 (2) of the UDHR and art 24 of the ICCPR.

³ Those are among others on the global level: the Convention on the Rights of the Child (CRC) (1989) and on African level: African Charter on Human and Peoples' Rights (ACHPR) (1981) and the African Charter on the Rights and Welfare of the Child (ACRWC) (1990) OAU Doc. CAB/LEG/24.9/49 (1990).

⁴ Art 8 of the UDHR, art 2 of the ICCPR, art 12 of the CRC and art 17 of the ACRWC.

representation in deceased estates, court applications and representation in court and tribunal hearings.⁵

Minors, like all other human beings, are entitled to the right of access to justice. However, when it comes to the effective enjoyment of this right, minors tend to be restricted because they are 'viewed as being unable to make competent decisions due to their immature understanding and judgment and lack of experience.'⁶ Thus in many jurisdictions minors have absolutely no capacity to act without the assistance of their guardians and the juristic acts performed by minors are subject to repudiation by the guardian.⁷ One of the duties of the guardian is to assist or represent the minor in legal matters.⁸ It follows therefore that the minor can only access justice for a potential remedy for the violation of his or her rights through his or her guardian.

1.2 Statement of the problem

Most international conventions define the child as a human being below the age of 18 years.⁹ This definition is similar to the definition given by the Rwandan law No 27/2001 of 28/04/2001 relating to the rights and the protection of the child against violence (Rwandan Child Law).¹⁰ However, as far as the capacity to act in civil matters is concerned the Rwandan Civil Code Book 1 in its article 360 as a person of either sex who has not yet attained the age of 21.¹¹

This disparity in age limits impacts on the rights of the 'minor'. The same person can be considered as a minor by one law and prohibit him or her from performing certain legal actions

⁵ L Schetzer & J Handerson, *Access to justice and legal needs: A project to identify legal needs, pathways and barriers for disadvantaged people in NSW* (2003) 5 <www.lawfoundation.net.au/report/background> (accessed on 22 September 2011).

⁶ SM Davis et al *Children in the Legal System, Cases and material* (2004) 101.

⁷ See C Himonga 'Children (minors)' in F Du Bois (ed) *Wille's Principles of South African Law* (2007) 179.

⁸ Himonga (n 7 above) 212. See also art 385 of the Law No 42/1988 of 27/10/1988 relating to the preliminary title and Book 1 of the Civil Code (Rwandan Civil Code Book 1).

⁹ See art 1 of the CRC and art 2 of ACRWC.

¹⁰ Art 1 of the Rwandan Child Law.

¹¹ Art 360 of the Rwandan Civil Code Book 1.

while the same person is considered by another law as an adult allowed to perform other legal actions. In Rwanda, the law that fixes the age of majority at 21 years seems to constitute a principal source of violation of the child's rights, especially the right to property.

In addition, it seems unusual to consider a University student as a minor since at the age of 21 years a person is eligible to be admitted to a University. The No 13/2009 of 27/05/2009 law regulating labour in Rwanda (Rwandan Labour Law) authorizes children from the age of sixteen to be employed.¹² Surprisingly, they are not authorized to institute legal proceedings without adults representation even in situations of conflicts related to their work. It is noted that in many cases such rights of the minor may be completely lost while the minor waits to attain the age of 21 years. Thus, there is a need for the harmonization of the age limit between international human rights treaties and national legislation in Rwanda.

The restriction on the performance of a juridical act could constitute an obstacle if the minor should seek to contract with an advocate or lawyer without the assistance of the guardian. In the circumstances where the guardian has the goodwill to accomplish his or her duties towards the minor, the latter can access justice easily either through the guardian or through a legal counsel. However, difficulties arise when the guardian himself or herself becomes an obstacle either because he or she is not willing to perfectly perform his or her duties or because the minor needs more efficient legal representation.¹³

The first case mostly occurs where the guardian is the source of the violation of the minor's rights, notably where the guardian is guilty of poor administration of the minor's property. In the second case, the guardian may have the goodwill and intention to represent the minor's interests but may be in need of more efficient legal representation by legal counsel.

The problems outlined above are very common in Rwanda, where after the genocide in 1994, many minors were left without any close relative to act as their guardians. In 2004,

¹² See art 4 of the Law No 13/2009 of 29/05/2009 regulating labour law in Rwanda. See OG No special of 27/05/2009 (Rwandan Labour Law) which prohibits the employment of a child in any company, even as apprentice, before the age of sixteen.

¹³ The guardian does not always have the legal skills, capacity or legal knowledge to represent the minor in the court.

statistics showed that 1/3 of the children in Rwanda were orphans.¹⁴ According to two non-governmental organisations (NGOs), International Social Service and Concern, 1122 Rwandan children were placed in host families between 1994 and 2000.¹⁵ In addition, recent statistics show that Rwanda has 1.26 million orphans and numberless vulnerable children whose rights have been violated as a result of the combined effects of a number of factors, namely the consequences of the genocide; chronic poverty experienced by some households; and the threat of HIV/AIDS.¹⁶ Some of these children head households. These children are often in conflict with their guardians because of the maladministration of their property. Furthermore, they cannot validly contract advocates, because they lack capacity and are compelled to rely on the guardian for financial means.

In criminal matters, the human rights and various legal instruments in Rwanda provide for compulsory legal representation of a minor in conflict with the law.¹⁷ Yet in civil matters nothing is set out clearly. There is a need for a legal framework that will allow the minor to bypass the guardian and access justice in particular situations. Such situations should include where the guardian is in conflict with the minor, as for example, where the guardian does not act in good faith to defend the interests of the child and when both of them are deprived of financial resources to institute legal proceedings. Such a legal framework is required, not only on the Rwandan domestic level but also in international human rights instruments which are not clear about this issue. The lack of clarity sometimes induces poor domestication and implementation of those instruments.¹⁸ Both the CRC and the ACRWC do not include any specific provisions dealing with access to justice for minors in civil matters in general or for

¹⁴ Committee on the Rights of the Child in its 36th session, UN Doc. CRC/C/15/Add.234 (2004) Consideration of reports submitted by states parties under article 44 of the convention: Concluding observations: Rwanda.

¹⁵ UN Doc. CRC/C/70 Add. 22 (2003) para 197.

¹⁶ Minister in Prime Minister's in charge of Family and Gender Promotion (September 2007) *Strategic plan of action for orphans and other vulnerable children: 2007-2011* (Strategic plan of action for OVCs).

¹⁷ Art 185 of the Rwandan Law No 13/2004 of 17/05/2004 relating to the criminal procedure code. See OG No Special of 30/07/2004 (Rwandan Criminal Procedure Code) that was modified and supplemented by the Law No 20/2006 of 22/04/2006 states that a minor who is being prosecuted must be defended by a counsel. If the minor or his or her guardians cannot choose one, the prosecution can ask the President of bar Association of lawyers to appoint one.

¹⁸ There is no general comment by United Nations (UN) treaty bodies on the best interests of the child.

children under guardianship, in particular.

It is noted however, that the General Comment No 6 of the CRC Committee provides some explanation on the legal representation of children under guardianship.¹⁹ According to the above mentioned general comment, States are required to create the underlying a legal framework and to take necessary measures to secure proper representation of an unaccompanied or separated child's best interests.²⁰ In cases where a child is accompanied by a non-family adult or caretaker, and the guardian is able and willing to provide day-to-day care, but unable to adequately represent the child's best interests in all spheres and at all levels of the child's life, supplementary measures -- such as the appointment of an adviser or legal representative -- must be secured.²¹ Yet, the general comment in question is not sufficient to deal with the problem because it is not binding.²²

In fact, a judge could decide to require compulsory legal representation for a minor in civil matters on the basis of the provisions related to the best interests of the child together with the general comment depending on the particular circumstances of the case.²³ Thus, it is crucial to enact specific legislation requiring the provision of legal representation for minors in civil proceedings in general, and for minors under guardianship in particular.

The issue is settled by different Rwandan laws in criminal matters but not in civil matters.²⁴ Indeed, a minor who is being prosecuted must be defended by a counsel.²⁵ If the

¹⁹ General Comment No 6 (2005): UN Doc CRC/GC/2005/6 'Treatment of unaccompanied and separated children outside their country of origin' UN Committee on the Rights of the Child <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/438/05/PDF/G0543805.pdf?OpenElement>> (accessed on 23 September 2011).

²⁰ n 19 above, para 33.

²¹ n 19 above, para 34.

²² General comments are defined by United Nations treaty bodies as interpretation of the content of human rights provisions on thematic issues or methods of work. See <<http://www2.ohchr.org/english/bodies/treaty/index.htm>> (accessed on 23 September 2011).

²³ In Rwanda, there is no chamber of minor for civil matters as exists in criminal matters. Thus, nothing legally compels the judges to grant any special treatment to minors as far as legal proceedings in civil matters are concerned.

²⁴ Art 9 of the Organic Law No 51/2008 of 09/09/2008 determining organisation, functioning and jurisdiction of courts (Law determining OFJC) provides that each Intermediate Court is comprised of a specialized Juvenile

minor or his or her guardians cannot choose one, the prosecution can request the President of the Rwandan Bar to appoint one.²⁶ According to this provision, it is clear that in criminal matters all minors are as matter of principle *granted legal representation*. None of them can plead without representation. On the contrary, this is not the case in civil matters.

This study is aimed at analyzing this issue of limited access to justice for minors in civil matters and recommends a legal solution involving the legal reform inspired by the criminal legal provision model ²⁷ in respect of the best interests of the child.

On the international level 'the best interests of the child is identified as the criterion against which a State Party has to measure all aspects of its law and policy regarding children.'²⁸ On the regional level, ACRWC states that in all actions concerning children, the best interests of the child shall be the primary consideration.²⁹ National legislation also takes into account the best interests of the child. In fact the Rwandan Child Law states that 'the child's interests must be taken into account before any decision concerning him or her is made'.³⁰From the above, it appears clear that legal representation of minors in civil matters constitute a response to the need of effective access to justice in the respect of the best interests of the child.

Chamber. Art 75 of the law determining OFJC affirms that minors accused of any offence shall be tried on the first instance only by a specialized Juvenile Chamber of Intermediate Court.

²⁵ Art 185 of the Rwandan Criminal Procedure Code.

²⁶ As above.

²⁷ Art 76 of the law determining OFJC provides that the juvenile chamber shall in addition to sentencing juvenile offenders; ensure appropriate measures for their safety, support supervision and education of such children. Art 185 of the Rwandan Criminal Procedure Code as modified to date, states that a minor who is being prosecuted must be defended by a counsel. If the minor or his or her guardians cannot choose one, the prosecution can ask the President of Bar to appoint one.

²⁸ F Viljoen 'The African Charter on the Rights and Welfare of the Child' in CJ Davel (ed) *Introduction to child law in South Africa* (2000) 219.

²⁹ Art 4 of the ACRWC.

³⁰ Art 9 of the Rwandan Child Law.

1.3 Research questions

- 1) How do minors enjoy the right to access justice under international law generally and more specifically under domestic legal framework in Rwanda?
- 2) What are the avenues to access justice in civil matters when the guardian is not acting in good faith or actually violates the minor's rights in Rwanda?
- 3) What are the limitations to legal representation of minors under guardianship in civil matters under Rwandan law?
- 4) What are appropriate solutions for ensuring better access to justice in civil matters for minors in Rwanda drawing inspiration from the existing legal framework in criminal matters?

1.4 Literature review

A number of scholars have addressed different dimensions of the issue of access to justice for minors. F Du Bois, in 'Principles of South African law' highlights the implications of the restrictions of the rights of minors, aimed at protecting them, including the capacity to litigate.³¹

M S Davis et al in their contribution 'Children in the Legal System, Cases and Material' go further and mention that the legal restrictions on minors can even affect constitutional importance.³² De Wall and Schoeman-Malan in the same book mention a great dependence of adopted minors on their adoptive parents. They also indicated the possibility for guardians to fail to fulfil their duty vis-à-vis the minor and discuss the remedies available to the minor.³³

³¹ See C Himonga 'Children (minors)' in Du Bois (n 7 above) 173.

³² Davis (n 6 above) 101.

³³ Davis (n 6 above) 509.

L Schetzer et al in 'Access to justice & legal needs, a project to identify legal needs, pathways and barriers for disadvantaged people in NSW' deplore the lack of legal aid services to assist children and young people to initiate legal proceedings in key civil law areas.³⁴

These studies do not address the limitations on access to justice for minors, with particular reference to civil matters. They do not differentiate in their analysis between the treatment of minors in criminal and civil procedure. Most of the studies contemplate the rights to a compulsory representation for minors in conflict with the law presuming that the role of the guardian is enough for minors who have civil claims.

KY Yeboah, in his article 'The civil rights and obligations of the child' emphasises the fact that an infant has no capacity to institute an action directly by himself, but needs a "next friend" who has to act by lawyer and discusses the issues that arise where there are conflicts of interest between the child and the members of his or her family or families.³⁵ He does not articulate any alternative legal measures of the child's representation when there is serious conflict with guardians in civil matters.

It is worth mentioning that article 37 and 40 of the CRC give details on access to justice for children in criminal matters while article 3(1) on the best interests of the child does not express clearly the administration of juvenile justice in civil matters. Fortunately, a number of scholars give their views on the understanding of the 'best interests of the child' principle and how it is applied to in Courts.

In this regard, T Hammarberg in his article 'Justice for children through the UN Convention' describes the triangular relationship between children, legal guardians and the authorities offered by the CRC. He explains the meaning of the best interests of the child. Yet, as he observes, these interests and the interests of the legal guardian do not necessarily coincide to the extent that some of the worst abuses perpetrated against children take place behind family

³⁴ Schetzer & Handerson (n 5 above) 33.

³⁵ KY Yeboa 'The civil rights and obligations of the child' in HJAN Mensa-Bonsu & C Dowuona-Hammond (eds) *The rights of the child in Ghana-Perspectives* (1994) 66. The child has in general one family, a nuclear family composed by father, mother, and sisters and brothers if any. The child can also acquire in addition to or lack of nuclear family, another or other families in case of guardianship including adoption.

doors as also mentioned by Hammarberg.³⁶ The author points out the concrete administration of juvenile justice in case of conflict between children and their legal guardians or other adults between the child.

Mower adds that the “inclusion of the best interests principle was an acknowledgment of the fact that, in all likelihood, there would be times when certain rights of the child would come into conflict with the rights, prerogatives, and responsibilities of parents or guardians and those of the state in ‘The Convention on the Rights of the Child: International Law Support for children’.”³⁷

Rose in her research report on ‘Land Rights in Post-War Rwanda: The Problem of Guardianship’ discusses the problems of guardianship in Rwanda during the period of 1994 post-genocide of Tutsi and post-war, especially related to orphans rights.³⁸ She assesses the Rwandan legal framework and points out the kinds of conflicts between children and their guardians and the children’s difficulties in accessing justice.

Despite the studies already conducted, no research on juvenile justice in civil matters has been conducted concerning the case of Rwanda which is particularly affected by a great number of minors under guardianship. This study purposes to highlight efficient legal remedies to address the issue. The legal proceedings in Courts concerning civil matters will be dealt with in this study. The comparison with criminal matters will be the principal focus of this study in order to draw attention to the existing model that could inspire future reforms.

³⁶ T Hammarberg ‘Justice for Children Through the UN Convention’ in S Asquith & M Hill (eds) *Justice for children* (1994) 59.

³⁷ AG Mower *The Convention on Rights of the Child: International Law Support for children* (1997) 24.

³⁸ LL Rose *Orphans Land Rights in Post-War Rwanda: The Problem of Guardianship* (2004) available at <<http://onlinelibrary.wiley.com/doi/10.1111/j.0012-155X.2005.00441>> (accessed on 02 September 2011).

1.5 Research methodology

The study is qualitative in nature and uses primarily desk or library research. A number of interviews will be conducted with selected persons including judges and lawyers. Internet research will be used as well.

1.6 Limitation of the study

This study is based mainly on the Rwandan legal system on administration of justice in civil matters in relation to minors. The author experienced some difficulties in gaining access to recent and interesting cases on the issue. In addition, it was difficult to get a general picture of children in need of legal representation in Rwanda because a number of conflicts between children and guardians happen mostly behind closed doors and are not recorded anywhere since they are resolved within families.

1.7 Overview of Chapters

The study will consist of four chapters:

The introductory and first chapter mainly sets down the objectives of the study, the research questions, the methodology and literature review.

The second chapter discusses theoretical foundations and conduct an assessment of the international legal framework as well as the domestic legal framework in Rwanda on the issue.

The third chapter reviews some Rwandan cases and discuss the problems and challenges to judicial protection of minors in civil matters in Rwanda.

The fourth chapter presents the conclusions and recommendations and proposals for the improvement of access to justice for minors in civil matters, taking into consideration the Rwandan context.

Chapter II

Theoretical foundations and legal framework on the rights of the child

2.1 Introduction

A child is an individual who possesses rights like other persons, but has a particular status due to his or her immaturity that renders the child vulnerable and limits his or her access to certain rights. For the full and harmonious development of his or her personality, a child has a right to grow up in a family environment, in an atmosphere of happiness, love and understanding³⁹ and this right must generally be ensured by the state without discrimination of any kind.⁴⁰ However, certain circumstances, including conflict situations tend to result in the denial of the child's rights, particularly his right to access justice and other civil matters. Juvenile justice is required to be administered in the best interests of the child in conformity with the existing legal framework established under international and national laws.

International human rights instruments ratified by Rwanda enjoy supremacy and prevalence over domestic law, with the exception of the constitution which is the supreme law of the nation. Rwanda has progressively incorporated a number of international human rights instruments by ratification. However, due to the lack of clarity in certain treaties with regard to principles such as the best interests of the child, the child's right to express views and the right to be heard, there has not been an adequate reflection of these important principles in the national laws related to juvenile justice in civil matters.

The 1994 Rwanda genocide against the Tutsis dramatically increased the number of children deprived of a family environment and who are in need of special protection. This chapter seeks to discuss the issues relating to guardianship in Rwanda and the existing legal framework providing access to justice for children under guardianship.

³⁹ See the preamble of the CRC, para 7 and principle 6 of the Declaration of the Rights of the Child. See also GV Bueren *International Documents on Children* (1998) 7.

⁴⁰ See art 2 of the CRC.

2.2 Defining a child

Generally, a child means 'an immediate descendant, one's natural child and does not include a grandchild or a nephew'.⁴¹ In this context, a person's offspring remains a child in his or her eyes, no matter the age of the child. According to international instruments such as the CRC and the ACRWC, a child is 'every human being below the age of 18 years'.⁴²

However, the CRC gives a margin of flexibility to the state parties concerning the age of the child by adding that 'unless under the law applicable to the child, majority is attained earlier.'⁴³ Thus, depending upon the context in which it is applied⁴⁴ and the purpose, different national laws or statutes assign different meanings and age limits to the word 'child'. The 2003 Rwandan Constitution is silent on the meaning of "child" and assigns the task of defining the term to national and international laws.⁴⁵ A review of the relevant domestic legislation reveals that the term 'child' is defined differently depending on the purpose and context.

A number of laws in Rwanda fix the age of a child to below 18 years. These include: The Rwandan Child Law⁴⁶, Rwandan Labour Law⁴⁷, Law No 59/2008 of 10/09/2008 on prevention and punishment of gender-based violence (GBV Law)⁴⁸, OL No 30/2008 of 25/07/2008 relating

⁴¹ See *Impraim v. Baffoe* (1980) GLR 520. See also *Dorin v. Dorin* L.R.7 HL 568 cited by KY Yeboa 'The civil rights and obligations of the child' in HJAN Mensa-Bonsu and C Dowuona-Hammond (eds) *The rights of the child in Ghana-Perspectives* (1994) 66.

⁴² Art 1 of the CRC and art 2 of the ACRWC.

⁴³ Art 1 of the CRC.

⁴⁴ See A Quartey 'Opening remarks' in HJAN Mensa-Bonsu and C Dowuona-Hammond (eds) *The rights of the child in Ghana-Perspectives* (1994) v.

⁴⁵ Article 28 of the 2003 Rwandan Constitution states that 'Every child is entitled to special measures of protection by his/her family, society and the State that are necessary, depending on the status of the child, under national and international law.'

⁴⁶ Art 1.

⁴⁷ Art 4.

⁴⁸ Art 1.

to Rwandan nationality⁴⁹ and the Decree-law No 21/77 of 18/08/1977 relating to Criminal Code⁵⁰.

However, the Rwandan Civil Code Book 1 provides that a minor is an individual who has not yet attained the age of 21 years.⁵¹ The same Code confirms that civil majority is attained at 21 years of age and stipulates that at that age, an individual has capacity to perform all actions of civil life, except for those determined by law.⁵² Instituting legal proceedings in civil matters is a civil action which shall therefore be performed normally from the age of 21 years. In determining the age of the child, the legislature does not appear to take into account the best interests of the child, since it can be seen that in some cases the rights of the child are impeded by the statutory age. The typical example is the fixing of the age of 21 as the age at which a child can take a complaint to court without representation.

A uniform age of majority was recommended by the Committee on the Rights of the Child in the second periodic report of Rwanda (CRC/C/70/Add.22) at its 953rd and 954th meetings. The committee was ‘concerned about possible discrepancies between the minimum age for employment and the age limit for compulsory education, despite the fact that legislation sets the minimum age at 18.’ The Committee further recommended that Rwanda as a state party should enact new laws aimed at harmonizing the minimum age for employment and compulsory education.⁵³ The Government of Rwanda, through its Ministry of Gender and Family Promotion (MIGEPROF) recognized the discrepancy and promised to take steps to harmonise the minimum age in the ongoing legislative reform.⁵⁴ The general trend that can be drawn from the above provisions is set the age below 18 years.

⁴⁹ Art 4.

⁵⁰ Art 77.

⁵¹ Art 360.

⁵² Art 431.

⁵³ UN Doc CRC/C/15/Add.234 (2004) paras 21 and 22.

⁵⁴ UN Doc.CRC/C/RWA/3-4 (2011).

2.3 General principles of child's rights: Focus on the best interests of the child

Four complementary general principles are recognised as constituting the basis of the promotion and protection of child's rights. All those principles are interconnected and have the same purpose, which is, to uphold the welfare of the child.

2.3.1 The right to non-discrimination

This principle is guaranteed by article 2 of the CRC, which states that:

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

'The Convention attempts to deal not only with the general problem of the priority to be given to the child's needs and concerns but also with one associated with it – the discrimination practiced by those who decide which needs and concerns are to be dealt with'.⁵⁵

It is important to note that the CRC recognises the need for special treatment of children who have been deprived of their family environment.⁵⁶ The 2003 Rwandan Constitution recognises special measures for every child, depending on his or her status, under national and international law.⁵⁷ On the basis of the child's status, as an orphan or as a child under guardianship, the law recognises certain special needs of the child. One of the special measures

⁵⁵ AG Mower *The Convention on the Rights of the Child: International Law Support for Children* (1997) 24.

⁵⁶ AG Mower *The Convention on the Rights of the Child: International Law Support for Children* (1997) 25. See also art 20 of the CRC.

⁵⁷ See art 28 of the 2003 Rwandan Constitution.

a child under guardianship needs is the facilitation and enhancement of his or her access to justice in case of need. In reality however, especially in civil matters, children under guardianship face great difficulties and impediments to their access to justice.

2.3.2 The best interests of the child

The principle of 'best interests of the child' is emphasised in almost all international human rights treaties relating to the child, such as in article 3 of the CRC and in article 4 of the ACRWC. On the national level, the principle of 'best interests of the child' is expressed in article 9 of the Rwandan Child Law,⁵⁸ which stipulates that:

The child's interests must be taken into account before any decision concerning him or her is made. It is a right for the child to express his or her opinion on any matter regarding him or her. It is necessary to hear from the child prior to making any decision concerning him or her regarding administrative and judiciary matters whether directly or indirectly through his or her representative.

However, the principle of 'best interests of the child' has been described as vague, indeterminate and susceptible to biased interpretation by decision-makers.⁵⁹ It has been observed that even when deciding cases, though the court's prime consideration is the welfare of the child, it sometimes considers first the supreme interest of the State and tends to subvert the welfare of the child to the supreme interest of public morality where the two are raised.⁶⁰

The inclusion of the 'best interests of the child' principle was an acknowledgment of the fact that there would probably be times when some child's rights would come into conflict with the rights and responsibilities of parents or guardians and with those of the state.⁶¹ This can be illustrated by the case of *Rutayisire v Tuyishime* in Nyarugenge Intermediate Court⁶². The case is

⁵⁸ Art 9 of the Rwandan Child Law.

⁵⁹ A Barratt 'The best interest of the child'- Where is the child's voice? in S Burman *The fate of the child: Legal decisions on children in the new South Africa* (2003) 145.

⁶⁰ WE Offei *Family Law in Ghana* (1998) 330.

⁶¹ AG Mower *The Convention on the Rights of the Child: International Law Support for Children* (1997) 24.

⁶² Case No RCA 0027/10/TGI/NYGE, decided on 15/03/2011 of *Rutayisire v. Tuyishime*.

an appeal against the decision made by Nyarugenge Primary Court⁶³ concerning a situation where Rutayisire made a will but excluded one of his children, Tuyishime for the only reason that Tuyishime during her youth misbehaved and disobeyed her parents. The Nyarugenge Primary Court had decided that the fact of chasing Tuyishime from home by her parents and excluding her from the benefit of the will of her parents while she was still a minor⁶⁴ constituted a violation of her rights as a child and should be rehabilitated. The Court of Appeal found that the parent was not allowed to decide alone the exclusion of the child without the consent of council of the family and confirmed the primary court decision.

Nevertheless this idea of the vagueness of the concept has been challenged by the “best interests” test. The so called statutes of Minnesota highlight the factors that should be considered by Courts or Legislature in making best interests of the child determination. Among the 13 factors mentioned by the so-called statutes, a few of them need to be underlined: the reasonable preference of the child if the court deems the child to be of sufficient age to express a preference; the child’s adjustment to home, school, and community; the child’s caretaker; the intimacy relationship between the parent and the child; and the child’s cultural background. ⁶⁵

‘The ‘best interests of the child’ is identified as the criterion against which a State Party has to measure all aspects of its law and policy regarding children.’⁶⁶ The best interests of the child should inspire lawmakers when they are drafting laws or suggesting legal reform. In this regards, it is important in Rwanda to note that lack of decision or initiative to reform laws is inconsistent with the best interests of the child concerning access to justice which infringes on the rights of the child.

Indeed, traditional guardianship has been illegally applied in Rwanda, especially during the post-1994 genocide period, which saw a huge number of genocide and HIV/AIDS orphans,

⁶³ Case No RC 0640/09/TB/NYG of *Tuyishime v. Rutayisire*, decided on 19/02/2010 by the Nyarugenge Primary Court.

⁶⁴ At the time when Tuyishime sued her parents in court she was adult and a student in University and she was represented by Me Mbonyimpaye, an advocate.

⁶⁵ AI Schepard *Children, Courts, and Custody: Interdisciplinary Models for Divorcing Families* (2004) 163.

⁶⁶ CJ Davel, Introduction to child law in South Africa, 219.

in need of legal assistance in civil matters. When there is conflict, an individual who is under 21 years age is not allowed to introduce a complaint in courts because of lack of capacity.

It could be argued that civil matters concern individuals. However, the matter implies children whose capacity of action is limited or does not exist according to state law and international commitments⁶⁷. Children are vulnerable and have to be protected by the state. The latter is more involved in the protection of the rights of vulnerable children such as orphans and other vulnerable children (OVCs). The principle of 'best interests of the child' binds the state in all matters concerning the child, and in particular civil matters where the state is implicated (where guardianship is ensured by the state, or where violations of the child's rights are caused by state agents or by guardians or where legal guardians *ad litem* are offered by the state). The 2003 Rwandan Constitution shows the State's commitment to the protection of the child in article 28 mentioned above. Thus in civil matters the best interests of the child must be paramount. When it comes to the representation of the child, the state is immediately involved. Thus, where there is a lack of facilities, it is the state's responsibility to provide appropriate ones, and when a child wants to institute legal proceedings, the presence of the state is sometimes unavoidable.

2.3.3 The right to life, survival and development

The right to life is the most fundamental to all people, including children because all other rights derive from it. This right is recognised by article 6 of the CRC and article 5 of ACRWC as inherent. The same provisions express the right to survival and development of the child. There is a clear link between the right to life and the right to survival of the child. On national level, as special protection for children, the death sentence shall not be pronounced for crimes committed by children.⁶⁸ This right is also guaranteed to child by the Rwandan Child Law which obliges the persons responsible for child to respect his or her rights in terms of welfare including good living conditions, healthcare and education so as to allow the child to develop

⁶⁷ Rwanda has ratified international treaties related to child's rights.

⁶⁸According to art 77 of the Decree-law No 21/77 of 18/08/1977 relating to Penal Code (Rwandan Penal Code).

physically, in his or her thinking ability, intellectually and culturally and in life in general.⁶⁹ However, the same provision states that the respect of those rights depends on the actions of the persons responsible of the child.

2.3.4 Right to express views and to be heard

The right of the child to express his or her views and to be heard is expressed in article 12 of the CRC and reaffirmed by article 9 of the Rwandan Child Law. This right also applies to the obligation of State parties to the CRC to ensure that the views of the child are given due weight in accordance with the age and maturity of the child.⁷⁰ One tool to ensure enjoyment and respect of this right of the child is the obligation to provide the child with the opportunity to be heard in any judicial and administrative proceedings affecting the child.⁷¹

It is important to categorise children according to their ages. Some of them should not be allowed to express their views in court because they are considered as not being sufficiently mature, while others, by virtue of their age and maturity, should be heard in court, not only in criminal matters as it is, but also in civil matters. In the case of *Rutayisire v. Tuyishime* above mentioned, the latter was not allowed to institute legal proceedings and plead because she was still a minor when the problems occurred. She waited until she attained the majority to take the case to court and at the time of pleading, she was assisted by an advocate, not represented. This right could be only more effective for the children under guardianship if laws related to civil proceedings are modified in order to make the courts and judicial proceedings more accessible to children.

⁶⁹ Art 14 of the Rwandan Child Law.

⁷⁰ Art 12(1) of the CRC.

⁷¹ As above.

2.4 Orphans and guardianship

An orphan is simply defined as ‘a child who has lost one or both parents’⁷² and is qualified as one category of vulnerable children.⁷³ Guardianship is governed by the Family Law in Rwanda.⁷⁴ Guardianship is open to a minor, both of whose parents are deceased, absent or have disappeared, or who is otherwise deprived of parental authority.⁷⁵ It is also open to a child who has never been recognised by either a mother or a father.⁷⁶ Minors who cannot obtain guardianship become children in state care or in care of the institutions that receive them.⁷⁷

Basically, a guardian is chosen by the surviving parent of the minor.⁷⁸ If the surviving parent did not choose a guardian, one is chosen by a relative if the minor has one.⁷⁹ If the minor has many relatives, guardianship is entrusted to the next of kin relative.⁸⁰ If there are many next of kin relatives at the same level of relationship with the minor, the guardian is designated by the council of guardianship.⁸¹ The Court proceeds to designate a guardian if the minor does not have any parent, any designated guardian or any relative.⁸²

The guardian of a minor whose parents are not known is designated by the Court.⁸³ In

⁷² See UN Doc.CRC/C/RWA/3-4 (2011) para 59 (September 2010) available at <<http://www.unohchr.org>>. (access on 27 September 2011). This report is to be examined by the Committee on the Rights of the Child. See also National Policy for Orphans and other Vulnerable Children (2003) 5.

⁷³ A vulnerable child is “a person under 18 years exposed to conditions, which do not permit him/her to fulfil her/his fundamental rights for her/his harmonious development”. National strategic Plan for orphans and others vulnerable children (2007-2011) 5.

⁷⁴ The Rwandan Civil Code Book 1.

⁷⁵ Art 361 of the Rwandan Civil Code Book 1.

⁷⁶ Art 361 of the Rwandan Civil Code Book 1.

⁷⁷ Art 401 and 402 of the Rwandan Civil Code Book 1.

⁷⁸ Art 364 of the Rwandan Civil Code Book 1.

⁷⁹ Art 364 of the Rwandan Civil Code Book 1.

⁸⁰ Art 364 of the Rwandan Civil Code Book 1.

⁸¹ Art 364 of the Rwandan Civil Code Book 1.

⁸² Art 365 of the Rwandan Civil Code Book 1.

⁸³ Art 366 of the Rwandan Civil Code Book 1.

the same manner, the Court proceeds to the designation of a guardian of the minor if the one who has been appointed had fallen under exclusion conditions or was duly⁸⁴ excused.⁸⁵

The following persons are prohibited to exercise guardianship or are excluded from being guardians: persons who have notorious misconduct and those whose management does not attest capacity or faithfulness.⁸⁶The Court designates an institution which exercises guardianship on behalf of the state.⁸⁷ In addition, an annual budget is allocated to the education and maintenance of state's wards.⁸⁸

A guardian has different duties, amongst others, administration of minor's property in good faith and representation of the minor in all civil actions.⁸⁹ In some cases, a conflict could occur between the interests of the ward and of those of the guardian. The case is therefore examined by the council of guardianship⁹⁰ which can appoint an *ad hoc* guardian just for the purpose of representation of the minor in that particular case.⁹¹ Persons engaged in litigation with the minor are not entitled to serve as guardians.⁹² This implies that guardians who have cases in courts against the wards are not allowed to continue in the role of guardianship.

When the case is to be filed in courts, it is deemed to be easy for the guardian to fulfil all required conditions: quality, capacity and interest but not so for the minor who lacks capacity because of age. In the latter case, the child is required to apply for emancipation or to be represented by another person.⁹³ This is illustrated in the case decided by Nyarugenge

⁸⁴ Article 415 stipulates that the guardian can require to be exempted of guardianship's role if he or she has attained at least 60 years, if he is attacked by a serious infirmity duly justified or if he or she has become indigent.

⁸⁵ Art 366 of the Rwandan Civil Code Book 1.

⁸⁶ Art 417 of the Rwandan Civil Code Book 1.

⁸⁷ Art 402 of the Rwandan Civil Code Book 1.

⁸⁸ Art 406 of the Rwandan Civil Code Book 1.

⁸⁹ Art 387 of the Rwandan Civil Code Book 1.

⁹⁰ See art 367 of the Rwandan Civil Code Book 1. The council of guardianship is one among the four organs of guardianship. Apart from the council, other organs are: the guardian, the substitute guardian and the Tribunal.

⁹¹ Art 391 of Rwandan Civil Code Book 1.

⁹² Art 416 of the Rwandan Civil Code Book 1.

⁹³ Emancipation and representation are discussed in chapter 3.

Intermediate Court between Mbonyimbuga as Plaintiff v. Simpakana as Respondent⁹⁴. The case concerned a transfer or change of ownership of the house from the plaintiff to the respondent. Mbonyimbuga bought a house from Simpakana but the latter got the house without the title deed because it was still registered under the name of Sekwene. Sekwene was the late parent of Uwizeyimana, Aduhineza, Isabane and Uwiringiyimana. Before his death, Sekwene has bequeathed his property to his children and Simpakana had been nominated as the guardian of the children from 25 May 1999.⁹⁵ During the same year and while children were still minors, he bought the house from the children, despite the fact that he was their guardian and sold it to Mbonyimbuga. Simpakana told the court that the contract made between him and Mbonyimbuga was valid and asked the court to order the transfer of the title deed. However with the intervention of the children represented by one of them who had attained the majority age, the court found that the contract was totally void because among other reasons, the children were still minors and did not have capacity to initiate a civil action. The court ordered that the house stay the property of Sekwene's children.

It must be highlighted first of all, that Simpakana was the guardian of the children and the source of the conflict of the contract was his act of buying the house from the children and selling it to another person. Secondly, it must be noted that from 1999 when the problem occurred, the case could not be brought before the court until one of the children Uwiringiyimana, the eldest attained the majority age. Upon attaining majority he was able to initiate the case before the court in the name of all the other children. Thirdly, the fact that before the court the plaintiff was represented by an advocate, while the children were represented by their elder sister, Uwiringiyimana, must also be noted. It could be inferred that they were not able to pay the services of an advocate.

Due to the post-genocide situation of orphans in Rwanda, a practice of traditional guardianship was developed which involved placing children in families, especially the families of the child's relatives. As mentioned previously, potential conflict of interest could

⁹⁴ Mbonyimbuga and Simpakana Case RC 0324/10/TGI/NYGE as decided by The Intermediate Court of Nyarugenge on 30 March 2011.

⁹⁵ It is important to note that Simpakana was the brother of the late Sekwene and obviously the uncle of the listed children.

arise between the interests of the relatives (guardians) and those of the orphans whose rights they were supposed to be protecting.⁹⁶

2.5 Legal Framework on the Rights of the Child

The legal framework in Rwanda consists of international and national laws.

2.5.1 The Status of International Human Rights Treaties in Rwandan Domestic Legal System

Rwanda is party to almost all the major human rights treaties at the United Nations (UN) level⁹⁷ by way of either ratification or accession. At the African level, almost all human rights treaties have been ratified or accessed to by Rwanda. According to international law theory, the extent to which international human rights treaties have become part of a domestic legislation correlates with the place enjoyed by international law in that domestic legal system⁹⁸. With time, Rwandan law makers have gradually granted an important place to treaties or international instruments in the national legal framework.

⁹⁶ LL Rose Orphans' Land Rights in Post-War Rwanda: The Problem of Guardianship 2006. Available at <<http://www.crin.org/resources/infoDetail.asp?ID=8378>> (accessed on 2 September 2011).

⁹⁷ Rwanda has ratified or accessed to eight out of nine key international human rights instruments: ICCPR, CRC, International Convention on the Elimination of All forms of Racial Discrimination (CERD), International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CRMW) and Convention on the Rights of Persons with Disabilities (CRPD). The only major international treaty which has not yet been ratified is The International Convention on the Protection of All Persons from Enforced Disappearance.

⁹⁸ F Viljoen *International Human Rights Law in Africa* (2007) 530.

The commitment of Rwanda vis-à-vis the guarantee of human rights to its citizens is proved by the fact that of all previous constitutions, the current constitution⁹⁹ contains the most provisions on human rights and duties of the citizen as well as the duties of the State.

To maximize its effect at the national level, an international human rights treaty has to be incorporated in domestic law.¹⁰⁰ In this regard, Rwanda could be considered as a monist¹⁰¹ state, meaning that municipal courts have to apply directly international treaties ratified without any adoption of laws by the legislature.¹⁰²

In fact, the 2003 Rwandan Constitution grants an important place to the international human rights instruments. Article 190 states that:

Upon their publication in the official gazette, international treaties and agreements which have been conclusively adopted in accordance with the provisions of law shall be more binding than organic laws and ordinary laws except in the case of non compliance by one of the parties.¹⁰³

In conformity with this provision of the constitution, it is obvious that when ratified or accessed to by Rwanda, international treaties become an integral part of national legislation and can be directly applied in courts if they are 'self executing.'¹⁰⁴ Where they are not self-executing, legislative measures are required for implementation. However, in Rwanda, effective implementation of the treaty is impeded by the ignorance or negligence of different users, amongst others, judges, prosecutors, judicial defenders and administrative authorities.

⁹⁹ The 2003 Rwandan 2003 Constitution. See <<http://www.parliament.gov.rw>>.

¹⁰⁰ Viljoen (n 98 above) 22.

¹⁰¹ The monist theory means that international treaties and national laws are considered as manifestations of a single conception of law. See M Killander & H Adjolohoun 'International law and domestic human rights litigation in Africa: An Introduction' in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 5. Available at <<http://www.pulp.up.ac.za>> (accessed on 27 September 2011).

¹⁰² J Dugard *International: A South African perspective* (2005) 47.

¹⁰³ The word 'adopted' shall be understood as 'ratified' or 'acceded' in term of this study. In fact, in Kinyarwanda version of the constitution, the term 'yemejwe burundu' is equivalent to 'ratification' or 'accession' and not 'adoption'.

¹⁰⁴ A self executing treaty provision does not require legislation to make it individual rights of action while non-self-executing treaty provision does. See also Viljoen (n 98 above) 534.

Read together with article 200 of the same constitution,¹⁰⁵ it is obvious to situate human rights treaties ratified by Rwanda at the second place, after the constitution, within the Rwandan hierarchy of norms. In case there is inconsistency between the provisions of an international treaty and the constitution, the authorisation to ratify the treaty or agreement cannot be granted until the constitution is amended.¹⁰⁶ Concerning the rights of the child, the CRC is positioned at the same level as some other international human rights treaties¹⁰⁷ a particular place conferred by the 2003 Rwandan Constitution in its preamble.¹⁰⁸

2.5.2 International treaties on Juvenile Justice that have been ratified

As mentioned above, Rwanda has ratified or accessed to almost all the major multilateral treaties.¹⁰⁹ Some of these international treaties make provision for juvenile justice and deal with issues relating to adults and include special provisions on minors, especially those under guardianship. Article 12 of the CRC states as follows:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

¹⁰⁵ Art 200 of the Rwandan Constitution states that 'The Constitution is the supreme Law of the State. Any law, any act which is contrary to this Constitution shall be null and void.'

¹⁰⁶ Art 192 of the 2003 Rwandan Constitution.

¹⁰⁷ Those eight other international treaties are: the UN Charter, the Convention on the Prevention and Punishment of the Crime of Genocide, the UDHR, the CERD, the ICESCR, the ICCPR, the CEDAW and the ACHPR.

¹⁰⁸ See Preamble of the 2003 Rwandan constitution (para 9).

¹⁰⁹ In this study, multilateral and international have the same meaning. Eg. Regional treaties like the ACHPR as well as the ICCPR are multilateral or international treaties.

This provision opens a window to children who want to access justice in criminal and civil matters. Children can directly express their opinion in courts or be represented. Representation is provided by an appropriate body, *inter alia* bar, courts, parents, guardians, lawyers or other persons that have the capacity and interest in the case. However, article 12 is silent concerning the child's right to initiate cases or complaints in courts.

In addition, the right to be heard in judicial proceedings guaranteed by article 12 is itself limited. Indeed, children can only enjoy this right when it is consistent with the procedural rules of the national law. This is unfortunate because according to civil proceedings in Rwanda, children do not have the legal capacity to submit a complaint in courts. This capacity is acquired at the age of 21 years in civil matters.¹¹⁰

As previously mentioned, the question arises as to whether fixing of the age limit as 21 years is in the best interests of the child. In fact, the age in question was fixed in 1988, before the adoption of the CRC in 1989, which defines a child as 'every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.'¹¹¹

This implies that in any case other than when the majority is reached before 18 years, majority shall be considered as attained at 18 years. In Rwanda, the majority in civil matters is attained at 21 years except when the law determines exceptions according to article 431 of the Rwandan Civil Code Book 1.

Article 1 of the CRC read together with article 12 is consistent with article 431 mentioned above concerning the age of majority. The latter seems to be inconsistent with the provision of the ACRWC that defines a child as 'every human being below the age of 18 years'.¹¹² If it was the case, article 190 of the Rwandan Constitution would apply because international treaties have superiority over ordinary laws. Nevertheless, in similar vein with article 12 of the CRC, article 4(2) of the ACRWC concerning the best interests of the child states as follows:

In all judicial or administrative proceedings affecting a child who is capable of communicating his or her own views, an opportunity shall be provided for the views of the child to be heard

¹¹⁰ Art 431 of the Rwandan Civil Code Book 1.

¹¹¹ Art 1 of the CRC.

¹¹² Art 2 of the ACRWC.

either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law.

The child's right to access justice in civil matters depends largely on the existence of procedural laws in Rwanda or other state. A question could be posed as to how to address the problem when the existing procedural rules and laws substantially and seriously impede the guarantee of the child's right to access justice and the principle of the best interests of the child.

In fact, both CRC and ACRWC repeatedly emphasise the principle of the best interests of the child in respectively article 3 and article 4(1). Article 3 the CRC states that:

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 4(1) of the ACRWC is stated as follows

In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.

The existing gap at international, regional and national levels concerning the issue of access to justice for minors in civil matters can be justified by many reasons.

First of all, at the international and regional¹¹³ levels, attention was less drawn to children involved in civil matters than to children in conflict with the law. In relation to children

¹¹³ Regional level in the context of this study means African level.

in conflict with the law, extensive provision has been made for the protection of the child before, during and after deprivation of liberty. The bias on the situation of a child in conflict with law is shown by the fact that the use of terms 'administration of juvenile justice' is attributed to those three kinds of situations involving children in criminal proceedings.

A typical example is articles 37 and 40 of the CRC and article 17 of the ACRWC which commonly oblige states to undertake to protect children alleged as, accused of, or recognized as having infringed the penal law. Thus, before deprivation of the liberty of children, the state shall in particular ensure that every child accused of infringing the penal law is presumed innocent until proven guilty according to law, to be informed of the charges against him or her, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence. The child is also entitled to have the matter determined as speedily as possible by an impartial tribunal and shall not be compelled to give testimony or confess guilt.

During deprivation of liberty, the child shall be treated with respect for the inherent dignity of the human person¹¹⁴. No child deprived of liberty shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment, he or she shall be separated from adults, shall have the right to prompt access to legal and other appropriate assistance¹¹⁵. After deprivation of liberty, article 17(3) of the ACRWC provides for reintegration into his or her family and social rehabilitation shall be envisaged.

Another reason is that at the national level, law makers in good faith are often inspired and guided by international laws and standards in the drafting of legislation. As said before, the above mentioned Rwandan Civil Code Book 1 which governs family law was established before the adoption of the CRC as well as the ACRWC. In addition, laws drafted after the adoption of the CRC and ACRWC, although inspired by them, failed to reflect the minimum rights guaranteed by those treaties.

The sudden Rwandan post 1994 genocide, which left thousands of orphans, has thus resulted in a nightmare of double victimization of children under guardianship. Such children

¹¹⁴ Article 17 of the ACRWC is more specific to the child's matter and envisages special treatment in a manner consistent with the child's sense of dignity.

¹¹⁵ In Rwanda, a child is not allowed to plead without legal assistant. See also art 387 of the Rwandan Civil Code Book 1.

have been violently deprived of a family environment by the effects of genocide; and in addition suffer further because in some cases the guardians appointed for them get into conflict with the children, principally because they want to appropriate the property of the children, whose interests they are supposed to protect. This happens when the laws stipulate that children under guardianship shall be represented by the legal guardians¹¹⁶ and do not render easy proceedings of accessing justice for those children while in conflict with guardians¹¹⁷.

2.5.3 National legislation

National legislation touches different areas, including socio-economic, civil and political rights. As has been mentioned different definitions have been offered as to who is a child in Rwanda. After ratification of main international child's rights, instead of defining a child as a person under 21 years old, as in the Rwandan Civil Code Book 1, the predominant tendency is to define a child as a human being under 18 years as has been done for example by the Rwandan Child Law¹¹⁸ and the GBV Law¹¹⁹.

Within the scope of this study, it is preferable to only refer to some provisions related to the juvenile justice in civil matters. Indeed, the fact that the constitution provides that 'Every child is entitled to special measures of protection by his or her family, society and the State that are necessary, depending on the status of the child, under national and international law' constitutes a guarantee of recognition of child's rights by the Supreme Law.¹²⁰ The Child Law, the Rwandan Civil Code Book 1 and the Rwandan Bar Law are mainly the laws that contain provisions in connection with access to juvenile justice for minors in civil matters. Those provisions will be discussed in chapter 3.

¹¹⁶ See art 185 of Rwandan Criminal Procedure Code.

¹¹⁷ See Case RCAA 0073/06/CS of *Mukandera Judith v Nyinawumuntu and others* decided by the Supreme Court on 27 April 2007.

¹¹⁸ Art 1 of the Rwandan Child Law.

¹¹⁹ Art 1 of the GBV Law.

¹²⁰ Art 28 of the 2003 Rwandan Constitution.

Chapter 3

Access to justice for minors in Rwanda

3.1 Introduction

Access to justice is marked by many factors, depending on the context. It has been shown from the beginning of the study that there is a big gap between access to juvenile justice in criminal matters and access to juvenile justice in civil matters in Rwanda. The standards articulated in international treaties ratified by Rwanda concerning juvenile justice played an important role in the legal reform agenda of Rwanda.

The rights provided in these treaties have been incorporated in the different aspects of juvenile justice: before deprivation of liberty, during deprivation of liberty and after deprivation of liberty. In the same vein, the lack of clarity in these same treaties concerning the rights to be guaranteed to minors during civil procedures has had an impact on national legislation on this issue.

This uncertainty and lack of clarity exists which regard to: (i) legal representation for the institution of legal proceedings; (ii) legal representation during the pleadings; and (iii) execution of courts decisions. For the purposes of this study, it is important to highlight the gaps between the laws for the same individuals and show the impact on access to justice. It is also crucial to point out opportunities and challenges of the protection of the rights of the child and envisage modifications for the best interests of the child.

3.2 Criminal procedure and legal assistance

Even if the procedure determined by ordinary law is the one which is followed by specialised juvenile courts for children above the age of 12 and below 18 years¹²¹, some specific rights embodied in different legal texts are guaranteed to the child in conflict with law depending on the relevant procedures. During prosecution, amongst others, the minor has a right to be

¹²¹ Art 192 of the Rwandan Criminal Procedure Code.

defended by a counsel, either chosen by his or her guardians or by the prosecution.¹²² In fact, the law is clear on the fact that children ‘must’ be assisted, meaning that representation is compulsory. In this regard, due to the large number of pending criminal cases involving minors in courts lacking legal representation, a Legal Aid Week was organised jointly by Ministry of Justice (MINIJUST) and partners in 2009. As a result, 698 court cases were initiated during the week and 350 cases passed the first instance.¹²³ However, during the mentioned Legal Aid Week, any child has been represented in civil matters because the whole attention was focused on minors deprived of liberty.

Before taking any decision on minors’ cases, a judicial police officer or a public prosecutor has to collect all the evidence relating to the life conditions of the child, his or her education and school life and the manner in which he or she was brought up.¹²⁴ Depending on the results of this investigation, a public prosecutor shall order for medical examination, and, if necessary, psychological examination into the behaviour of the child and the child can be sent to a centre where his or her behaviour can be observed.¹²⁵ This is a very important step which shows the sensitivity of the authorities dealing with matters involving children. The judicial police officers and public prosecutors should have specific skills that allow them to conduct such investigations without endangering the right to privacy of the child.

On the basis of prior investigations, a prosecutor can decide to release the child, to hand him or her to a competent court or to send the child to a rehabilitation centre while awaiting a court decision.¹²⁶ As a consequence, the reports that the judicial police officer or a public prosecutor makes on the investigation should impact on all decisions, for example, the fact of minimising or maximising of sentences. This step of investigation on life conditions of the child in his or her environment should inspire proceedings in civil matters.

¹²² Art 185 of the Rwandan Criminal Procedure Code.

¹²³ Combined third and fourth periodic reports of Rwanda on the implementation of the Convention on the Rights of the Child (September 2010) para 181.

¹²⁴ Art 186 of the Rwandan Criminal Procedure Code.

¹²⁵ Art 186 of the Rwandan Criminal Procedure Code.

¹²⁶ Art 187 of the Rwandan Criminal Procedure Code.

Within ordinary courts, specialised juvenile chambers have been established to try children accused of offences.¹²⁷ After hearing from the child, witnesses, parents, guardians, the prosecution and defence counsel, specialised juvenile chambers decide on children's cases.¹²⁸ In addition to sentencing juvenile offenders, juvenile chambers have to ensure appropriate measures for the safety of children and support their supervision and education.¹²⁹

Specialised Juvenile Chambers can receive civil actions against the child or against the responsible person for paying damages and automatically appoint a counsel when the child and legal representatives seek to choose one.¹³⁰ By the term 'specialised', it can be understood that those chambers are only competent to hear specific issues. In this case, those chambers are specialised not in issues involving children in every matter, but only to try minors accused of criminal offences. Specialisation of chambers should mean that staff is also specialised in juvenile justice in criminal matters. In this regards, appointed Judges are specially trained¹³¹.

With specialisation of chambers, it is easy to separate minors' files from adults' ones. Collection and desegregation of data should normally have a positive impact on children's rights. For examples, if it appears that a large number of delinquents have been accused and convinced of a specific offence such as rape of small children, administrative and other measures should be taken for the prevention that crime in the society, either on the side of potential offenders or on the side of potential victims. Apart from the expediting of cases, it can also have an impact on the evaluation of judicial system in the field of juvenile justice.

This specialisation may inspire the idea of establishment of specialised chambers of minors in civil matters. When the perpetrator of crime or offence is aged between 14 years and

¹²⁷ See art 188 of the Rwandan Criminal Procedure Code. According to art 75 of the Law determining OFJC, only specialised juvenile chambers are competent to try children in the first instance.

¹²⁸ Art 189 of the Rwandan Criminal Procedure Code.

¹²⁹ Art 76 of Law determining OFJC, only specialised juvenile chambers are competent to try children in the first instance.

¹³⁰ Art 191 of the Rwandan Criminal Procedure Code.

¹³¹ Combined third and fourth periodic reports of Rwanda on the implementation of the Convention on the Rights of the Child (September 2010) para 180.

18 years, penalties are half reduced in comparison with sentences that an adult would receive.¹³² However, the absolute minority in criminal matters cannot go beyond 10 years old according to the Rwandan Criminal Procedure Code. In fact, the law articulates that¹³³ a child who is below the age of twelve (12) years cannot be detained in the custody meant for criminal suspects.

However for the purpose of investigation, a minor aged between 10 and 12 years can be detained by a judicial police officer for a period which cannot exceed forty-eight (48) hours but only when the offence he or she is suspected to have committed is punishable by at least five (5) years imprisonment.¹³⁴ Depending on the cases, juvenile chambers do not order only sentences, but can also order protection measures of the child, assistance, supervision or education if it deems it appropriate.¹³⁵

The Law governing Prisons in Rwanda¹³⁶ has been inspired by some international human rights instruments, among others the CRC particularly in its article 37.¹³⁷ According to this law, imprisoned minors aged between 14 to 18 years shall be especially assisted or supervised by competent employees.¹³⁸

Assistance reserved for minors is very important because they are deprived of the family environment. The idea of special assistance for minors in prisons should be emphasised for minors deprived from family environment during lawsuit in civil matters. In criminal matters, minors must be deemed to have at least minimum protection by the national legislation as well as international law especially when the provisions of the treaties are self-executing.¹³⁹

¹³² Art 77 of the Penal code.

¹³³ Art 184 of the Rwandan Criminal Procedure Code.

¹³⁴ Art 184 of the Rwandan Criminal Procedure Code.

¹³⁵ Art 190 of the Rwandan Criminal Procedure Code.

¹³⁶ Law No 38/2006 of 25/09/2006 establishing and determining the organisation of the National Prisons Service. See OG No special of 23 October 2006.(Prison Law)

¹³⁷ Other international instruments that inspired the Rwandan Law governing prisons are: the UDHR and the ICCPR. See the Preamble of the above mentioned Law.

¹³⁸ Art 24 of the Prison Law.

¹³⁹ E.g.: The provision provided by art 37(c) of the CRC concerning the fact that every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age.

3.3 Civil procedure and legal assistance

The main issues to be examined in relation to access to justice in this study are: legal representation for the institution of legal proceedings, legal representation during the pleading and execution of courts decisions.

3.3.1 Legal representation and the Institution of legal proceedings

A minor must be represented by an adult because the minor is prohibited from taking any of these three steps in a civil action by himself or herself. In civil procedure, the institution of legal proceedings can be considered as an opening stage or the starting point of gaining access to justice. In Rwanda, to institute legal proceedings requires three conditions relating to quality, interest and capacity.¹⁴⁰ If any one of these three conditions is lacking, the complaint is declared inadmissible by the court.¹⁴¹

It is only at the age of 21 years that a person attains the age of majority which allows him or her to perform all acts in relation to his or her civil life.¹⁴² Defined as an individual who has not yet attained the age of 21 years¹⁴³, a minor thus fulfils all conditions to institute legal proceedings, except capacity. However, the fact that he or she does not have the capacity in question does not imply that he loses the right to access justice because he or she can apply for emancipation or be represented by persons who are responsible for him or her¹⁴⁴, such as parents and guardians.

Concerning emancipation, it is obtained by a minor who has already attained 18 years of age and on approbation of the parents¹⁴⁵ or the council of guardianship¹⁴⁶ if the minor is deprived of parents. For the particular case of a minor under guardianship, he or she is

¹⁴⁰ Art 2 of the Rwandan Law No 18/2004 of 20/6/2004 establishing code of civil, commercial, social and administrative procedure. See OG No Special bis of 30/07/2004. (Rwandan Civil Procedure Code).

¹⁴¹ Art 94 of the Rwandan Rwandan Civil Procedure Code.

¹⁴² Art 431 of the Rwandan Civil Code Book 1.

¹⁴³ Art 360 of the Rwandan Civil Code Book 1.

¹⁴⁴ See art 3 and art 27 of the CRC.

¹⁴⁵ Art 427 of the Rwandan Civil Code Book 1.

¹⁴⁶ Art 428 of the Rwandan Civil Code Book 1.

represented by guardians in all actions of civil life.¹⁴⁷ However, in most of the situations, even emancipated minors as well as guardians may need legal assistance by a counsel or advocate for the process of instituting legal proceedings. Unfortunately, it is not guaranteed that the parents, guardians or emancipated minors can afford the costs involved in instituting a lawsuit. In cases of insufficiency of resources, they apply for representation in the Bar.¹⁴⁸ This stage of instituting legal proceedings is reaffirmed and articulated in jurisprudence available from April 2007 which has been recommended to be followed by the Rwandan courts.¹⁴⁹

Jurisprudence on the institution of legal proceedings

On 27 July 2007, the President of the Supreme Court¹⁵⁰ wrote to all Presidents of Intermediate and Primary Courts. The subject of the communication was the following: directive about how minors can initiate legal proceedings and how legal proceedings can be instituted against minors. Following a request from an advocate Ntamwera Denyse concerning the lack of common understanding about the procedure followed when a minor wants to institute legal proceedings and when legal proceedings are initiated against him or her, the President of the Supreme Court gave directives concerning the issue. She further indicated that directives together with the case No RCAA 0073/06/CS decided by the Supreme Court on 27 April 2007 should constitute the guide when courts have to decide about similar cases.

The directives responded to the following questions: (i) the procedure to be followed when a minor wants to institute legal proceedings; (ii) the procedure to be followed when legal proceedings are instituted against a minor; (iii) the limits of the Clerks of Courts as to their attribution when a person needs to initiate proceedings. The first question is the most relevant

¹⁴⁷ Art 387 of the Rwandan Civil Code Book 1. According to article 361 of the Rwandan Civil Code Book 1, guardianship is open to a minor whose both parents deceased, absent, disappeared, deprived of parental authority or not recognised by any of his or her parents.

¹⁴⁸ Art 60 of the Law No 03/97 of 19/3/1997 establishing a Bar in Rwanda. See OG No 8 of 15/04/1997 (Rwanda Bar Law). See also art 72 of the Rwandan Civil Procedure Code.

¹⁴⁹ *Mukandera v Nyinawumuntu* case.

¹⁵⁰ In some countries, this authority is named Chief Justice.

for this study. The law provides the procedure to be followed when there is a cause of action in favour of the minor. The proceedings are instituted by the guardian of the minor on his or her behalf for the reason that he or she is the one who has *locus standi*. Otherwise the minor will request a particular authorization to be emancipated from the court. The person has *locus standi* if he or she can show that he or she has 'interest in the action, the quality and the capacity' to institute the action. If one of the elements is lacking the case will not be heard.

The Act instituting proceedings must mention the name of the plaintiff. The latter must fulfill the three requirements to legally bear the *locus standi*. Without the *locus standi* nobody can institute lawsuit proceedings in the court.

The President of the Supreme Court backed the opinion of the court using a case decided by the Supreme Court concerning the similar issue. The court declared the case inadmissible because the Act instituting proceedings mentioned the names of the minors as plaintiffs instead of mentioning the name of their guardian on their behalf. She concluded by indicating the case No RCAA 0073/069/CS decided by the Supreme court on 27 April 2007 as constituting the general guide or jurisprudence when the courts have to decide similar cases.

In fact, the case concerns the appeal against the case No 1024/R3/01/KGO decided by the Intermediate Court of Kibungo on 22 February 2005 and confirmed by the case in appeal No RCA 0006/05/HC/RWG decided by the High Court, Rwamagana Chamber on 02 November 2005.

In the case before the Intermediate Court, the Applicants were all the children of late Bahigi namely Nyinawumuntu, Bazubagira, Umuhoza Niyirema, and Uwimana represented by Mukarugwiza. They claimed the restitution of the property controlled by Mukandera Judith. They wanted the court to order Mukandera to relinquish the role of guardian to Nyinawumuntu Delphine who was designated later on 21 June 2004 as the guardian of her younger sisters. Mukandera Judith lost the case in Intermediate and High Court and appealed to the Supreme Court.

Before the Supreme Court, the Council for the Appellant disagreed with the decision of the High Court which did not consider article 361 and follows as well as article 387 of the Rwandan Civil Code Book 1 according to which the *locus standi* is vested in the guardian not in

minors themselves. The Council of the Respondents explained to the court that after the death of the Respondents' parents during the genocide, the Appellant (Mukandera Judith) who kept the properties of the late couple did not relinquish them to Mukarurema, the sister of late Gahigi who had been appointed the guardian of wards by the court. The council of the plaintiffs further explained to the court that the case was brought to court by Mukarurema because the children under guardianship were still minors. However, their names had been mentioned as plaintiffs because they were the real plaintiffs (the initiators of the case) despite the lack of *locus standi*.

The court, considering that the majority age is 21 years old according to article 360 of the Rwandan Civil Code Book 1; having considered that instituting a lawsuit is one of the restrictions with regard to minors because he or she lacks *locus standi*; considering that the proceedings are initiated by the guardian according to article 387 of the Rwandan Civil Code Book 1; considering that in the Act instituting proceedings the names of the Plaintiffs were Nyinawumuntu, Bazubagira, Umuhoza Niyirema, and Uwimana instead of their guardian; declared void both decisions taken by the Intermediate Court of Kibungo and the decision taken by the High Court, Rwamagana Chamber which decided the case despite that it was inadmissible. This does not prevent the parties from re-instituting the legal proceedings according to due process.

3.3.2 Legal representation in pleading and execution of judgements

Upon the institution of legal proceedings, a complaint can be admitted or rejected. In the first case, there is no possibility of pleading. If the complaint is admitted, adversaries are allowed to plead. The Rwandan civil code does not establish any specific procedure or special chambers for cases involving children in civil matters like in criminal matters because the latter do not participate in the debates in general.

Persons who can plead include lawyers, parents, guardians and legal representatives.¹⁵¹ Minors are not allowed. However, the problem of violation of the right of the child to be heard

¹⁵¹ Art 50 of the Rwandan Bar Law.

can be settled if the President of the court orders a personal arraignment of the adversaries¹⁵² in court for the administration of justice¹⁵³, even for those who have no capacity.¹⁵⁴

Legal representation or legal assistance is done during the stage of pleading and execution of judgement. In contrast to criminal procedure which provides for investigations to be conducted by the judicial police to know the living conditions of the minor, to interfere even in his or her private life for his or her best interests; civil procedure does not provide for any special investigation related to the living conditions of the minors. In fact, investigations on the situation of the living conditions of the child are necessary in general for all cases, and especially in cases concerning conflicts between a minor and his or her guardian. The minor is more victimised when he or she has to stay in the same environment with the people with whom he has problems.

3.3.3 Impacts of Existing Legal Procedure on Access to Justice in Civil Matters

In general, the right to access justice is guaranteed by the international treaties ratified by Rwanda as well as the national law. However the implementation of the right is threatened by three main factors related to the institution of legal proceedings in courts. First of all, an individual who is a minor cannot institute legal proceedings because he or she lacks capacity. Compared to other fields such as criminal and labour law which fix the majority at 18 years as well as the CRC and the ACRWC, the age of 21 years as the age limit for the institution of legal proceedings appears not to be in the best interests of the child.

18 years has been adopted by lawmakers all over the world through international treaties and Rwandan laws as the age of majority, that is, the age at which an individual is considered to be sufficiently mature as to be totally responsible for his or her actions and to take

¹⁵² Three judges and two advocates interviewed on the phone on 30 September 2011 said that in practice, children do not say anything during pleadings. The president of the court normally does not ask anything to children. It is an absolute representation.

¹⁵³ Art 43 of the Rwandan Civil Procedure Code

¹⁵⁴ Art 44 of the Rwandan Civil Procedure Code.

important decisions in life. In exceptional cases, minors below the age of 21 years can apply for emancipation. However, on one hand it is not a favour for a minor under guardianship to get emancipation because it implies the end of guardianship. Emancipation is an exception, otherwise it is considered as a general need which implies modification of the law. However, emancipation could be beneficial to the minor where there is conflict between the minor and his or her guardians. In such case, the minor is treated as an adult because he or she can take any civil action and as a result is completely deprived of privileges of assistance that his or her peers are entitled to. The council of guardianship can appoint another guardian for the minor who gets into conflict with his or her guardian. Both the emancipated minor and the new guardian can be assisted or represented if necessary in courts. In the interests of the child, emancipation must be applied for only as a measure of last resort. In addition, it is not in the best interests of the child to be deprived of the right to express his or her views and to be heard, which is guaranteed by the CRC as well as national legislation.¹⁵⁵ Indeed, where a minor is represented in civil proceedings he or she is not allowed to say anything in court and all the minor's views are expressed through representatives.

Article 12(2) of the CRC states that a child shall be given the opportunity to be heard in any judicial and administrative proceedings in a manner consistent with the procedural rules of national law. This provision, read together with article 9 of the Rwandan Child Law,¹⁵⁶ is inconsistent with article 387 of the Rwandan Civil Code which provides that a guardian represents a minor in civil action and article 50 of the Rwandan Bar Law ¹⁵⁷ which renders mute the minor. Article 190 of the Rwandan constitution above mentioned is clear about the

¹⁵⁵ See art 12 of the CRC and art 9 of the Rwandan Child Law.

¹⁵⁶ Article 9 stipulates that the child's interests must be taken into account before any decision concerning him/her is made. It is a right for the child to express his/her opinion on any matter regarding him/her. It is necessary to hear from the child prior to making any decision concerning him/her regarding administrative and judiciary matters whether directly or indirectly through his/her representative.

¹⁵⁷ Art 50 of the Rwandan Bar Law provides that "Except as otherwise provided by law, only lawyers are entitled to plead before all jurisdictions. However, a party can postulate and plead by itself, his spouse, his parent or relation holding a written proxy and registered specially by the judge, his guardian or legal representative. Likewise, the state and other legal parties publicly entitled, could be represented by the agents duly mandated provided for in art 1 of this law."

hierarchy of norms in Rwanda. According to this provision, international treaties ratified by Rwanda are more binding than organic and ordinary laws. It is obvious that there is a need for harmonisation of national legislation concerning civil procedure in general and especially legal proceedings for implementation of human rights treaties ratified by Rwanda.

Secondly, legal representation is not compulsory in civil matters as it is in criminal matters. This is due to the fact that a minor is represented in civil matters. In fact, a civil matter is considered as a matter between adults who are mature enough to speak before the bench. The fact that there is no particular procedure for the civil matters involving minors proves that the principle of 'best interests of the child' is not emphasised in the juvenile justice in civil matters in Rwanda. As a result, the state cannot commit itself absolutely to ensuring representation by legal counsel for minors in all civil matters. As in all other civil matters, a legal representative who does not have sufficient means to pay an advocate shall apply and get one from the Bar. This application should be accompanied by proof of indigence, referred to as a 'certificate of indigence' which is provided by the local administrative authority. This certificate is given to people who are known as poor in the community. In matters involving children who still have parents it is easy for them to commit themselves to spend the money. However, guardians are reticent to use their personal money for the interest of the ward if it is not possible to recover it from the latter's property. Thus, if they cannot get the certificate in question, they can decide to stop procedures in courts. In case there is a conflict between the interests of the guardian and the interests of the child, the guardian is less likely to pay an advocate, especially when the guardian is not familiar with the child, but is just appointed for the purpose of representation in a particular case.

Finally, the complicated procedure that must be followed to institute legal proceedings and the fear of losing time during the period of pleading and the risk of being dismissed constitute significant impediments to accessing the various legal institutions and legal proceedings. The complexity of the procedure is illustrated by the above mentioned case RCAA 0073/06/CS of *Mukandera Judith v Nyinawumuntu and others*. If advocates and judges were not aware of the exact procedure to be followed in the institution of legal proceedings (until the President of the Supreme Court gave clarifications) anyone can imagine how difficult it could be for ordinary people without any assistance to institute legal proceedings. In addition, even if

the issue has been partly clarified by the president of the Supreme Court, the population at the grass root level is not informed about the procedure to be followed.

3.4 Critical analysis of opportunities and challenges to the protection of the rights of the child

Apart from the courts, there are other opportunities which should be relied on for the protection of the rights of the child, including policies, institutions, law reform, reporting and budget. A number of institutions which can deal with the issue of legal representation of minors in civil matters have been established, amongst others the National Commission for Human Rights (NCHR) and the Civil Society Organisations (CSOs).

To carry out the duty of ‘following up the protection of the rights of the child’ to be performed by the NCHR¹⁵⁸, a structure has been established known as Observatory of the Child’s Rights (OCR) which operates at three different administrative levels, namely at sector, district and national levels.¹⁵⁹ The OCR has the main functions of monitoring the respect of all policies and legal regulations related to children rights, collection of data on the situation of children’s rights respect, prevention of children’s rights violation and advocacy.¹⁶⁰ In conformity with article 4(3) of the law determining the organisation and functioning of the NCHR which attributes to it the duty of filing complaints,¹⁶¹ the latter pay advocates for minors in civil matters.¹⁶²

¹⁵⁸ Art 24 of the Rwandan Child Law.

¹⁵⁹ Booklet of NCHR, Observatory of the Child’s Rights.

¹⁶⁰ As above.

¹⁶¹ Art 4(3) of the law No 30/2007 of 06/07/2007 determining the organisation and functioning of the National Commission for Human Rights.

¹⁶² In the Appeal case *Karemera Pascal v Mukansanga Evelyne* No RCA 0045/08/HC/Kig against a ruling of the Intermediate Court of Gasabo at Ruhuha. Mukansanga was separated from Karemera after a period of an illegal conjugal union. The Intermediate Court of Gasabo had ruled in the case RC 0378/07/TGI/GSBO that the couple had to equally share the amount of the price after the sell of their commercial premises. In order to protect the interests of

Similar to the NCHR, Haguruka¹⁶³ plays an important role in the representation of minors in civil matters. As stated previously, the Bar Association contributes to the matter by appointing advocates to plead cases involving indigent persons on *pro bono* and *pro deo* basis, amongst other cases involving minors in civil matters.

The recent creation of the National Commission for Children (NCC)¹⁶⁴ offers a good opportunity for the identification of children under guardianship and the development of more efficient National Strategic Plan on Children and Other Vulnerable Children within MIGEPROF mechanisms for handling civil matters. The Access to Justice Bureau (AJB) See report of MIGEPROF to the CRC Committee operates in all 30 districts of the Country under the auspices of MINIJUST to give legal counsel to the population in need indistinctively criminal and civil matters.

A National Strategic Plan on Orphans and Other Vulnerable Children within MIGEPROF has been established from 2007-2011. Through the Strategic Plan, different activities have been planned and executed but none of them concern the legal representation of OVCs in civil matters. In fact, the Legal Aid Fund within MINIJUST does not take into consideration the issue of juvenile justice in civil matters. As raised by the National campaigns namely “Fata Umwana wese nk’uwawe” and “Marayika Murinzi”,¹⁶⁵ every child shall have a family.

It is obvious that the access to justice of minors must be enhanced especially in the area of civil matters and legal representation is one of critical remedies that have to be addressed. Even if some opportunities are pointed out to deal with the issue, the main challenge is the awareness of the issue of legal representation by lawmakers and decision makers. In this regard, there is the need for the development of specific policies, legislation and strategies governing legal representation of minors in civil cases in Rwanda, backed by adequate budgetary allocations to implement the various plans and strategies.

Karemera and Mukagasana, two minors born from that union the NCHR decided to pay a lawyer to represent them in court. See the non translated document *Activity Report of the NCHR 2009-2010* (2010) 95.

¹⁶³ Local Non Governmental Organisation for promotion and protection of women and child rights.

¹⁶⁴ See the Law No 22/2011 establishing the National Commission for Children and determining its mission, organisation and functioning.

¹⁶⁵ The campaign aimed at finding families for orphans.

Chapter 4

Conclusions and Recommendations

4.1 Conclusions

Rwanda is still living the aftermath of the genocide which happened in 1994. One of the consequences of the genocide is that Rwanda now has a large number of orphans, i.e., children who have lost either of one or both parents as well as all near relatives in some cases. The number of orphans has been greatly increased by the incidence of HIV/AIDS. In Rwanda as elsewhere in the world, it is recognised that children living in exceptionally difficult conditions need special consideration.¹⁶⁶ It must be noted that orphans as well as children deprived from family environment for any other reasons are often placed under guardianship in Rwanda.

Guardians represent their wards in all civil actions. However, due to miscellaneous reasons, minors under guardianship often come into conflict with their guardians on civil matters, which result in situations where the minors need to have direct access to the justice system. A number of factors have been pointed out in connection with legal representation that contributes to poor access to justice for minors in civil matters in Rwanda. By making a comparison between the regime governing legal assistance in civil matters and that governing criminal matters, it has been shown that the root cause of limited access to justice for minors in civil matters is the inadequacy of the current legal framework in Rwanda, which is in urgent need of reform. In this regard, a number of recommendations are formulated with reference to the different actors and stakeholders.

The child is an important member of the family as well as society.¹⁶⁷ Thus there is no society without laws governing and harmonising relationships between individuals and

¹⁶⁶ Preamble of the CRC.

¹⁶⁷ Article 27 of the 2003 Rwandan Constitution situates a child in the family which is recognized as the natural foundation of Rwandan society and ensures its protection by the State.

guaranteeing them rights. The effective enjoyment of rights must be preceded by the establishment of laws which binds all people and all institutions¹⁶⁸ within the state.

Applicable Rwandan legislation that has been examined includes *inter alia* the constitution, international treaties and national laws. Weaknesses have been pointed out concerning the existing legal framework in the specific era of 'access to justice' for minors in civil matters and particularly children under guardianship. As Rwanda has shown great commitment to the advancement of children's rights by ratifying almost all human rights instruments relating to child's rights, it is time to further harmonize the law by the enactment of national legislation which effectively takes into account the best interests of the child.

4.2 Recommendations

For the promotion of effective access to justice in civil matters for minors in general, and those under guardianship in particular, a number of recommendations have been made to be taken into consideration by different actors, institutions and stakeholders.

4.2.1 Government and national institutions

It is recommended that the government of Rwanda harmonises national laws with international and regional human rights treaties related to child's rights which it has ratified in order to effectively implement the treaties. National laws in the area of child's rights which contain contradictory provisions or which do not measure up to standards in ratified international and regional treaties should be modified or revised.

Lawmakers should take steps to avoid or minimise any factors that tend to impede the access to justice for children in civil matters, such as limitations in relation to age and criteria for legal representation and address the issue of the non-existence of specialised chambers for minors in civil matters. They should enact law governing civil procedure which comprises

¹⁶⁸ Art 201 of the 2003 Rwandan Constitution states that 'Ignorance of the law which has been duly published shall not be a defence.'

specific provisions on the juvenile justice. In this regard, the law should comprise provisions requiring investigations in civil cases before taking any decision. Those investigations should be conducted by judges who are specialised in child's rights. In the similar context, specialised chambers for minors should be provided for by a law related to organisation and competence of courts in Rwanda in order to have good data collection, avoid backlog of pending cases and to have specialised judges sensitive to child's problems.

Legislation on family law should fix the age of civil majority at 18 years instead of 21 years and state clearly that emancipation, which should be fixed at 16 years, must be a measure of last resort. Legal representation should be compulsorily provided by the Bar or any other competent organ when adversaries acting on behalf of the minor or emancipated minors have insufficient means to afford legal representation. Minors between the ages of 12 years and 18 years should have the right to be represented, assisted and to be heard in courts. It is recommended that even emancipated minors should be represented or assisted by a legal counsel in order to avoid an increase in cases of minors who lose protection for the only purpose of instituting legal proceedings.

The MIGEPROF which has children in its portfolio in collaboration with the NCHR, the NCC, Parliament, NGOs, Civil Society Organisations (CSOs) and other stakeholders interested in child's rights should collaborate and conduct a national inquiry aimed at the identification of all children under guardianship, monitoring of their living conditions in respective families and assessing children and guardians' needs, especially in the area of juvenile justice in civil matters.

The Supreme Court should collect data concerning decisions issued by courts and conduct a survey aimed at ascertaining the extent of minors' accessibility to justice, especially those under guardianship.

For the best interests of the child, institutions comprising the judicial system should play an active role to ensure that representatives of children are assisted or represented in courts. All pending cases in courts and execution of court decisions should be given priority.

There should be established a service within the court system which will provide counselling for children, parents and guardians when they have cases in court in order to avoid or minimise the negative impact on children under guardianship.

A national collaboration of all stakeholders from governmental and non-governmental institutions involved in upholding child rights must be established led by MIGEPROF to provide all necessary technical and financial assistance to defenders of child's rights in civil matters. The activities of the various agencies and institutions should be streamlined to avoid duplication.

Children under guardianship should be closely monitored through periodic visits by administrative local authorities of their areas, members of counsel of guardianship and MIGEPROF's staff in order to ensure the stability of the child in their respective families.

The Supreme Court in collaboration with MIGEPROF must undertake to sensitise the general public about the various procedures involved in instituting legal proceedings, pleadings and the execution of court decisions as well as provide education on the means of obtaining legal aid assistance.

The government should show greater commitment to the protection of children's rights by making adequate budgetary allocations for legal aid.

4.2.2 Public at large

The public at large should be sensitized about problems which arise in relation to the rights of children under guardianship and should be encouraged to report any breaches they may observe to local authorities.

4.2.3 Treaty bodies

Treaty bodies, especially the Committee on the Rights of the Child at the UN and AU levels should revisit and review the provisions of the CRC and ACRWC and make general comments on the principles relating to child's rights, especially the best interests of the child and the right of the child to give his or her views and be heard in all matters concerning him or her. They should review the guidelines concerning the reporting process and propose additional provisions relating to juvenile justice in civil matters.

4.2.4 Civil society organisations and international organisations

CSOs and NGOs should be more proactive concerning the provision of legal aid to children in civil matters, especially those under guardianship. They should draft thematic reports on the situation and living conditions of children under guardianship and make proposals for improvement to competent authorities. They should produce shadow reports to be submitted to treaty bodies.

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Bibliography

Books

Davel, CJ (ed) 2000 *Introduction to child law in South Africa* Western Cape: Juta.

Davis, SM; Scott, ES; Wadlington, W & Whitebread, CH (2004) *Children in the Legal System, Cases and Materials*, New York: Foundation Press.

Dugard, J (2005) *International: A South African perspective* Lansdowne: JUTA.

Mower, AG (1997) *The Convention on the Rights of the Child: International Law Support for Children*, London: Greenwood Press.

Offei, WE (1998) *Family Law in Ghana*, Accra: Sebewie Publishers.

Schabas, WA and Imbleau, M (1997) *Introduction to Rwandan Law* Cowansville: Les Editions Yvon Blais Inc.

Schepard, A I (2004) *Children, Courts, and Custody: Interdisciplinary Models for Divorcing Families* Cambridge: Cambridge University.

Viljoen, F (2007) *International Human Rights Law in Africa*, New York: Oxford University Press.

Chapters in Books

Barratt, A 'The best interest of the child'- Where is the child's voice? in Burman, S (2003) *The fate of the child: Legal decisions on children in the new South Africa*. Cape Tawn: Juta.

Doek, JE 'The CRC General Principles' in J Connors; Zematten, J and Panayotidis, A *18 Candles: The Convention on the Rights of the Child Reaches Majority* (2007) 33. Sion: Institut international des droits de l'enfant.

Hammarberg, T, 'Justice for Children Through the UN Convention' in Asquith, S and Hill, M (1994) *Justice for Children* London: Martinus Nijhoff Publishers.

Himonga, C., 'Children (minors)' in Du Bois, F (ed) (2007) *Wille's Principles of South African Law*, Cape Town: Juta & Co.

M Killander, M & Adjolohoun, H 'International law and domestic human rights litigation in Africa: An Introduction' in M Killander (ed) (2010) *International law and domestic human rights litigation in Africa* Pretoria: Pretoria University Law Press.

Quartey, A 'Opening remarks' in Mensa-Bonsu, HJAN and Dowuona-Hammond, C (eds) (1994) *The rights of the child in Ghana-Perspectives*.

Viljoen, F 'The African Charter on the Rights and Welfare of the Child' in Davel, CJ (ed) (2000) *Introduction to Child Law in South Africa* Lansdowne: Juta & Co, Ltd.

Yeboa, KY 'The civil rights and obligations of the child' in Mensa-Bonsu, HJAN & Dowuona-Hammond, C (1994) (eds) *The rights of the child in Ghana-Perspectives*

International instruments

African Charter on the Rights and welfare of the Child (1990).

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).

Convention on the Elimination of All Forms of Discrimination Against Women (1979).

Convention on the Prevention and Punishment of the Crime of Genocide (1948).

Convention on the Rights of Persons with Disabilities (2006).

Convention on the Rights of the Child (1989).

African Charter on Human and Peoples' Rights (1981).

International Convention on the Elimination of All forms of Racial Discrimination (1965).

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990).

International Covenant on Civil and Political Rights (1966).

International Covenant on Economic, Social and Cultural Rights (1966).

Universal Declaration of Human Rights (1948).

National legal instruments

Constitution of the Republic of Rwanda of 4 June 2003.

Law No 03/97 of 19/3/1997 establishing a Bar in Rwanda. (OG No 8 of 15/04/1997).

Law No 13/2004 of 17/5/2004 relating to the Code of Criminal Procedure.

Law No 13/2009 of 27/05/2009 regulating labour in Rwanda (OG No special of 27/05/2009)

Law No 18/2004 of 20/6/2004 establishing code of civil, commercial, social and administrative procedure. (OG No Special bis of 30/07/2004)

Law No 20/2006 of 22/04/2006 modifying and complementing the Law No 13/2004 of 17/5/2004 relating to the Code of Criminal Procedure, (OG special No of 27 May 2006)

Law No 27/2001 of 28/04/2001 relating to the rights and the protection of the child against violence.

Law No 38/2006 of 25/09/2006 establishing and determining the organisation of the National Prisons Service (OG No special of 23 October 2006).

Law No 42/1988 of 27/10/1988 relating to the preliminary title and Book I of the Civil Code.

Organic law No 51/2008 of 09/09/2008 determining organization, functioning and jurisdiction of courts. (Special No of 30/07/2004).

The Decree-law No 21/77 of 18/08/1977 relating to Penal Code.

The law No 30/2007 of 06/07/2007 determining the organisation and functioning of the National Commission for Human Rights.

The Law No 22/2011 establishing the National Commission for Children and determining its mission, organisation and functioning.

Documents

Observatory of the Child's Rights, National Commission for Human Rights.

Activity Report of the National Commission for Human Rights 2009-2010.

Strategic plan of action for orphans and other vulnerable children: 2007-2011 of the Ministry of Family and Gender Promotion (September 2007).

OAU Doc. CAB/LEG/24.9/49 (1990).

Rose, LL (2004) *Orphans Land Rights in Post-War Rwanda: The Problem of Guardianship*.

Schetzer, L & Handerson, J *Access to justice and legal needs: A project to identify legal needs, pathways and barriers for disadvantaged people in NSW* (2003) 5

UN Doc CRC/C/15/Add.234 (2004).

UN Doc. CRC/C/70 Add. 22 (2003).

UN Doc. HRI/GEN/1/Rev.9 (Vol. II) (2005).

UN Doc.CRC/C/RWA/3-4 (2011).

UN

Doc. CRC/C/15/Add.234 (2004).

General Comment No 6 (2005): UN Doc CRC/GC/2005/6 'Treatment of unaccompanied and separated children outside their country of origin' UN Committee on the Rights of the Child <<http://daccess-dds-y.un.org/doc/UNDOC/GEN/G05/438/05/PDF/G0543805.pdf?OpenElement>>.

Cases

Ghana

Impraim v. Baffoe (1980) GLR

Rwanda

Mbonyimbuga v Simpakana case RC 0324/10/TGI/NYGE as decided by the Intermediate Court of Nyarugenge on 30 March 2011.

Mukandera Judith v Nyinawumuntu and others Case RCAA 0073/06/CS of decided by the Supreme Court on 27 April 2007.

Rutayisire v Tuyishime Case No RCA 0027/10/TGI/NYGE, decided by the Intermediate Court of Nyarugenge on 15 March 2011.

Karemera Pascal v Mukansanga Evelyne Case No RC 0378/07/TGI/GSBO, decided by Intermediate Court of Gasabo at Ruhuha on 31 March 2009.

Websites

African Commission of Human and Peoples' Rights <<http://www.achpr.org>>.

Rwandan Ministry of Justice <<http://www.amategeko.net>>.

African Union <<http://www.au.int>>.

Haguruka asbl <<http://www.haguruka.org.rw>>.

Ministry of Gender and family Promotion <<http://www.migeprof.gov.rw>>.

Ministry of Justice <<http://www.minijust.gov.rw>>.

Rwanda Parliament <<http://www.rwandaparliament.gov.rw>>.

Office of the High Commissioner of Human Rights <<http://www.ohchr.org>>.

United Nations <<http://www.un.org>>.

<<http://onlinelibrary.wiley.com/doi/10.1111/j.0012-155X.2005.00441>>.

<www.lawfoundation.net.au/report/background>.