The impact of a child-rights approach to litigation on the realisation of the right to education of pregnant learners in Africa.

Submitted in partial fulfilment of the requirements of the master's degree Human Rights and Democratisation in Africa by

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Dedication

This work is dedicated to my parents, Callie and Lilla Muller.

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I would like to thank my supervisors, Professor Akonumbo and Professor Ann Skelton, for guiding me through this process and providing their tireless, expert opinion. I am grateful to Amy Tuchten who made this journey with me, to Anjuli Leila Maistry who is my consistent colleague and soundboard, and to Nadine Yango, my co-ordinator in Cameroon whose planning and support made this possible.

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CHAPTER 1

'I pleaded with them to allow me to take the exam, because I was mentally and physically prepared to take it.'

BS. Affected pregnant learner (WAVES v Sierra Leone)[1]

1 Background and context

A multitude of children are affected by child pregnancy across the African continent, which has the highest rate of learner pregnancy in the world.[2] In 2019 world adolescent pregnancy rates were at approximately 42 per 1000 adolescents globally. In Africa, however, 22 out of 54 African countries recorded more than 100 births per 1000 adolescents, with the highest at 165 in Mali.[3] The African Committee of Experts on the Rights and Welfare of the Child (ACERWC) has identified this issue as a priority on the continent.[4] Government responses to the crisis has consisted almost exclusively of merely removing children from schools.[5] This leads to a significant violation of their right to education. In response to these violations, lawyers and human rights organisations have resorted to the courts for remedy.[6] These cases are bound to have both short- and long-term effects on the extent to which children have enjoyment of their fundamental rights, but also on shaping the narratives, socio-political views and practices in the communities where children live. For this reason, it is important that those who embark on litigation on behalf of children are deliberate in applying a child-rights approach to the process of litigation.

There are approximately 600 million children on the African continent, constituting half of Africa's population,[7] and education affects every one of them. Yet, their involvement in, and contribution to, litigation regarding their right to education is often neglected. The opposite of this is the intentional inclusion of children, their views and their wishes in the conduct of litigation: a child-rights approach. To ensure effective solutions which make a real impact on the realisation of the right to education for pregnant learners, a child-rights approach should be followed by litigators, including active participation of rights-holders themselves. Litigation characterised by a child-rights approach is

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1 *Women Against Violence and Exploitation in Society (WAVES) v The Republic of Sierra Leone*, Suit ECW/CCJ/APP/22/18, ECOWAS Community Court of Justice (2019) Witness statement.

2 UNICEF 'Early childbearing' May 2021 https://data.unicef.org/topic/child-health/adolescent-health/ (accessed 17 October 2021).

3 World Bank *Adolescent fertility rate (births per 1,000 women ages 15-19)* 2019 https://data.worldbank.org/indicator/SP.ADO.TFRT (accessed 24 October 2021).

4 African Committee on the Rights and Welfare of the Child (23 November – 2 December 2020), Report on the 36th session, AU Doc ACERWC/RPT(XXXVI) (2020).

5 Human Rights Watch 'Tanzania: pregnant student ban harms thousands' 6 October 2021. https://www.hrw.org/news/2021/10/06/tanzania-pregnant-student-ban-harms-thousands (accessed 24 October 2021).

6 S Mahtani 'What do African courts say about banning pregnant girls from school?' 10 December 2019 https://www.africaportal.org/features/what-do-african-courts-say-about-banning-pregnant-girls-school/ (accessed 29 October 2021).

7 Worldometer 'Africa Population Live' 24 October 2021 https://www.worldometers.info/world-population/africa-population/ (accessed 24 October 2021).

important, because of the child's self-standing right to be heard and to express their views on matters which affect them.[8] The African Charter on the Rights and Welfare of the Child (ACRWC) places specific emphasis on the importance of this right during judicial proceedings in article 4(2):

> 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 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 the relevant law.

The ACRWC includes the phrase 'as a party to the proceedings' in the right to participation, which the UN Convention on the Rights of the Child (CRC) does not, making the right to participation stronger for the African context. In addition to the right to be heard, a child-rights approach is important to adjudicators' understanding of the essence of the barrier to rights, as well as the outcome that the affected persons would like to see realised. Children's rights cases, like all human rights cases, are complex and their outcomes have a profoundly personal effect on those involved. As such, the child's participation in litigation is a matter of dignity, agency and efficacy.

Several African court cases have recently emerged at regional and local level regarding the education rights of pregnant learners. Most recently, in 2019, the Economic Community of West African States (ECOWAS) Court of Justice handed down judgment against the Republic of Sierra Leone directing its government to retract a 2015 ban on pregnant learners attending school.[9] National courts such as the South African Constitutional Court have found that policies barring children from returning to school in the year they give birth are unconstitutional.[10] Similar cases are currently pending at the ACERWC,[11] and the African Court on Human and Peoples' Rights (African Court).[12] It is unclear whether a child-rights approach was employed at every stage of these cases, including development, active litigation and implementation. The effect of such an approach on the outcome of the case, successful implementation of the judgment and the long-term legal empowerment and mobilisation of the girl child is also undetermined. This dissertation argues that litigators need to ensure that all phases of the litigation is child-rights compliant. In a world where children are fighting to emerge from a purely protectionist conception of childhood, towards being perceived as individual rights holders with

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8 UN Convention on the Rights of the Child (1989) art 12; African Charter on the Rights and Welfare of the Child (1990) art 7.

9 *WAVES* (n 1).

10 *Department of Education Free State Province v Welkom High School and Another (Equal Education and Centre for Child Law as Amici Curiae)* 2014 (2) SA 228 (CC).

11 *Legal and Human Rights Centre and Centre for Reproductive Rights (on behalf of Tanzanian girls) v United Republic of Tanzania,* African Committee on the Rights and Welfare of the Child, Communication 0012/Com/001/2019 (2020).

12 *Tike Mwambipile & Equality Now v The United Republic of Tanzania,* Application 042/2020, African Court on Human and Peoples' Rights (outcome pending).

agency, the narrative shaped by the jurisprudential process both inside and outside the courtroom is critical to their future enjoyment of rights.

2 Problem statement

Strategic litigation for the achievement of education rights for pregnant learners in Africa has emerged at both national and regional level in recent years. While it is important that the narrative shaped by these cases reflect a child-rights approach, informed by sufficient child participation and consideration of their views, it is unclear to what extent this approach has been applied in the impact litigation on this subject so far. Research is lacking with regards to the theoretical content of a child-rights compliant approach to litigation as well as its application in African cases, and the effect that this approach or lack thereof has on children's long-term enjoyment of their rights.

3 Research questions

The main question the research seeks to answer is whether strategic litigation on pregnant learners in Africa has effectively applied a child-rights compliant approach. In order to answer that question the scope and content of, and the normative basis for, a child-rights compliant approach to strategic litigation will be explored. The research will seek to answer whether the cases before the African human rights system's judicial bodies are compliant with such an approach. The main research question is complemented by secondary questions: What is the effect of a child-rights approach to impact litigation on access to education for pregnant learners in Africa, and what can future litigators do to improve child-rights compliance to litigation?

4 Literature review

The literature available on child-rights compliant approaches to strategic litigation is scant. There is an emerging body of literature facilitated by Advancing Child Rights in Strategic Litigation (ACRiSL),[13] a network of academics and practitioners seeking to establish a model for child-rights compliant strategic litigation which involves children, by developing indicators for and outlining key features of strategic litigation practice and recording a database of existing cases which comply with these standards to a greater or lesser extent. They define child rights strategic litigation (CRSL) as 'litigation that seeks to bring about positive legal and social change in terms of children's enjoyment of their rights'.[14] The project has outlined four key aspects of CRSL which need to be compliant, namely the process which led up to the case; the way in which the case is developed during litigation; the remedy

13 Advancing Child Rights in Strategic Litigation (ACRiSL) https://www.acrisl.org/ (accessed 24 October 2021).

14 As above.

granted and the legal and social outcomes of the case.[15] The project has identified partners who are, or may, consider litigating on issues affecting children such as climate change and migration. This dissertation seeks to add to this body of work by extending the study to the CRSL on pregnant learners in Africa, which has not been covered before. The ACRiSL project and its work provides the foundations for an understanding of CRSL which is child-rights compliant and provides concrete factors and indicators which will be used in this study, particularly with regards to analysing the data collected from the participants.

Du Toit[16] provides a normative basis in international and South African domestic law for the child's right to participate in legal proceedings which affect them, in particular through the right to separate legal representation. Du Toit's contribution is confined to the South African context and is focused mostly on civil matters concerning children involved in their parents' divorce matters or in care and protection cases. She includes reference to a precedent setting South African case concerning the education rights of children with regards to their participation and legal representation.[17] She also provides a solid normative legal basis for the right to participation and a child-rights compliant approach in international law and fleshes out the developments in national law which gives content to these rights which is useful to this study.[18] In particular she finds that the South African Constitutional Court establishes an approach to litigation which honours the child's right to participation and respects the opinion, view and wishes of the child, in compliance with international law.[19] Her findings and recommendations are relevant to the development of a child-rights compliant approach to strategic litigation on the rights of pregnant learners which this study aims to achieve.

Kangaude et al provide an argument for a shift in legal narratives from the child as an innocent to the child as an agent.[20] Their work focusses mainly on the legal age for sexual consent; comprehensive sexuality education; and other issues which involve children's sexuality. It does touch on pregnant learners briefly but is limited to the philosophical basis for imagining the child as an individual with agency regarding their sexual and reproductive rights more generally.[21] Their work is useful to this study for the establishment of a normative basis for the shift in a protectionist approach to the legality of pregnant learners in school towards an approach which considers their wishes and views (agency), and the fulfilment of their rights, such as access to equal education and cultural, social,

15 Advancing Child Rights in Strategic Litigation (ACRiSL) 'Identifying Child Rights Strategic Litigation – A Guide' Available on file with the author (ACRiSL 2021).

16 C Du Toit 'Legal representation of children' in T Boezaart (ed) *Child Law in South Africa* (2018).

17 *Centre for Child Law v The Governing Body of Hoërskool Fochville* 2016 (2) SA 21 (SCA).

18 C Du Toit 'Legal representation of children' in Boezaart (n 15).

19 C Du Toit 'Legal representation of children' in Boezaart (n 15) 130.

20 GD Kangaude; D Bhana, D & AM Skelton 'Childhood sexuality in Africa: A child rights perspective' (2020) 20 *African Human Rights Law Journal* 688 at 692.

21 Kangaude et al (n 20) 690.

and economic rights which are invariably affected by policies which ban pregnant learners from school.[22]

Liefaard explores access to justice for children with a focus on child sensitive procedural rights and remedies.[23] According to Liefaard, child-friendly procedural rights are not yet sufficiently explored within the existing literature. He highlights the need for academia to step in and contribute to the meaning of access to justice for children.[24] He contributes by paving the way with a general contribution to the meaning of the right. This study builds on his writing by focussing specifically on strategic litigation for the rights of pregnant learners in Africa. He suggests that the development of standards in this field is encouraged by judicial interactions with children's rights, particularly the right to legal standing.[25] He recognises the need for child specific conceptualisation and contextualisation of the right to access to justice. He identifies two core requirements for effective access to justice for children, namely legal empowerment of children and the availability of child-friendly proceedings.[26] Liefaard supports an approach to access to justice which is wider than access to court and legal representation, but which encompasses an approach which is tailored to the needs of children.[27] This approach is supportive of the child-rights compliant approach which is investigated in this study. Access to justice includes judicial outcomes that are 'just and equitable'.[28] A child-rights approach to strategic litigation has just and equitable legal outcomes as one of its aims. Liefaard provides a comprehensive definition of access to justice for children which includes a remedy which also supports an outcome which facilitates greater equality, dignity, and legal empowerment.[29] These are integral elements of a child-rights compliant approach to strategic litigation. Crucial to this definition of access to justice is the principle that the remedy must be effective in a comprehensive sense. This study considers whether a child-rights compliant approach to strategic litigation makes remedies more effective, resulting in greater equality, dignity, and legal empowerment. Barriers to access to justice for children include specific challenges like lack of legal standing and the intimidating, exclusive nature of the judicial system. These child specific challenges create an increased duty on the legal representatives to ensure and design inclusion for children.[30] Liefaard places the child's right to be heard at the centre of access to justice. He acknowledges that being represented by a parent or other guardian is not in itself a barrier, but could be if sufficient care is not taken to ensure child participation

22 Kangaude et al (n 20) 699.

23 T Liefaard 'Access to justice for children: towards a specific research and implementation agenda' (2019) 27 *International journal of children's rights* 195 at 196.

24 Liefaard (n 23) 221.

25 Liefaard (n 23) 196.

26 Liefaard (n 23) 198.

27 As above.

28 Liefaard (n 23) 201.

29 n 23, 198.

30 Liefaard (n 23) 204.

and consideration of their ability to provide instructions in line with their evolving capacities.[31] This right is contained in the right to be heard in article 12 of the CRC. Liefaard also places emphasis on the need for legal representatives to be trained to facilitate child participation (particularly communication with children) as a legal standard, without which effective child participation cannot be achieved.[32]

The gap in the available literature is a theoretical analysis of the child-rights approach as it pertains to strategic litigation on the rights of pregnant learners in Africa. There is a need to analyse and critique the application of this approach (or lack thereof) in this field. Existing literature does not focus sufficiently on the procedural aspects of child rights within access to justice, nor does it provide enough guidance on a child-rights compliant approach to strategic litigation on issues that affect children.

5 Methodology

The research is essentially qualitative and will make use of both desktop and empirical data sources. The desktop research draws on legal primary sources, such as the Convention on the Rights of the Child; the African Charter on the Rights and Welfare of the Child; the general comments and the outcomes of complaint mechanisms adopted by the UN Committee on the Rights of the Child and the Committee of Experts on the Rights and Welfare of the Child is also examined. The study also considers the jurisprudence regarding the rights of pregnant learners from regional and national forums such as the ECOWAS Community Court of Justice; the African Committee on the Rights and Welfare of the Child (ACERWC), the African Court on Human and Peoples' Rights; and the Constitutional Court of South Africa. Secondary sources include journal articles, books, reports, and relevant internet sources.

In addition, the study uses data collected through interviews in the field as an additional primary source of data. Data has been collected through semi-structured online interviews with key informants. The key informants include legal representatives; adjudicators; and organisations who represented children in the cases. The analytical framework consists of a doctrinal and non-doctrinal approach involving content analysis.

6 Significance of research

The study has scientific and social importance to the field of child law as informed by child rights. The study seeks to contribute to the theoretical narratives which view children as social agents, whose views are crucial to the jurisprudence being created on their behalf. It seeks to contribute to the principle that applying a child-rights approach is not only a legal duty but is also beneficial to the

31 Liefaard (n 23) 206.

32 n 23, 210.

promotion of children's rights and for changing harmful and redundant social and cultural norms in the long term. The study also seeks to contribute to an understanding of the need for social mobilisation and client engagement in litigation and its likelihood to ensure that the litigation matches the needs and aspirations of those whose rights it seeks to promote, which should result in more effective outcomes through better enforcement and empowerment. In view of emerging literature on the subject, this study contributes to the research on the African context.

7 Scope

This study is a critique of strategic litigation as it has been applied to pregnant learners and young mothers who seek to return to school within the African human rights system. It does so by applying a child-rights approach to the litigation as identified in emerging scholarship. The study does not seek to address the content of educational rights or reproductive rights of children. Instead, the focus on pregnant learners is chosen because of its recent emergence in the African human rights system and its importance for a multitude of children and girls in Africa. The study is limited to a theorised contribution to the wider research on child-rights compliant strategic litigation. The empirical research is limited to interviews with a small group of respondents to acquire insight into the process beyond the court papers. The study does not seek to interview all involved parties, but selects respondents comprising of non-governmental (NGOs) organisations, adjudicators and legal representatives across three main cases.

8 Structure

The study is structured in five parts. The first chapter sets out the background, objectives, and methodology of the research. The second chapter establishes the theoretical basis for a child-rights compliant approach to strategic litigation in law and literature and provides a definition and scope to the approach. The third chapter homes in on the specific cases decided and pending before regional and subregional forums in the African human rights system, applying the child-rights compliant approach in a critique of the papers and the judgments. The fourth chapter summarises the results of the interviews conducted with key informants and provides an analysis of the level of child rights compliance adhered to. Finally, chapter five brings together findings and conclusions based on the research and makes recommendations.

CHAPTER 2

The normative basis for a child-rights compliant approach to strategic litigation.

2.1 Introduction

The development of child rights in international and domestic law has seen a slow but certain evolution from a paternalistic view of children with little or no agency, to an agentic view which sees children as individual rights holders who are entitled to demand enforcement of their rights, even independently of adults.[33] Today, the international legal texts as well as many domestic constitutions recognise the agentic conception of children.[34] Despite this official recognition, children across the world are not yet experiencing its full effect in their daily access to enjoyment of their rights.[35] Liefaard argues that this is due to a lack of understanding, and formulation into text, of the content and methodology of ensuring a child-rights approach to access to justice, and calls on academia to fill this gap.[36] This chapter establishes the definition and scope of a child-rights compliant approach to strategic litigation, and establishes a normative basis in law and literature, to set the stage for an analysis of its application in the strategic litigation on pregnant learners in Africa. In doing so this chapter considers the international, regional, and noteworthy domestic legal systems, as well as the available literature and case law to establish the definition and content of a child-rights compliant approach to strategic litigation.

2.2 Scope and definition of a child-rights compliant approach

Strategic litigation is one of the tools available to social change activists who make use of the courts to establish, enhance and accelerate access to fundamental rights. It is characterised by its intention to effect change beyond the parties directly involved, towards a sustainable and systematic solution to rights violations.[37]

Very little has been written on a child-rights compliant approach to strategic litigation, but recently a global movement has emerged from academia and legal practitioners to fill this gap and advocate for adherence. Advancing Child Rights in Strategic Litigation (ACRiSL) is a collaborative project which brings together academia and activism, research, and practice on the theme of a child-rights compliant approach to strategic litigation.[38] The project seeks to 'develop a model of strategic litigation

33 A Holzscheiter *Children's rights in international politics* (2010) 142.
34 U Kilkelly & T Liefaard 'Legal implementation of the UNCRC: lessons to be learned from the constitutional experience of South Africa' (2019) *De Jure Law Journal* 521 at 525.
35 As above.
36 n 23, 221.
37 AM Skelton 'Strategic litigation impacts: equal access to quality education' Open Society Foundations (2017) 13.
38 n 13.

that itself respects children's rights, as well as bringing cases and supporting other strategic litigators in their work'.[39] ACRiSL defines child rights strategic litigation (CRSL) as 'litigation that seeks to bring about positive change in terms of children's enjoyment of their rights.'[40] The project's main goals are to develop indicators which determine the extent to which litigation practice is consistent with the protection and promotion of children's rights; and to outline key features of a model of child-rights compliant CRSL.[41] In this ongoing process they have identified four aspects of the litigation process which need to be considered when determining if litigation complies with the CRSL approach. They include the process that led up to the case; the way in which the case is developed and shaped by child rights during litigation (this includes legal argument and litigator practice); the remedy granted; and the legal and extra-legal outcomes of the case.[42] When considering these aspects of the litigation process, ACRiSL proposes key questions regarding the identity of the litigators; and the objectives of the litigation.[43] Regarding the identity of the litigators, ACRiSL suggests that it is important to consider who initiated the litigation. CRSL is litigation initiated by a child or a group of children, an adult on behalf of a child; a human rights or litigation organisation; or a National Human Rights Institution or Ombudsman.[44] Not only is the identity of the litigator indicative of a CRSL approach, but also the objectives of the litigation.[45] According to ACRiSL the objectives of CRSL is broader than merely obtaining a remedy for an individual child. CRSL seeks an impact beyond the immediate parties. Such objectives include the advancement, promotion, and protection of child rights. It seeks to remove barriers to child rights and increase legal protection by development of the law, expansion of legal interpretation or application of laws, declarations of illegality of practice and interdicts to stop or take specific action.[46] CRSL seeks to affect social change and to provide solutions for systemic barriers to child rights. Lastly, CRSL seeks to achieve reparation and to hold duty bearers accountable.[47]

The definition as adopted by ACRiSL differentiates between child rights strategic litigation on the one hand and mere child rights jurisprudence or child law on the other.[48] Like Liefaard, they emphasise that the existence and development of child law does not automatically lead to access to justice which promotes and protects child rights.[49] Beyond the content of child law, there is need for the development of specific approaches to children's access to justice. For instance, according to Liefaard, children's access to justice must lead to the legal empowerment of children and include

39 ACRiSL (n 13).
40 As above.
41 ACRiSL (n 15).
42 As above.
43 As above.
44 As above.
45 As above.
46 As above.
47 As above.
48 As above.
49 n 23, 204.

mechanisms which are child sensitive.[50] This implies that access to justice is both a substantive and a procedural right. There is a difference between litigation which focusses on the needs of the child, and litigation which is informed by child rights. Where child law is mainly concerned with the substantive nature of child rights, a CRSL approach gives equal consideration to procedural aspects which ensure the protection and promotion of child rights by ensuring accessibility for children in all aspects of the litigation process.[51] The procedural aspect of children's access to justice includes specific approaches to making litigation child-friendly in three important aspects, according to Liefaard. These include guaranteeing child-friendly information, child participation, and child-friendly remedies.[52] These elements do not manifest automatically as a result of the existence of child law, but require deliberate procedural intervention by legal representatives, adjudicators and adults representing the child. These specific approaches include ensuring that children can express themselves freely in an environment which is not intimidating, based on sufficient information. In this regard lawyers should be knowledgeable on effective communication with children and the involvement of parents and guardians as key intermediaries.[53] The procedural aspect of children's access to justice must crucially give due weight to the input provided by children, which includes providing feedback to children on how and why their input has been incorporated (or not) into the decision of the adjudicators.[54] A child-rights compliant approach to strategic litigation must go beyond advancing the substantive child rights, to include development and inclusion of child-friendly procedure.[55] Only in this way can an outcome which promotes and protects children's enjoyment of rights, and their legal empowerment be achieved.

2.3 Basis for moving from a protective approach to a child-rights approach

The motivation behind policies which keep pregnant learners out of school seems to stem from the responsible adults' or states' perceived duty to protect learners from premature exposure to adult affairs, in this case sex and sexuality. This approach to child law originates from what Holzscheiter terms the 'innocent child' conception of childhood.[56] She identifies four main conceptions of childhood which inform legal and policy responses to issues affecting children as can be deduced from the UN Convention on the Rights of the Child. They are the unruly child (who needs to be assisted and guided);[57] the immanent child (who needs to be prepared for adulthood),[58] the innocent child (whose

50 n 23, 204.
51 ACRiSL (n 15).
52 Liefaard (n 23) 219.
53 Liefaard (n 23) 217.
54 Liefaard (n 23) 219.
55 Trynie Boezaart 'General principles' in C J Davel & A M Skelton *Commentary on the Children's Act* (Revision Service 6, 2013) 2.
56 n 33, 102.
57 Holzscheiter (n 33) 101.
58 Holzscheiter (n 33) 102.

innocence must be preserved); and the evolving / agentic child (who can form and express views which must be considered).[59]

The innocent child conception of childhood conceives of the child as pure and blissful, because they are yet untainted by the adult world. If one perceives the child mainly from this point of view, the response is to protect such innocence by preventing exposure to things and experiences which are perceived to belong to the adult world.[60] In the present case the violating element is sexuality and therefor means removing all evidence that children might be sexually active (pregnancy) whether with or without their consent. Indeed, the innocent child conception of childhood perceives the child as being incapable of consenting to sexual acts whatsoever and condemns childhood sexuality as unnatural.[61] In the case against Sierra Leone the applicants averred that pregnant girls were asked to stop attending school when their pregnancies became visible so as 'not to mingle with other students and influence them'.[62] In this view, sexuality in childhood is not only to be removed from view of other children, but may be dealt with punitively, because of the social conception of it being wrong or immoral.

The innocent child conception of childhood addresses an issue like learner pregnancy, mainly by attempting to preserve innocence. However, child law has evolved from viewing the child paternalistically as an object to be protected, to a more nuanced and individual subject of the law who has differing levels of autonomy, responsibility, and the ability to form views which should be considered in all matters affecting the child.[63] These later conceptions of childhood are represented by the evolving or agentic child conception of childhood. This conception of childhood gives way to solutions which consider the wishes and the views of the child. It recognises that a child is an individual with evolving capacity and that there is a duty to have regard to and act upon the views of the child.[64] Kangaude et al argue that in matters affecting the child, those shaping the narrative on childhood and child law, must ensure that emphasis is not solely placed upon the innocent child conception.[65] Instead, moving intentionally towards an approach which equally considers the agentic child conception. In this way a balance can be struck between protection and autonomy, leading to more effective results. They argue that the mainly protective approach has not yielded the desired results in protecting children from sexual harms and that accepting the child as a sexual being with views and needs regarding sexuality will lead to solutions which empower the child with knowledge and agency to make decisions regarding sexual matters in their lives.[66] Not only does the innocent child point of departure limit the

59 Holzscheiter (n 33) 109.
60 n 33, 102.
61 Kangaude et al (n20) 698.
62 *WAVES* (n 1) 4.
63 Holzscheiter (n 33) 111.
64 Kangaude et al (n 20) 699.
65 n 20, 711.
66 Kangaude et al (n 20) 699.

efficiency of responses to specific issues, but as Kangaude et al argue, it shapes the narrative of childhood which disempowers children, especially girls, by shaping the social and cultural norms which influence what a society accepts as normal.[67] The narrative of the innocent child with no agency, and therefore no power, created by law is grafted into the psyche of a society, which in turn again affects the way laws and policies are written.[68] Should the cycle not be broken, the disempowering effect on children will be further entrenched. Kanguade et al argue that it is the duty of those shaping the narrative on the sexuality of children to ensure that the agentic child conception is placed at the forefront, to ensure that the views of children are core to the solutions we design for matters which affect them.[69] The innocent child, unruly child and the immanent child conception is still present but is no longer the sole or even main point of departure. According to Kangaude et al this will lead to more nuanced and successful approaches to child law issues, particularly involving their sexuality.[70]

To apply this narrative to the issue of pregnant learners in school, one must move beyond attempting to preserve the innocence of children. One must pay heed to the agentic child. The duty to shape this narrative lies on those who shape the law, such as the ACERWC, but also on those who bring these matters to their attention. The lawyers and the organisations who represent the interests of children at a court level must place the forum in a position to consider the views of children in their adjudication of a case which decides whether they will attend school or not when pregnant. The level of input on the views of the child will affect the solution designed by the court. Not only the solution, but also the reasoning of the judgment will be influenced by the agentic child conception, should an agentic child approach be followed in the process of litigation. This would entail seeking out the view of the child, incorporating it into the court papers and presenting it to the court, who will then be able to consider the views of the affected children in their deliberations and final judgment. The narrative created by such judgments will then influence the social, political, and cultural norms which either empower or disempower children. According to Kangaude et al:[71]

> If children are regarded as devoid of sexual agency and positioned always as potential victims of any sexual experience, then social institutions would treat them as such and sustain practices that disempower children.

When children are prevented from accessing education through these policies, not only is the victim and non-agentic narrative strengthened, affecting the social and cultural norms which affect their lives, they are also deprived of education, a crucial part of the child's development which prepares them for adulthood. Without education, the child (especially the girl child) is further disempowered, forced into

67 n20, 696.
68 CS Vance 'Innocence and Experience: Melodramatic Narratives of Sex Trafficking and Their Consequences for Law and Policy' (2012) 2 *History of the Present* 200.
69 n 20, 711.
70 As above.
71 As above.

dependency on those who were allowed to finish their education (boys and men). This has the effect of deepening the gender equality gap and entrenches harmful gender roles in society. The act of removing pregnant girls from schools, but not the boys who may have impregnated them also creates a punitive measure along gender lines. [72] This stems from the intensified innocent victim conception of girls as opposed to boys. Sexuality in men and boys are more readily accepted and seen as natural.[73] Punishing sexuality only in girls reinforces this harmful notion, further disempowering girls. Kanguade et al argue that the narratives around childhood sexuality need to accept that both boys and girls have sexual agency in order to provide them with the solutions they require.[74] If sexual agency is only accepted in boys, girls will continue to bear the brunt of punitive measures against sexual agency. The ideal is to not punish sexual agency at all, but to protect the child's right to have sexual agency in line with their evolving capacities. The obsession with keeping pregnant learners out of sight only reinforces these gender binaries, perpetuating male power.

The challenges children face regarding pregnancy and education are informed by a society's ideological conceptions of childhood sexuality. For as long as these ideologies condemn the child (especially the girl child) to victimhood and innocence, the problem will not be solved. Ironically the protection of innocence is also what prevents children from accessing the kind of information which would aid them in navigating the sexual world and to make decisions which may reduce their likelihood of becoming pregnant.[75] This information includes comprehensive sexuality education on consent to sex, safe sexual practices, and birth control. Equipping the girl child with these knowledge tools will give them the power they need to negotiate the kind of sexual interactions they will likely have.[76] Such education enhances the child's sexual agency, meaning they are more likely to refuse sex when they do not want it or feel empowered to insist on the use of protection when they do want to have sex.[77] They are less likely to be victimised and learner pregnancy is likely to decrease.

Kangaude et al illustrate how contemporary narratives of victimhood and innocence have not only been inadequate[78] to address the needs of children but have caused damage.[79] These narratives are born from the views of adults. They point out that it is necessary to engage with the opinions of children. This approach is what is called a child-rights approach as opposed to a strictly child law

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72 *Student Representative Council (of Molepolole College of Education) v The Attorney General of Botswana (for and on behalf of the Principal of Molepolole College of Education and the Permanent Secretary of the Ministry of Education)* Case 13/1994, Appeal Court of Botswana (1995) 32.

73 Kangaude et al (n 20) 704.

74 Kangaude et al (n 20) 705.

75 MLJ le Mat ''Sexual violence is not good for our country's development'. Students' interpretations of sexual violence in a secondary school in Addis Ababa, Ethiopia' (2016) 28 *Gender and Education* 562 at 565.

76 Kangaude et al (n 20) 705.

77 As above.

78 Kangaude et al (n 20) 695.

79 Kangaude et al (n 20) 706.

approach. The difference is in the focus on protecting what the child views as important, as opposed to adults' entrenched perceptions of childhood.

According to Holzscheiter children are particularly vulnerable to ideological exploitation because of the emotionally charged and value-laden nature of their plight in international politics.[80] Thus, the ideological point of departure for addressing learner pregnancy and education is crucial to the outcome. Restricting responses to sexual issues in childhood to the views of adults has evidently led to less than favourable results.[81] Incorporating the views of children will likely lead to more efficient results as well as the long-term empowerment of girls and the transformation of harmful narratives on girls and childhood sexuality. Consequently, this dissertation explores the extent to which strategic litigation towards access to education for pregnant girls has used a child-rights approach and whether such approach or the lack thereof had any effect on the outcome and long-term change of social norms oppressing the girl child.

Lastly, the child-rights approach is in harmony with several international agreements to which many African States are party. The ACRWC for instance recognises not only the fact that the child is able to form views which must be considered, but also the notion that the child has duties which they are expected to fulfil toward their community, pointing toward the acceptance of a level of autonomy and self-realisation.[82] The child's right to attend school as opposed to the protection of their innocence is also reflected in the Convention on the Elimination of Discrimination against Women (CEDAW) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (Maputo Protocol) both of which require states to take measures to reduce school drop-out among girls.[83] The ACRWC requires states to eliminate discrimination against girls which means that the punitive measures against pregnant girl learners as opposed to boys who may be fathers, is contrary to the aims of the ACRWC. African treaties speak specifically to the obligation of states to support pregnant learners, as opposed to the CRC, creating a stronger obligation for a child-rights approach to access to education for pregnant learners as is discussed in the next section.[84]

2.4 Basis in international and regional texts and case law

The CRC and the ACRWC both provide a turning point in the codification of child rights within an agentic view of childhood. The right to be heard is entrenched in both treaties, in article 12 in the CRC (and its corresponding general comments) and in articles 4 and 7 of the ACRWC. Article 4 of the ACRWC makes

80 n 33, 115.
81 Kangaude et al (n 20) 694.
82 ACRWC (n 8) art 31.
83 Convention on the Elimination of All Forms of Discrimination Against Women (1979) art 10; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (2003) art 12.
84 ACRWC (n 8) art 31.

a clear reference to the procedural right to be heard by stating that the child has the right to be heard and his or her views taken into account in all judicial proceedings which affect them. Article 17 of the CRC gives content to the right to information which creates a basis for the right to receive child-friendly information in all phases of the litigation process to facilitate the child's participation. The ACRWC can be said to create a strong narrative in support of the agentic child by including duties within its ambit. The ACRWC, by including duties, views the child as not only a receiver of goodwill from the community but also an active contributor. Both treaties place emphasis on the best interest of the child and their participation in decisions which affect them as a procedural right. This presents a stark break from the past conceptions of childhood as innocent and helpless. It points toward a present and active role of the child in access to justice.

None of the cases on pregnant learners before the regional and subregional courts have joined individual children to the proceedings as parties. Instead, organisations represent them as a group. Whether children have been directly consulted and their views incorporated in the litigation will become clear in chapters 3 and 4. If their active participation was absent, it may have serious consequences for the affected children who may benefit from, but who may also not agree with the approach or outcome of a case before courts. Even though their rights are very directly affected, their views are not necessarily presented.

In a landmark case, *Van Niekerk v Van Niekerk* (the *Van Niekerk* case), before the South African courts a judge decided to join the children involved in the custody battle as parties to the case in their own names, with independent legal representation.[85] The court reasoned that in the case where there are differing views from various adult parties, the court can only achieve a balanced perspective by directly considering the views of the children involved. This case illustrates how the competing interests of adults can shroud the real issue at hand and indeed the issues that are important to the affected children, in their own view. It illustrates how parents' views can deviate significantly, not only the facts of the matter, but also from what the child wants and views as important. Obtaining the child's views and giving due weight to their expression of their views is crucial to an outcome which is in the best interest of the child. This case embodies a child-rights approach as opposed to a protectionist approach. The children had the right to participate in a case and indeed to appeal a judgment which affected their rights.

In the recent *AB v Pridwin Preparatory* case (*Pridwin* case)[86] the South African Constitutional Court also reflected on this issue. The court found that the child's right to have his or her best interest taken into account as a primary consideration is a procedural right in addition to being a substantive

85 *Ex parte Van Niekerk & another: In re Van Niekerk v Van Niekerk* 2005 JOL 14218 (T).

86 *AB v Pridwin Preparatory School* 2020 (5) SA 327 (CC).

right. This finding is based not only in the South African Constitution, but the court reasons that it is in line with the CRC.[87] The CRC Committee's General Comment 14 states that the best interest serves three purposes: a substantive right, an interpretative principle, and a procedural rule.[88] The court confirms that children are individual rights bearers and therefore the process which lead to decisions which affect them, must include them. This approach to the best interest principle supports the child-rights compliant approach which espouses effective child participation. As the judge in *Van Niekerk* reasoned in his judgment joining children as parties to the case, he could not make a finding on the best interest of the children without hearing their views, and they should be enabled to appeal his decision regarding their best interest.[89] This approach embraces the best interest principle as a procedural right in the proceedings and is in line with the ACRWC. The ACRWC provides an even stronger basis for child participation than the CRC where it specifically allows children to be joined as a party to the proceedings in article 4(2). Justice Khampepe in her opinion judgment in the *Pridwin* case went further than citing involvement of children, but states that children have a right under section 28(2) to be heard and to participate in the decisions affecting them (as is reflected in the ACRWC).[90]

The *Student Representative Council of Molepolole College of Education v the Attorney General* case *(Molepolole* case) provides an interesting example of children participating directly in proceedings.[91] The Botswana Court of Appeal was called upon to rule on the legal standing of the Student Representative Council (SRC). The case dealt with the legality of a ban on pregnant learners in the school based on alleged gender discrimination. The children, representing themselves through the SRC, sued in their own name as a party to the case. Although the respondents objected to their legal standing on the basis that the SRC's constitution was never formalised, the court finds that the children have the right to associate with the SRC and sue in their own name, making an exception in the interest of their access to justice.[92] The court does not refer to the best interest of the children, but allows their direct participation having regard to their right to access to justice. Then having regard to whether the education ban on pregnant learners amounted to gender discrimination and should be declared invalid, the court indeed finds in favour of the appellants considering their accounts of discrimination.[93]

In the ground-breaking *Centre for Child Law v The Governing Body of Hoërskool Fochville* case (the *Fochville* case) on access to education, the Supreme Court of Appeal of South Africa ruled in favour of children who expressed their views to the court through an affidavit deposed to by their legal

87 *Pridwin* (n 86) para 115.
88 General comment 14 on the right if the child to have his or her best interests taken as a primary consideration, UN Committee on the Rights of the Child (29 May 2013), UN Doc CRC/C/GC/14 (2013) para 6.
89 *Van Niekerk* (n 85) para 8.
90 *Pridwin* (n 86) para 115.
91 *Molepolole* (n 72).
92 *Molepolole* (n 72) 26.
93 *Molepolole* (n 72) 32.

representative, after filling in questionnaires.[94] The respondents argued that they should have full access to the questionnaires, failing which the evidence should not be allowed before the court. The court relies on article 12 of the CRC and article 4(2) of the ACRWC in finding that the affidavit would be allowed despite not producing the questionnaires to the respondent. The court reasons that as a result of the child's right to participate in all matters that affect them, the children have the right to be represented by a separate legal representative and to provide their views to the court without fear of victimisation through the exposure of their identities.[95] This court refers to two other notable cases which reflect the same viewpoint. In *Christian Education v Minister of Education* (*Christian Education* case) the court remarks that the children involved would have been able to express their views on the matter before the court and that such views would have enriched the dialogue and benefitted the balancing exercise in a complicated matter. The court emphasises that parents or the state may act on children's behalf but cannot speak in their name.[96] In *MEC for Education v Pillay* (the *Pillay* case) the court finds that direct participation of children in a case has a basis in both common law and domestic South African law, and gives weight to the specific age of the children involved by stating that direct participation becomes increasingly important as the child reaches an age where they are able to take responsibility for their actions and beliefs.[97] These cases provide a convincing argument for the existence of the elements of a child-rights approach as a self-standing right to which the child is entitled.

2.5 A case for movement lawyering as a crucial part of a child-rights compliant approach

Further to the elements of a child-rights compliant approach to strategic litigation suggested by ACRiSL and Liefaard, this study argues that the embodiment of strategic litigation within a movement and a community is crucial to a child-rights compliant approach. This is also known as movement lawyering, an approach to strategic litigation which engages with a movement for the same cause. This is because strategic litigation has an effect beyond the courtroom on the wider community. The case outcome is also affected by the socio-political views of the community within which it is anchored.[98]

Kangaude et al argue that the law is narrative.[99] The way in which legal texts are worded, but also the jurisprudence which emerges from courts and the way the cases are litigated all feed into the wider narrative of how a community sees children and decides what they are entitled to, capable of and what is good for them. If this is the case, then the way in which child rights strategic cases are

94 *Fochville* (n 17) para 19.
95 *Fochville* (n 17) para 19.
96 *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) para 53.
97 *MEC for Education, KwaZulu-Natal & others v Pillay* [2007] ZACC 21; 2008 (1) SA 474 para 56.
98 A Roa & K Klugman 'Considering strategic litigation as an advocacy tool: a case study of the defence of reproductive rights in Colombia' 22:44 *Reproductive Health Matters: an international journal on sexual and reproductive health and rights* 31.
99 Kangaude et al (n 20) 695.

litigated and whether children and their views have been sufficiently included in the process (a child-rights compliant approach) will influence the narrative affecting children's enjoyment of rights. The child's opinion of what they want, and need, are often different to what adults imagine without their input. If litigation is practiced without the input of the child the narrative will be shaped in a way that is not conducive to the child's wants and needs, limiting their enjoyment of rights. Roa and Klugman argue that movement lawyering which engages the community is necessary for shaping the narratives around children which affect the decision of the adjudicators, but also the actions and socio-political views of the community after the case.[100] These effects of movement lawyering speak to both the outcome of the case and the implementation thereof. If a movement joins in on the advocacy surrounding a case, the case is more likely to create long lasting change in a community, providing the most effective promotion and protection of children's enjoyment of their rights.[101] Roa and Klugman argue that movement lawyering creates and enables the conditions for implementation of judgments.[102] The aim of movement lawyering is to optimise the conditions in society for addressing rights violations. This approach, like the ACRiSL approach requires a more comprehensive understanding of strategic litigation, but it goes further. Beyond setting progressive legal standards, it seeks to shape public opinion and strengthen social movements.[103]

A study by Pitchall finds that engagement with the community during strategic litigation is not only beneficial to long-term reform but is reform in itself.[104] By this he means that often the engagement with a movement creates enough momentum, training and empowerment for the movement to be more sustainable after the case. The greatest legacy of the case is the fact that there is a change toward what he calls the 'agency culture of engagement'.[105] Where a movement may be disorganised before a case and the complaints anecdotal and haphazard, the litigation brings their experiences together under one case and gives them something concrete (like a judgment) to advocate from. In the process people in the movement are empowered by the language of the case and its judgment, which paves the way for the community to hold authorities to account and to provide ongoing oversight. Pitchall encourages the lawyer to think about what will be left behind when the case ends so that there is sustainable change.[106] Applied to education rights, this may mean that empowered parents take an active role in the governing structures of a school so that exclusive policies are prevented. If the strategic litigation is rooted in the movement, the societal reform produces a

100 n 98, 32.

101 SL Cummings 'Movement Lawyering' 5 *University of Illinois Law Review* (2017) 1658.

102 Roa & Klugman (n 98) 34.

103 Roa & Klugman (n 98) 32.

104 ES Pitchall 'Engagement is the reform: the role of youth, foster parents and biological parents in child welfare litigation' in J Meltzerm RM Joseph & A Shookhoff (eds) *For the welfare of children: lessons learnt from class action litigation* (2012) 65.

105 ES Pitchall 'Engagement is the reform: the role of youth, foster parents and biological parents in child welfare litigation' in Meltzerm and others (n 104) 63.

106 As above.

permanent community of constituents responsible for implementation, monitoring and ongoing training. The impact that movement lawyering has on reforming a community is crucial to changing the entrenched negative views of children and practices which create barriers to their full enjoyment of their rights.

Skelton draws our attention to the expansion of the democratic space which can be caused by movement lawyering. This is a result of increased dialogue between civil society and the state.[107] If this increased dialogue is sustained, there will be no need for further litigation, which is the ultimate goal of a child-rights approach to strategic litigation.

2.6 Conclusion

A normative basis for a child-rights approach exists both legally and philosophically but is not yet widely researched and fleshed out. This chapter has provided an overview of the basis in human rights texts, relevant literature, and jurisprudence at international, regional, and domestic levels in the African context, and extends the meaning of a child-rights compliant approach to include social movement lawyering. The case has been made for a child-rights compliant approach to strategic litigation. In the next chapters these principles and indicators will be applied in an analysis of the strategic litigation brought on behalf of pregnant learners in Africa.

107 Skelton (n 37) 24.

CHAPTER 3

An analysis of three African Human Rights system cases on rights of pregnant learners & their procedural right to participation.

3.1 Introduction

This chapter analyses three strategic litigation cases in the African human rights system against the CRSL model. Three relevant cases have either been finalised or are currently before the African human rights system for adjudication. The first is a case heard at the ECOWAS Community Court of Justice, *WAVES v Sierra Leone* (*WAVES* case), which has been finalised in favour of the applicants. The second case is before the ACERWC, *Legal and Human Rights Centre v Tanzania* (*LHRC* case), which is pending for a decision on the merits, but has been decided on the admissibility requirements in favour of the applicant. The third is a case brought to the African Court, *Tike Mwambipile & Equality Now v Tanzania (Mwambipile* case), which has been lodged but has not been heard or decided by the court. Upon a reading of the decisions already issued and the court's case summaries, some initial observations can be made about the level of compliance with a child-rights approach to the litigation and what effect this has had, or can be projected to have, on the outcome, considering the elements identified in the previous chapter.

3.2 An analysis of the cases

3.2.1 *WAVES v Sierra Leone* (ECOWAS Community Court of Justice)[108]

The *WAVES* case provides the most comprehensive insight into a litigation process on the topic so far. That is because judgment has already been delivered, and implementation since the judgment can be gaged.

The case was brought by a thematic NGO, Women Against Violence and Exploitation in Society (WAVES) with a focus on fighting against discrimination against women and girls. Initially, a second applicant was party to the proceedings before being removed for lack of standing. They are the Child Welfare Society Sierra Leone (CWS-SR), an advocacy organisation focussed on children, acting 'on behalf of pregnant adolescent schoolgirls in Sierra Leone'.[109] The litigants in this case are not affected children themselves, but human rights NGOs with a thematic focus on the rights of women and girls. Later, the court allowed Amnesty International to join as amicus curiae to place additional arguments before the court. Amnesty International is a global human rights organisation with local experience on

108 n 1.
109 n 1, 2.

the subject due to their work in West Africa, and Sierra Leone in particular. Each of the three litigants present themselves as acting in the interests of children, with the objective of increasing children's enjoyment of rights. As such, the identity of the litigants and litigators, specifically those who initiated the proceedings, fall within the ambit of child-rights strategic litigation.

Following the implementation of a government ban which prevents pregnant learners from attending school, pregnant learners, many of whom became pregnant during the Ebola crisis school closures, were unable to return to school as a direct result of this ban.[110] The litigators approached the ECOWAS court to challenge the legality of the ban, and to force the government of Sierra Leone to implement strategies towards inclusion of pregnant learners, and community wide education.

The objectives of the case as brought by the applicants can be determined from the remedies requested in the papers (or supported by the amicus curiae). These include a declaration that the ban policy is unlawful and must be revoked; an order for the state to develop strategies and nationwide campaigns to reverse negative societal attitudes, to enable learners' attendance at school with subsidies, and to include sexual and reproductive health education in school curricula.[111] The relief requested goes beyond immediate relief for the learners currently affected and seek to effect long lasting change, not only with reference to the right to education (legal), but also with regards to empowerment of children and community education toward a change in attitude toward pregnant learners (extra-legal). The relief addresses the immediate barriers to rights which is the effective ban of pregnant girls from schools and requests the court to make a declaration of unlawfulness. The relief identifies a systemic problem and seeks a systemic solution to redress it. The applicants' objectives are broader than access to education for a specific group. The remedy seeks societal change and to remove additional barriers facing children beyond the ban. All except one of the above remedies were granted by the court and were in line with the child rights objectives of the applicants.[112] The content of these remedies may well be critiqued considering whether the actual wishes of children were considered. This aspect will be explored in chapter 4 where information gathered from interviews with the legal representatives regarding the involvement of children in the drafting of the remedy is analysed. What can be determined at this stage is that the objectives of the case are generally in line with child rights litigation in that the objective is wide enough to achieve greater enjoyment of children's access to rights beyond the courtroom, the law, the parties, and the era.

The respondent, in opposition, cites its main objective behind the ban as the reduction of child pregnancy and used this narrative as a defence for their (in)action. When the Minister of Education warned that no pregnant girls would be allowed back into school, he emphasised that their presence

110 n 1, 3.
111 n 1, 6.
112 n 1, 32.

at school would have a negative influence on their peers.[113] The experiences of victims seemed to corroborate this objective. The papers refer to the accounts of children who were asked not to return to school so as not to 'mingle and influence' other children. These accounts were provided to the court by the applicants.[114] The respondent's strategy for reducing child pregnancy involved merely hiding those already pregnant from view, along a narrative of shame and punishment for girls. The respondent's approach, as far as can be determined, was not informed by consultation with affected children, nor did the respondent offer any proof that children had been consulted or that this approach was in line with their wishes. The respondent avers that alternative schooling was provided for pregnant learners because of their 'obvious fragile situation'.[115] The use of the word 'obvious' suggests that the respondents made an assumption as to the condition of the affected children and how they would like to be treated. It suggests there is no need for consultation. The fact that the assumption was that these children are 'fragile' is further concerning. It both feeds and relies on established paternalistic views of children, who need protection, but don't have the agency to input on decisions which affect them. Had the respondents consulted with children they may have found that the children are capable and willing to attend regular schools with some assistance as to adjustments during the birth and early mothering of their children. It was, however, quite easy to rely on the stereotypes of children and women in this regard, thanks to societal views. Whether this was the reason for the ban or because of their perceived negative influence on other children, the entrenched narrative of a 'fragile' child in a 'situation' was available to the respondents to rely upon in defence of their actions. This narrative assumes that the affected children are disempowered and further entrenches their disempowerment. The presence of learners' voices on their situation and their wishes, if they'd been pursued by the respondent, would have been crucial to counter this harmful narrative, but was left to stand unchallenged until the case was brought by the applicants. The conception of childhood which is relied upon by the respondent is the 'innocent child' conception which on its own is not conducive to the actualisation and enjoyment of rights in a way which children want and need.

The respondent raised an interim objection relating to the standing of the parties. The court, in finding that the first applicant has legal standing, had to venture quite liberally into the doctrine of public interest litigation (the *actio popularis*).[116] Had a child or children been added to the proceedings in their own name(s), standing would not have been an issue or potential weakness in the case. The ECOWAS court has jurisdiction over any person who falls within the jurisdiction of a member state.[117] Not only would this have made the issue of standing simpler, but it would have added a human face to the case. This has the effect of humanising the proceedings and gives the court the opportunity to

113 n 1, 4.
114 n 1, 5.
115 n 1, 9.
116 n 1, 14.
117 Protocol of the Court, ECOWAS Community Court of Justice (2005), art 9(4).

consider the direct account of a victim. The second applicant, Child Welfare Society, was eventually struck off as second applicant for lack of standing.[118] This is a pity, because it erases the additional insight they may have added to the proceedings on behalf of affected children, in the absence of individual applicants. This hurdle may have been avoided had children been directly involved as litigants. Of course, this approach may raise new objections as to the standing of the individual child, but these need to be aired and challenged in court to broaden the child's right to access to justice. The case ends up focusing mainly on questions of fact and evidence, without delving deeper into the effects of these facts on children and what children need and want. This outcome is a result of a clinical adult approach to access to children's justice and should be avoided.

Many of the jurisdictional challenges faced in these *actio popularis* cases can be avoided by joining individual children to a case. It may also alleviate the challenges regarding the issue of whether the matter is already before another forum, because where the issue may be aired elsewhere, the individual's case is unique. The court points out that affected individuals have standing.[119] If children are added as parties this will mean that the individual child's case will need to have passed the domestic remedies requirement in the local courts. This is not necessarily negative. It is favourable for local courts to have opportunity to adjudicate cases where individual children are involved, to develop the domestic law in line with a child-rights approach. This will enrich the jurisprudence at local level and perhaps provide earlier relief. Adding children as parties to the case need not exclusively be the approach. There may be cases where a representative, *actio popularis* type action without individual victims as parties will be appropriate. This may be the case where there are particular risks involved for the affected child or children.[120] However, in these cases it should be abundantly clear that the case is led by the instruction and involvement of affected children. This approach is illustrated in *Fochville* where the court finds that it is appropriate for the children to participate in the proceedings by way of an affidavit deposed to by their legal representative summarising their views, while protecting their identities.[121] This will negate the risk of the court having to deal with a "victimless" case, as they had to in the *WAVES* case.[122] Not only is this a procedural barrier, but it erases the lived experiences of child victims whose input is crucial to the narrative and outcome of the case. It remains to be seen whether a respondent state will raise issues as to the legal standing of a child, which may raise new barriers, but these are ripe to be aired in court towards deeper access to justice and legal

118 n 1, 10.

119 n 1, 13.

120 The *actio popularis* may also be useful in cases where children are detained and access cannot be gained, or where urgency demands that a case be brought immediately to prevent grave harm, such as deportation. These instances are beyond the scope of this study and not further explored here.

121 *Fochville* (n 17) para 29.

122 n 1, 14.

empowerment for children. The fact that the court accepts the legitimacy of the *actio popularis* to grant standing to the organisation as a representative itself may be critiqued.

The court acknowledges that it is important to recognise representation, because litigation is often reserved for the well-resourced and elite. It therefore posits that it is important, for the wellbeing of the vulnerable, to allow public interest litigation.[123] This approach proves useful in this case but is not ideal. This is because it, again, paints the child as a vulnerable innocent child who needs protection, this time, not by the government but by organisations who have their best interests at heart. Representation cannot be assumed. If it is not informed and led by intentional child involvement and instruction, the assumed representation is as illegitimate as the government's purported representation of children's needs. If this is allowed, the litigation sphere remains elite to the exclusion of litigating adults who assume the needs and wants of children. If an organisation had to bring a case on behalf of a specific group of adults without their involvement, it would be absurd. The court would surely require some involvement and input from these adults, particularly with regards to remedies. The reason is that the agency of adults is assumed, where children are more likely to be demoted to being mere beneficiaries. Where the court reasons that the *actio popularis* is beneficial, because it is inherently more inclusive, litigants need not rest there. They need to be vigilant not to allow the same space to become an elite space for adults and lawyers. This can be avoided by essentialising the child-rights approach to litigation. The court in the *Christian Education* case laments that representation of the children was assumed by the adults involved in the case because as it says '[a]lthough both the state and the parents were in a position to speak on their behalf, neither was able to speak in their name'.[124]

In deciding whether public interest litigation is legitimate the court also reflects that the fact that there is 'public concern' weighs in favour of the *actio popularis* being allowed. It further notes that the fact that a declaratory order will have a long-term effect on the community is important to allowing standing.[125] The court underpins the importance of the case being rooted in a community at both the outset and outcome stages. It supports the argument that movement lawyering is important to both the judgment as well as the extra-legal consequences of the case and the effect it has on children.

The court had the task of deciding whether there was proof that a ban existed. No official written policy was issued. Rather the Minister of Educations' public speech sparked an informal erratic practice of denial of access to school of pregnant learners.[126] The respondents attempted to distance itself from the Minister's words, by saying that it was a once off event which was never endorsed by

123 n 1, 14.
124 *Christian Education* (n 96) para 53.
125 n 1, 15.
126 n 1, 16.

the government. The court was able to find that the Minister's announcement did indeed amount to a policy which could be attributed to the state.[127] The court was aided by the availability of witness statements of learners who had been affected, provided by the applicant. As a result of the accounts of these children, the court was able to establish that the Minister's words had a wide enough reach to have the effect of a ban. Without the accounts of victims, this may have been more difficult, if not impossible, to establish. The court specifically takes into account the fact that a general stigma faced by children had the effect of institutionalising the ban.[128] The court can only come to this conclusion having taken into account how children felt about returning to school, which can only be achieved by using a child-rights approach. Having regard to the effect of the Minister's words on teachers, but also children and their likelihood of returning to school, the court finds that the Minister's words can indeed be attributed to the state. The court reasons that the state is responsible for what its officials say in public, and they have the responsibility to address or reverse it. This is crucial to changing narratives, social views and prejudices in the community which engender deeply held beliefs about children and lead to the violation of their rights. The court finds that where a state tolerates its officials directing, praising, or endorsing unlawful acts, the state is complicit. This includes when a state fails to hold such officials to account.[129] This is an important outcome of the case which was made possible by the applicant's producing accounts of children facing stigma.

Specific, established, and harmful existing narratives about children are utilised by the respondent throughout the case as a soft landing for the its listless approach to reducing childhood pregnancy. Fortunately, the applicant's use of direct accounts of children could able to counter this narrative towards a favourable outcome. However, the presence and use of these narratives in the case by the respondent is proof that there is need for a wider societal change in attitude informed by the voices of children. Once this narrative shifts in societal views, society can no longer tolerate the harmful practices of the state.[130]

The respondent fixates its defence on and limits it to the fact that human rights are included in the Sierra Leonian constitution.[131] This approach is the opposite of a child-rights approach. Kilkelly and Liefaard contend that constitutionalising children's rights is important to establish the rights' position in the hierarchy of law, but falls far short of actually improving children's enjoyment of rights.[132] They point out that even in states where children's rights are comprehensively covered by the constitution, legal implementation and significant extra-legal efforts are required to realise these rights. A child-rights approach requires the state to adopt additional measures to facilitate the

127 n 1, 18.
128 n 1, 17.
129 n 1, 19.
130 Skelton (n 37) 14.
131 n 1, 9.
132 Kilkelly & Liefaard (n 34) 523.

realisation of children's rights and to remove barriers. Constitutionalising human rights generally, not even children's rights specifically, can hardly be said to create the kind of space conducive to children's access to justice and enjoyment of rights. The court therefore is correct in finding that the mere inclusion of human rights in the constitution is not sufficient to negate the barriers facing children, considering their particular needs. The court similarly finds that alternative schooling for pregnant learners is not a viable option if the learners themselves do not have the choice of which school to attend, endorsing the importance of the agency and participation of the child.[133]

With regard to the relief, the court makes it clear that where reparation is ordered it is crucial that the court considers the case of the applicant.[134] Here it becomes evident that the views and wishes of children, if included in the content of the case, will affect the relief given by the court. The relief in this case ultimately addresses more than the ban. It addresses the negative societal attitudes to pregnant learners, and empowers children. The applicant does reasonably well in its child-rights approach, but there is room for improvement with regards to adding children as parties to the case. As Kilkelly and Liefaard put it: children's direct involvement has a transformative effect on both the substance and the outcome of cases regarding children's rights.[135] The effect should be pursued intentionally.

3.2.2 *LHRC & Another v Tanzania* (ACERWC)[136]

This case was brought by the Legal and Human Rights Centre (LHRC) and the Centre for Reproductive Rights (CRR) in terms of article 44 of the African Charter on the Rights and Welfare of the Child. It is brought on behalf of Tanzanian girls against the United Republic of Tanzania. Like the *WAVES* case, it challenges a ban on pregnant learners attending school. The merits in this case have not been decided, but the Committee has handed down its decision on admissibility which raises important elements of a child-rights approach.[137]

The litigators in this case are two organisations who are directly involved in the promotion of the rights of pregnant learners in Tanzania specifically (LHRC) and globally (CRR). They purport to advance these rights and aim to increase enhanced access to girls' enjoyment of rights. The identity of the litigators here, as in the previous case, qualifies as child-rights strategic litigation. The remedies include, beyond the declaration of unlawfulness of the ban, that society wide educational strategies be implemented and access to schools and sexual and reproductive health and rights education be

133 n 1, 28.
134 n 1, 29.
135 Kilkelly & Liefaard (n 34) 532.
136 *LHRC* (n11).
137 n11, 2.

included in school curricula. These are strategic objectives which seek to influence society beyond the individual children.

Significant elements of a child-rights approach raised in this case includes the importance of the best interests of the child and access to justice for children. In deciding whether local remedies had been exhausted, the Committee applies the exception where local remedies have been unduly prolonged. In determining whether local remedies have been unduly prolonged, irreparable harm must be considered.[138] The Committee finds that the best interests of the child must be the primary consideration when determining whether irreparable harm will result from further delay. They refer to their previous decision in the *Nubian children* case where they found that one year in the life of a child is equal to 6% of their childhood and is therefore more significant than in cases concerning adults.[139] This approach to the exception and determination of irreparable harm is unique in that it centres the best interests of the child and facilitates a particularly child-friendly approach to litigation, enhancing children's access to justice. The Committee also finds that the fact that a similar thematic issue is before a Special Rapporteur of the United Nations, does not amount to it being settled or before another forum, because the special procedures have no mandate to order reparations and provide a remedy. The Committee finds that should the case be excluded on this ground it would rob children of their right to an effective remedy.[140] These are crucial elements of the child-rights approach.

As in the previous case, this case is not brought in the names of individual children, raising the same concerns and room for improvement regarding legal standing and child empowerment. Where this case does succeed is in its provision of direct accounts in the form of affidavits to the court. The influence of these direct statements, while already influential at admissibility phase (for determination of best interest) will become clear in the merits hearing.

3.2.3 *Tike Mwambipile & Equality Now v Tanzania* (African Court on Human and Peoples' Rights)[141]

This case is brought by an individual adult, the director of the Tanzanian Women's Lawyers Association (TAWLA), as first applicant and Equality Now, an international organisation as second applicant. The case has not been heard or decided by the African Court, but the preliminary available information can

138 n11, para 11.

139 *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on behalf of children of Nubian descent in Kenya v The Government of Kenya* (2011) AHRLR 181 (ACERWC 2011) para 33.

140 n11, para 25.

141 *Mwambipile* (n 12).

be analysed for a child-rights approach. The case is very similar to the *LHRC* case before the ACERWC, concerns the same respondent, Tanzania, and requests that same remedies.[142]

TAWLA is a local NGO dedicated to gender equality and the promotion of gender justice and human dignity. They have a specialised focus on sexual and reproductive health for women in Tanzania and cite promoting public dialogue alongside legal and policy advocacy as main objectives of their work.[143] They have joined efforts with Equality Now, an international NGO working toward ending legal inequality for women and girls. Their identity as litigators with a specific focus on the thematic issue at hand qualifies this case as child-rights strategic litigation. How they used this position in the development phase of the case will be explored in chapter 4.

Considering the remedies sought by and the identity of the litigators the case qualifies as CRSL. It seeks to achieve results beyond the immediate parties and issues. The African Court is yet to make any decision on the case, and it is unclear whether a hearing will be scheduled before a decision is reached. This will be the first case before the African court dealing with strategic litigation involving the rights of children, and not all the adjudicators are human rights experts (as is the case with the ACERWC). It would be particularly important for this group of adjudicators to have access to individual accounts and interaction with children directly to make an informed decision. It remains to be seen to what extent the African Court will be able to engage the views of the affected children. Having regard to the fact that the court may hand down judgment without hearing, it is particularly important that the litigators' papers reflect the views and wishes of the affected children. A child-rights approach is therefore particularly important at this forum.

The same critiques as in the *WAVES* case apply to the joining of individual children, and the inclusion of direct affidavits of children in this case. The case is brought on a representative basis. The remedies, however, do seem to follow a child-rights approach in that it seeks revocation of the ban on school attendance by pregnant learners, and seeks to achieve societal change through national strategies and campaigns to improve education on the rights of children. The case therefore qualifies as child-rights strategic litigation but lacks crucial elements of participation and legal empowerment of the children involved. This aspect will be further explored in chapter 4.

3.4 Conclusion

The three cases discussed above are at the forefront of shaping laws, policies and narratives around pregnant learners. They all take a representative approach, instead of directly adding children as parties to the case, missing an important opportunity to humanise the case and empower children.

142 n12, para 5.

143 https://www.tawla.or.tz/ (accessed 25 October 2021).

However, they do purport to have the representation of children's best interest and children's rights as a core objective. All three cases have similar broad strategic objectives which are reflective of a child-rights approach. They all seek remedies which aim to expand on the content of children's rights and remove legal barriers which curtail them. Importantly, the litigators are all part of a dynamic social movement which operates alongside the litigation. The next chapter will delve deeper into the behind the scenes involvement of children and social movements which support the work.

CHAPTER 4

An analysis of the findings of the interviews with legal representatives, adjudicators and NGOs.

Interviews were held with individuals from stakeholders in their personal capacity. The aim was to get a personal sense of the involvement of children in the cases and to gage the importance that these stakeholders assign to a child-rights approach. This chapter reflects on their insights on their specific approach, the benefits and challenges they face(d) and how their approach was beneficial to the outcome of their case.

4.1 Legal representatives

4.1.1 Legal representative for the *WAVES* applicant[144]

An interview was held with a senior legal officer who represented the applicants in the *WAVES* case before the ECOWAS court. According to the informant the idea for the litigation was born out of a litigation workshop organised by Equality Now and facilitated by the Institute for Human Rights and Democracy in Africa (IHRDA). The workshop brought together local organisations working on the issue of learner pregnancy in Sierra Leone and sought to brainstorm strategies for litigation towards better access to rights for pregnant learners. In consultation with grassroots activists within the social movement, the need for a challenge to the education ban was identified.

WAVES was represented at this workshop and was one of few organisations willing to put themselves forward as potential applicants in the matter. According to the informant it was not for lack of interest in the issue that organisations were reluctant to volunteer to be parties to the case, but rather because of the colossal commitment to a lengthy process and risk of legal costs. According to the informant, the issue of pregnant learners in Sierra Leone was already a popular issue amongst community activists and international organisations in the country. Partnerships between international and local organisations focussed on the issue had already existed for several years, bringing their respective skills and resources together towards change. Sierra Leonian society was indeed divided on the topic and the partnership focussed on providing a consistent flow of education and advocacy to teachers, parents, and the society at large. The informant recalls how WhatsApp had been used as a key tool in this process. Apparently, the WhatsApp messaging service is a main source of news and information in Sierra Leone. The network of NGOs worked together to run a targeted campaign in the years before the case was brought and also during the hearing of the case and beyond.

144 Online interview with informant 1 held in October 2021.

The informant considers engagement with this network of activists as crucial to the success of the case. They were able to gain a wide perspective on the relevant issues from partners across the country, particularly from rural areas where the manifestation of human rights issues is often quite different than in cities. It was important to include advocacy in all these various geographical areas of the country as traditional societal attitudes range significantly from conservative to vehemently conservative in their approach to sexuality in childhood and religious standards of morality. The vast network of activists established a diverse social movement which eventually primed society for the important agenda change to come, in return having an effect in the court's view of the importance of the case.[145] The informant stresses the importance of local ownership of the work, which is key to the legitimacy of the cause, and is likely to lead to improved implementation and empowerment. This insight is important to the child-rights approach in that child ownership of the work will likely have the same effect, but with deeper legitimacy for the case and empowerment of those directly affected: the children.[146] Their participation will not only benefit the case but will graft them into the work and establish them as actors for implementation in their own right.[147]

The informant testifies to a development phase rich with consultation with children, but also with their parents and the organisations who support them. The legal representatives, with the help of the NGO network, were able to consult with two communities and gather 20 affidavits from affected children directly. Interviews with children were structured and planned to intentionally involve an adult who the child trusts and looks to for guidance, but also providing the opportunity for children who would like to speak without their parents present to do so with a different adult they feel comfortable with. This process employs the broader approach to child-friendly access to justice which Liefaard suggests where he stresses the importance of including the child's parents as intermediaries in the process to enhance the child's understanding and support, but also makes room for the need for privacy in a responsible way, where necessary.[148] These initial interviews and affidavits informed the strategy, content and relief sought in the case. Only once the litigation had been conceptualised after consultation, did the legal representatives start drafting and ended up submitting four direct affidavits from children, and two affidavits from NGOs, for use in the case. The informant recalls how meeting the children, talking to them and seeing their faces, brought it home how deeply personal and important the case was to the children. It made it personal. Their wants and needs were clearer as a result and informed the way the papers were drafted, and the case was presented to the court. Direct consultation also enhanced the legal representatives' understanding of the case. Although they knew prior to consultation that the ban in theory would allow children to return to school after giving birth,

145 Roa and Klugman (n 98) 32.
146 Skelton (n 37) 69.
147 Skelton (n 37) 51.
148 n 23, 217.

talking to the children made it clear that the stigma associated with pregnancy made them reluctant to return. This insight ultimately allowed the court to find that an effective total ban was in place. The consultations provided insight into the effect of the ban on children's dignity as they described having to undergo forced pregnancy testing, lack of prosecution of their rapists, and the fear of returning to school if they found out they were pregnant on their own. It was also revealed that girls had very little information on how to prevent pregnancy and this insight led to the inclusion of a remedy which seeks to enhance sexual and reproductive health education and services. A less consultative process might not have revealed this crucial strategic element of the case aimed at longer term impact.

Regarding the decision to cite an organisation as applicant instead of an individual child, the informant recalls that the team considered adding a child as a party to the case. However, after deliberation it was decided that an individual child should not be the focus of the case for two reasons. The first is that they wanted the court and society to understand that the case is not only about one child, but is much broader in the sense that it affects all girl children to some extent and the community at large. The second is that they were weary to expose a child to the scrutiny of the community and was cautious of the long-term risk this would pose to the child. This is a valid argument, particularly in the context and the team's careful consideration of the matter may be applauded. However, ideally a child or children would have expressed their views on this issue as well before a decision was made.

The experience of the legal representatives in this case reveals the vastly beneficial impact which a child-rights approach has on the litigation development, process and outcome and reveal, on the whole sensitivity to the dignity and inclusion of the child.

4.1.2 Legal representative for the applicants in *Mwambipile*[149]

In this interview a legal officer on the legal team for the applicants was interviewed. The informant revealed some impressive evidence-based groundwork. In the years before the case was brought a network of NGOs work together to gather information and a report was published by Equality Now, who is the second applicant. The network had also put together a policy document which they used to do advocacy to government and the African Commission on Human and Peoples' Rights (African Commission) who then issued an open letter to the Government of Tanzania. The advocacy was already ongoing by the time the case was conceived. The legal team sent a legal officer to consult with children in two different children's homes. These interviews had also informed the report which informed the case. When they started drafting, they returned to interview the children with the help of their local partner, TAWLA. Five girls provided their accounts and presented letters they received from their schools expelling them. The team gathered information in this way and made sure they had

149 Online interview with informant 2 held in October 2021.

a safeguarding framework in place for these interviews, one of the principles of which was to ensure that girls and their parents were willing to participate and were supported in the process.

The case had been in the national court of appeal which hadn't assigned a date of hearing for years and in 2019 the team decided to take the matter to the African Court. According to the informant, the court was chosen as a platform because of its wider jurisdiction over additional African legal instruments, such as the Maputo Protocol, which are also important to the case, as opposed to the narrower mandate of the ACERWC. This is a sound argument, however, the African Court, not being experts and not having much experience with child rights matters, would as a result need significant guidance in terms of the best interest of the children involved. In other words, a child-rights approach would be crucial for this case. Unfortunately, the girls themselves did not depose to affidavits which were submitted to the Court,[150] and according to the informant the court is likely to make a decision without a hearing, as it often does.[151] This is worrying because the court will have had no access to the direct accounts of children either in the papers or in person. In order to negate this, the court would need to *mero motu* request that children appear before it or arrange for an onsite visit.[152] This presents its own difficulty, as the informant explains, because it is difficult for children to have to travel to Arusha to appear before the court. However, the court may decide to have an online hearing with children as was recently done by the CRC Committee.[153] Again, the court is unlikely to have a hearing. The informant explains that there were certain risk factors which prevented them from submitting direct accounts signed by the children. This is unfortunate, and could have easily been negated by, for instance, deducting the names of the children deposing to affidavits, considering they were not added as parties.[154] The legal representatives lost an important opportunity to expose the court to the first-hand experience of affected persons, which is likely to affect their understanding of the case and the eventual outcome. Liefaard argues that article 5 of the CRC on the evolving capacities of children, prevents the application of a blanket exclusion of legal capacity for children as a category.[155] The legal representatives should have had regard to the evolving capacities of the children involved.

Overall, this team seemed to have done a lot of consultation work on the substance of the problem but neglected to involve the children sufficiently in the litigation process and papers. The legal representatives had identified a strong partner in TAWLA who, admittedly, have an abundance of experience with pregnant learners, but it shouldn't replace the first-hand accounts of children nor the

150 The children's parents deposed to affidavits instead.
151 Rule 30(1) Rules of the African Court on Human and Peoples' Rights (2020).
152 Rule 55(3) Rules of the African Court (2020).
153 Rule 55(2) Rules of the African Court (2020); *Chiara Sacchi et al v Turkey*, CRC Committee UN doc CRC/C/88/D/108/2019 para 7(1).
154 *Fochville* (n 17).
155 n 23, 205.

valuable benefits of their involvement. As is expressed in the *Pillay* case, it is crucial to hear from children themselves even when represented by parents.[156]

Regarding consulting the children on legal remedies, the informant confirms that the children's views were considered, but that they do not understand the law and which remedies are available in terms of the law. This is unfortunate because it is the job of a legal representative, in a child-rights approach, to explain the law and legal possibilities to children at all phases of the litigation to ensure that they do not only understand the case, but provide informed input on the direction of the case and the remedies sought.[157] The children seemed not to have any significant direct contribution to the strategic elements of the case. Even though they had been consulted broadly on their experiences for the prelitigation evidence building process, they do not seem to have played a crucial role in the litigation drafting and strategising phase. The informant did, however, say that the children expressed that a strategy for a long-term outcome is important, but not that they were asked to say how they would suggest that it be manifested. This approach is lacking and is characteristic of an approach to litigation which assumes the best interests of clients. With the best intentions, legal representatives fall prey to the excuse of it being 'complicated' to involve children, especially because experienced adults assume they know what is good for children. Legal representatives should be wary of this pitfall when pursuing litigation in line with a child-rights approach. Such a case may well achieve what it sets out to do: obtain a successful judgment. But the process will have failed to empower individual children and a movement and will likely not achieve a rich agentic child positive narrative in the judgment. Because this case is brought before the African Court, it will need to provide significant first-hand insight into the experiences, needs and wishes of children to assist the court in making a decision which doesn't usually fall within its caseload, but is crucially important to the jurisprudence and the narrative that it creates. Hopefully the local organisations will manage to fill this gap if a successful judgment is obtained.

4.2 NGO representing the interests of children in the *LHRC* case[158]

An interview was held with one of the NGOs who represented pregnant learners as an applicant in the case before the ACERWC. This NGO provides an insight into the significant work it takes to build a movement which supports a case. The NGO is particularly important to bridging the gap between lawyers and children, gathering the data with which they engage through their work and acting as a conduit for information sharing and advocacy.[159] The informant refers to a report which was assembled

156 *Pillay* (97) para 56.
157 Liefaard (n 23) 209.
158 Online interview with informant 3 held on 12 October 2021.
159 Skelton (n 37) 58.

in collaboration with the local activists and children which was the basis for the case.[160] This important initiative highlights the important role that NGOs play in the collection of data to enable an evidence-based approach to both advocacy and litigation. The informant emphasises the importance of partnering with local movements and organisations to root the work in the country and ensure ownership. The international organisation provides important experience and insight, but their contribution is theoretical at best without the support of local actors. The informant stresses that this partnership is also important because of the close contact and engagement that these organisations have with the children themselves and the amount of cases they have been faced with as a result. It is important for these organisations to be able to document their experiences and present them to the court. Often these grassroots organisations do a variety of important work which goes unnoticed but that will be beneficial for the court process.

The informant testifies to the fact that maintaining social pressure and engagement in a case is relevant before, during and after the case and takes an enormous amount of work and collaboration. This valuable work should be acknowledged and incorporated as much as possible to provide insight, but also to build upon a partnership for future implementation.[161] The informant confirms that the direct engagement of children is important and that personal accounts of children were indeed included in the case before the Committee. This is an account of a strong movement, which makes the case ripe for hearing.

4.3 Adjudicator in the *LHRC* case[162]

An interview was held with a senior child protection officer at the secretariat at the ACERWC who was involved in the decision-making process in the admissibility phase of the *LHRC* case. The informant confirms that the merits had not been heard, but that the decision on admissibility was taken on the basis of the papers submitted. Included in these papers were the affidavits of six directly affected children from different parts of Tanzania.

Although the merits will only likely be heard at the next session of the ACERWC, the informant confirms that the best interest of the children is already a primary consideration at the admissibility phase. The best interest determination at admissibility phase includes considerations of the gravity of the matter, the political climate surrounding the case and the efficacy of law enforcement machinery available at domestic level. The informant confirms that the stigmatisation and discrimination emerge clearly from the affidavits of the children. In this case, where admissibility was vehemently objected

160 A Bjerregaard 'Forced out: mandatory pregnancy testing and the expulsion of pregnant students in Tanzanian schools' (2013).

161 Skelton (n 37) 70.

162 Online interview with informant 4 held on 12 October 2021.

to during this phase based on the fact that the same issue was already being considered by a UN Special Rapporteur amongst others, the direct accounts of the children would have imprinted on the ACERWC both the gravity and the lack of solutions available at home. Although small, this contribution is critical toward whether the case is actually heard by the ACERWC.

According to the informant, the level of child participation will significantly increase at the merits phase. Not only is the ACERWC able to hear individual children at the hearing of the case, but the ACERWC may also decide to have an onsite investigation,[163] as they did in a case on modern slavery against Mauritania.[164] In addition to the papers before them, an onsite investigation will allow them to meet with the affected children in their hometowns to get a better sense of the issues which affect them, the barriers they face, the impact it has on the children as well as the remedies they seek. The informant is clear that child participation is a very important part of the decision-making process and that the ACERWC will be sure to interact with the children in various ways. It is beneficial to a child-rights approach to bring a case to the ACERWC, because even if the legal representatives neglect child participation, the ACERWC pursues it regardless. This is beneficial, but not ideal. Children should be included from the very beginning phases as a rule considering the case directly affects their lives. They should have ownership in the case and be empowered by the process alongside their communities, even more so in cases which are brought before other courts who are not likely to pursue child participation at the decision-making level.

With regards to whether children should be joined in their personal capacities as parties to the case, the informant confirms that it is possible and that it is not even a requirement to hide the identity of the child in all cases. Such cases have been brought to the ACERWC before, like in the *Hassam Benjamin* case against Sudan.[165] There are however cases where it is in the best interest of the child to protect their identity. One such case, the informant says, was a sexual assault case, *IHRDA v Cameroon*,[166] where the affected child was neither joined as a party nor, was her identity revealed. This was because of the very sensitive nature of the case which dealt with the rape of a minor. The informant emphasises that even if the identity of the child is hidden in the papers, they are certainly not invisible at the ACERWC. There are ways to ensure that the child's views and wishes are considered without violating their privacy, and the ACERWC takes this very seriously. It seems that the decision whether to include a child in their personal capacity as party, must be considered on a case by case basis considering the best interest of the particular child involved. This conclusion is in line with the

163 ACRWC (n 8) art 45.

164 *Minority Rights Group International & others v Mauritania*, African Committee on the Rights and Welfare of the Child, Communication 007/Com/003/2015 (2017).

165 *African Centre of Justice and Peace Studies (ACJPS) and People's Legal Aid Centre (PLACE) v the Government of Republic of Sudan*, African Committee on the Rights and Welfare of the Child, Communication 005/Com/001/2015, (2018).

166 *IHRDA v Cameroon*, African Committee on the Rights and Welfare of the Child, Communication n 006/Com/2015 (2018).

principle in child law that the best interest of the child is not a blanket consideration, but is unique to different children in different situations and places, and even at different periods during their lives.[167] Decisions to cite individual children in learner pregnancy cases should be made on the same basis. An individual assessment should be pursued including considerations of whether a child wishes to be joined, despite the stigma evident in the community and should not be overridden because of a blanket approach to sensitivity when it comes to child pregnancy. Such an approach would revert to a purely protectionist approach to child-rights litigation and does not enhance the agency of the child. It may well be a powerful opportunity to elevate the agency of the child above the restrictive opinions of their community and there may well be a child out there who wishes to take on that challenge.

The informant confirms that child participation is pursued again at remedies phase. Children may have had the opportunity to provide input on the remedies through their legal representatives, but the ACERWC goes beyond that, to ensure that child participation is part of determining the suitability and desirability of remedies. The informant emphasises that it is important that the views of children are considered regarding remedies. This is the part of the case which will most directly affect the lives of affected children. It is notable that the ACERWC makes a deliberate distinction between child participation at every stage to ensure that children are involved. The different stages of the case may reveal different needs and wishes, and this approach is ideal to a child-rights approach. The legal representatives should likewise be intentional in bringing their clients' views on each of these stages to the court's attention.

4.4 Conclusion

The interviews provided a deeper insight into the processes behind the cases, and importantly the attitudes towards a child-rights approach. What is interesting about these interviews is that it reveals that the person reading the papers takes the information at face value, and assumes that the views expressed are those of the children involved when in actual fact, there are levels of engagement which is not clear in the reading.

The *WAVES* case emerges as the best example of a comprehensive child-rights approach, particularly with regards to the applicant's consistent consultation with children throughout the process. The *Mwambipile* case, despite managing to collect important data for an evidence-based approach to advocacy and litigation which is worth mentioning, has missed important opportunities for child involvement and empowerment. This is indicative of a subtle problem, which legal representatives often miss, but should always be vigilant of. Where this case managed to involve

167 *S v M* 2008 (3) SA 232 (CC) para 24.

children at the development phase, there could have been further involvement during active litigation and regarding remedies and strategic objectives.

The *LHRC* case is an example of best practice for adjudicators. Their practice of going beyond what is placed before them to find the views and wishes of children is noteworthy. Approaches to child involvement range from embracing children's involvement to evading it with the excuse of it being impractical. All three cases, but this one in particular, reflect the proven benefit of engaging a social movement directly in the litigation.

CHAPTER 5

Conclusions and recommendations

5.1 Introduction

The study reveals that the essential tenets of a child-rights approach consist of four crucial elements, namely a basis in conception of childhood as agentic as opposed to protectionist; procedural child-friendly access to justice; child participation through being heard and by being parties to a case; and rootedness in a child inclusive social movement.

The three cases analysed prove to have been successful in some elements but less so in others. All the cases have both stronger and weaker points. It emerges that the cases were all rooted in a wider social movement which proved beneficial to the reception, outcome and implementation of the case. All three cases could have done better in considering joining a child or children as a party to the proceedings as is their right. Some cases included affidavits deposed to directly by the affected children (*WAVES* and *LHRC* cases), which is ideal, and others opted for a less direct involvement of their views (*Mwambipile* case). There is room for improvement in all the cases on providing more accessible child-friendly involvement in the proceedings. Finally, although all the cases used a level of child-rights narrative, more can be done in terms of using the agentic child narrative. Having analysed the cases and the approaches of stakeholders, the impact and what can be learnt from these experiences can now be addressed.

5.2 Impact

A report on the impacts of education related litigation by Open Society Foundations[168] identifies three relevant areas of impact. They are material impacts, legal and jurisprudential impact, and agenda change.[169] The cases analysed in this study has resulted in an impact in all three of these ways.

Material impact consist of the immediate and measurable impacts on the issue and those involved. In all three cases the litigation significantly contributed to the available data which governments, courts and activists can rely on to inform their work in future and provides a bassline to measure the impact of the litigation. The ban has been revoked, and children can in theory return to school when schools open after COVID-19 closures.[170]

168 Skelton (n 37).

169 Skelton (n 37) 58.

170 J Habib 'Sierra Leone reverses ban on pregnant students' (8 September 2020) https://www.care.org/news-and-stories/news/sierra-leone-reverses-ban-on-pregnant-students/ (accessed 28 October 2021).

Legal and jurisprudential impact relates to positive changes in the law, expansion of jurisprudence which gives content to rights and the adoption of new policies. The *WAVES* judgment declared the education ban to be unlawful, creating a change in the law and policy. It has also directly resulted in the publication of a radical new inclusion policy by the government of Sierra Leone.[171] The COVID 19 lockdown situation has led to another increase in child pregnancies which present a further barrier to access to education and perhaps reveals cracks in the effectiveness of the declaration of unlawfulness and subsequent policies. However, it being early days in the post-pandemic context, the *WAVES* judgment may well provide a legal basis for advocacy of the right to education for pregnant girls which is likely to be successfully utilised in this regard. The prelitigation work, done mainly by NGOs, in the *LRHC* case and the *Mwambipile* case has led to an open letter being addressed to the government of Tanzania by the African Commission and to the ACERWC adopting recommendations for Tanzania on the subject.[172] These efforts have led to the creation of international (soft) law which will be useful in future engagement with the government of Tanzania or courts and is a positive legal impact.

Agenda change refers to the more intangible effects of a case, particularly regarding shifting narratives and societal views. All three cases have managed to engage social movements which resulted in a significant increase in awareness and support for the cause. Existing movements were strengthened, but new partnerships were also born from the work. This gain will provide a soft landing for any judgments which will come out of the courts soon. There will be increased implementation and social understanding of the issue.

5.3 What can legal representatives, adjudicators and NGOs do better

5.3.1 Legal representatives

Legal representatives need to ensure that they deliberately involve children in every phase of the case. Not only do they need to allow participation, but they need to create a space which facilitates the participation of children. Child participation is often by definition impractical, but it is the job of the litigator to carve the way for children to enter the space.

The legal representative needs to ensure that children are consulted in a way that is conducive to their improved understanding, incorporating support by their caregivers. This includes involving the adults as intermediaries in a child's life who they rely on for support and guidance, while at the same time providing a safe space for privacy if needed.

171 As above.

172 Concluding observations on Tanzania, ACERWC, DSA/ACE/64/55/18/MC, (2018) para 28.

The legal representative needs to take it upon themselves to explain the law to the child in a way which is child-friendly, and which recognises the agency of the child. The child should feel that they are crucial to the case and that their decisions are respected. However difficult, the litigator being the one who understands the law, must be able to translate what they seek to achieve with the case and seek the child's input and instruction.

Legal representative need to make sure that they do not assume the needs and views of the child, nor the extent to which they are able to contribute to the case. If a legal representative allows a child to take a leading role in the strategising and development of the case, they will provide insights which are crucially valuable to the case. It is the representative's duty to listen to the child and to translate their views into the legal jargon suitable for the court. It is not enough to say that children do not understand the law and the available remedies. The representative is tasked with providing legal options to the child in an understandable way, and to glean from their inputs the legal remedies they seek and the relevant sections in the law.

Legal representatives need to ensure that their clients' direct accounts are made available to the court. It emerges from the analyses that regardless of how supportive of the cause a lawyer, judge or activist may be, they are always surprised at what they learn from direct engagement with children which ends up benefitting the case.

It is important that legal representatives consider citing children directly as parties to the case. There should be no blanket approach to this element, and the representative should approach this matter on a case by case basis, with regard to the best interest of the particular child. They should have specific regard to the wishes of children without assuming sensitivity on their behalf. This is important to the agentic child narrative in the long run. It may also prove to be empowering for the child. This aspect should be approached with caution but should not be shied away from without serious consideration, particularly considering the legitimacy it brings to a case.

Legal representatives should not decide to exclude children on the basis that it would be complicated or impractical to include them. Such reasoning should be regarded as a red flag to try harder to ensure the involvement of children. This will often mean that additional planning, finances and resources need to be dedicated to realising child participation, but it should be incorporated as a necessary aspect of the case. A child-rights approach is about finding ways to give the child meaningful access to justice. If it was easy for children, they would have already been involved. Children need representatives who are willing to spend time, effort and money to ensure they have dignified and meaningful and empowering access to justice.

Legal representatives should always consult children in the strategic elements of the case. Children must be consulted on how the representative can facilitate an outcome which will empower

them to implement their judgment. Children have ideas for activism which will be impacted by the strategic outcomes. This approach is different to an approach which stops at providing the court with an unfortunate story of child suffering, provided to further the legal representatives' agenda. The legal representative needs to find out what the children's agenda is and how the case can help them and their community to advocate for their rights.

Legal representatives should consult and engage social movements. They should strive to make NGOs parties to the case for ownership and legitimacy, and to allow them to drive the advocacy alongside the case in a more informed way. The legal representative should be intentional about empowering the social activists with the legal knowledge and understanding they need to advocate for their rights.

Lastly, legal representatives must remember that the case is about real people and is not only a means to jurisprudence or legal achievement for the legal representative. The child's best interest should be at the forefront of the legal representative's mind throughout the case. It is crucial that the legal representative challenge themselves throughout to see the child as agentic and not merely vulnerable. The legal representative, like the rest of society, is emerging from socialising in a particular narrative and part of the process of reform is to start with themselves. If legal representatives challenge themselves on this front constantly, they will provide the best possible version of the case to the courts and the public, hopefully leading to a liberated future for children in society.

5.3.2 NGOs

NGOs should endeavour to collaborate in a wide movement. The case analyses show that consistent, sustained advocacy across a range of sectors and locations is beneficial to the case's deliberation, success and implementation. NGOs should not be reluctant to engage with the legal process. They should seek to understand the legal implications with the help of the legal representatives in order to effectively advocate for their constituency's rights. They should insist on being part of the legal process, especially considering lawyers tend to be exclusive in the legal space. They act as crucial bridging gaps for children and as catalysts for change. Their involvement is crucial. NGOs need to ensure that information and pressure is supplied before, during and after the case to ensure that the public and the political decision makers are brought along in the process and are aware of the importance of the case. It is important for NGOs and social movements to ensure that they are child-friendly and led by the views and needs of children. Movements should endeavour to engage and empower children to be activists themselves and should support them in their advocacy.

5.3.3 Adjudicators

Adjudicators are the last line of defence for ensuring a child-rights approach. Therefore, it falls to them to ensure the legal representatives have provided them with enough insight and resources to enable them to make an informed decision. If that has not been the case, the adjudicator should either insist on additional information and affidavits or use available powers to do onsite investigations and interview children in the hearing. They should bear in mind that children face multiple barriers to reach the court and extend a hand to them as far as possible. The adjudicator should make a distinction between child views on the different stages of the case. The child's view with regards to the effect of the violation is different to their view on the remedy and the adjudicator should make sure that they have regard to both. The court as the last bastion should ensure that the child has agency by insisting on a child-rights approach from legal representatives. This will aid their determination of best interest and as such they are able to insist on it *mero motu*.

5.4 Conclusion

A child-rights approach is not easy, but is possible. The benefits of a child-rights approach far outweigh the effort it requires to implement. Children are generally willing and able to provide input and contribute in an involved way to their litigation. What is needed is an intentional shift in the mindset of lawyers, NGOs and adjudicators to make the participation of children possible. Effective children's justice requires planning, dedication of resources and sensitivity to their needs and circumstances. It also requires a good amount of bravery to push the limits of what has been possible before in child rights litigation. This is often because stakeholders are afraid to overstep limits of propriety and ethics. These are important considerations, but a sensitive dedication to the involvement of the child, giving weight to their evolving capacities, with a good dose of involvement of their adult intermediaries will allow legal representatives to navigate this complex field. Most importantly, it requires legal representatives, adjudicators, NGOs, governments and society at large to accept that children are full human beings with a stake in their lives. They need to start seeing children as human beings first. The fact that they are in phase of their lives called childhood, is a secondary consideration which should lead to increased efforts to help them be seen and not as an excuse to patronise them.

5.6 Recommendations

This study's recommendations comprise of what has been included in the section above on what stakeholders can do better in future cases, and the following additional general recommendations:

a. There is a need for legitimate guidance on a uniform child-rights compliant approach to litigation. Academics should continue to contribute to the content of such an approach and its

basis in law and other existing obligations. Ideally international human rights bodies should issue a document akin to a general comment on a child-rights compliant approach to litigation, based in the child's right to access to justice.

b. Legal regulatory bodies such as local and regional lawyers' associations should adopt best practices for a child-rights compliant approach as guidance for lawyers and should provide training on the issue to assist lawyers in their representation of children. Particular emphasis should be placed on effective communication with children.
c. Litigation organisations should adopt standard procedures for conduct in a child-rights compliant way in all their litigation. They should pursue knowledge building and training to enhance their awareness and skills to effectively employ such an approach. They should adopt a compulsory practice in all child related matters to ensure that all lawyers are intentional about a child-rights approach. They should also monitor and report on the effect of such an approach in their cases to contribute to the available data.
d. Judges associations and other forums of adjudicators such as the African Commission should adopt resolutions on the pursuance of a child-rights approach and provide training to their members. For instance, the International Association of Refugee Law Judges has a global network with regional branches who meet annually for training and best practice sharing. A child-rights compliant approach should be inserted as a key component of these trainings and discussion between adjudicators.

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BIBLIOGRAPHY

BOOKS

Boezaart, T 'General principles' in Davel, CJ & Skelton, AM (eds) *Commentary on the Children's Act* (Juta 2013).

Du Toit, C 'Legal representation of children' in Boezaart, T (ed) *Child law in South Africa* (Juta 2018).

Draga, L; Stuurman, C & Petherbridge, D 'Pregnancy' in Veriana, F; Hodgens TF & Thom, A (eds) *Basic education rights handbook: education rights in South Africa* (Section 27 2017).

ES Pitchall 'Engagement is the reform: the role of youth, foster parents and biological parents in child welfare litigation' in J Meltzerm RM Joseph & A Shookhoff (eds) *For the welfare of children: lessons learnt from class action litigation* (Centre for the Study of Social Policy 2012).

Holzscheiter, A *Children's rights in international politics* (Palgrave McMillan 2010).

Judith, M; Joseph, RM & Shookhoff, A (eds) *For the welfare of children: lessons learnt from class action litigation* (Centre for the Study of Social Policy 2012).

JOURNAL ARTICLES

Cummings SL 'Movement Lawyering' 5 *University of Illinois Law Review* (2017) 1645.

Kangaude, GD; Bhana, D & Skelton, A 'Childhood sexuality in Africa: A child rights perspective' (2020) 20 *African Human Rights Law Journal* 688.

Kilkelly, U & Liefaard, T 'Legal implementation of the UNCRC: lessons to be learned from the constitutional experience of South Africa' (2019) *De Jure Law Journal* 521.

Le Mat MLJ ''Sexual violence is not good for our country's development'. Students' interpretations of sexual violence in a secondary school in Addis Ababa, Ethiopia' (2016) 28 *Gender and Education* 562.

Liefaard, T 'Access to justice for children: towards a specific research and implementation agenda' (2019) 27 *International Journal of Children's Rights* 195.

Roa, A & Klugman K 'Considering strategic litigation as an advocacy tool: a case study of the defence of reproductive rights in Colombia' 22:44 *Reproductive Health Matters: an international journal on sexual and reproductive health and rights* 31.

Vance, CS 'Innocence and Experience: Melodramatic narratives of sex trafficking and their consequences for law and policy' (2012) 2 *History of the Present* 200.

Wnukowska-Mtonga, S 'The real impact of impact litigation' (2019) 31(1) *Florida Journal of International Law* 121.

REPORTS

Advancing Child Rights in Strategic Litigation (ACRiSL) 'Identifying Child Rights Strategic Litigation – A Guide' Available on file with the author (ACRiSL 2021).

Beqiraj, J & McNamara, L 'Children and access to justice: national practices, international challenges' Bingham Centre for the Rule of Law Report 02/2016 (International Bar Association, October 2016).

Child Rights International Network (CRIN) 'Rights, remedies and representations: global report on access to justice for children' (CRIN 2016).

Graham, H; Kawa, M; Hayward, H; Murry, T; Malyon, S & Conteh, S 'Sierra Leone out-of-school children study' Minister of Basic and Secondary Education, Sierra Leone (September 2021).

Skelton, AM 'Strategic litigation impacts: equal access to quality education' (Open Society Foundations 2017).

Bjerregaard, A 'Forced out: mandatory pregnancy testing and the expulsion of pregnant students in Tanzanian schools' (Centre for Reproductive Rights 2013). https://reproductiverights.org/wp-content/uploads/2019/04/crr_Tanzania_Report_Part1.pdf

INTERNATIONAL INSTRUMENTS AND DOCUMENTS

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

African Committee of Experts on the Rights and Welfare of the Child (24 November - 4 December 2020) 'Report on the 36th session' ACERWC/RPT(XXXVI) (2020).

African Committee of Experts on the Rights and Welfare of the Child (4 May 2021) 'Outcome statement if the day of general discussion on the sexual and reproductive health and rights of adolescent children' (2021).

African Committee of Experts on the Rights and Welfare of the Child (6 February 2018) Concluding observations on Tanzania, ACERWC, DSA/ACE/64/55/18/MC, (2018).

African Court on Human and Peoples' Rights 'Rules of Procedure' (2020).

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003).

UN Convention on the Rights of the Child (1989).

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

CASE LAW

AB and Another v Pridwin Preparatory School and Others 2020 (5) SA 327 (CC).

African Centre of Justice and Peace Studies (ACJPS) and People's Legal Aid Centre (PLACE) v the Government of Republic of Sudan, African Committee on the Rights and Welfare of the Child, Communication 005/Com/001/2015, (2018).

Centre for Child Law v The Governing Body of Hoërskool Fochville 2016 (2) SA 121 (SCA).

Chiara Sacchi et al v Turkey, CRC Committee UN doc CRC/C/88/D/108/2019 (2021).

Christian Education South Africa v Minister of Education 2000 (4) SA 757 (CC).

Department of Education Free State Province v Welkom High School and Another; Head of Department, Department of Education Free State Province v Harmony High School and Another (Equal Education and Centre for Child Law as Amici Curiae) 2014 (2) SA 228 (CC).

Ex parte Van Niekerk & another: In re Van Niekerk v Van Niekerk 2005 JOL 14218 (T).

Institute for Human Rights and Development in Africa and Finders Group Initiative on behalf of TFA (a minor) v the Government of the Republic of Cameroon, ACERWC, No 006/Com/002/2015 (2018).

Institute for Human Rights and Development in Africa and Open Society Justice Initiative on behalf of children of Nubian descent in Kenya v the Government of Kenya (2011) AHRLR 181 (ACERWC 2011).

Legal and Human Rights Centre and Centre for Reproductive Rights (on behalf of Tanzanian girls) v United Republic of Tanzania, Communication 0012/Com/001/2019, Admissibility decision 001/2020 African Committee on the Rights and Welfare of the Child (2020).

MEC for Education, KwaZulu-Natal & others v Pillay 2008 (1) SA 474 (CC).

S v M 2008 (3) SA 232 (CC).

Student Representative Council (of Molepolole College of Education) v The Attorney General of Botswana (for and on behalf of the Principal of Molepolole College of Education and the Permanent Secretary of the Ministry of Education) Case 13/1994, Appeal Court of Botswana (1995).

Tike Mwambipile & Equality Now v The United Republic of Tanzania, Application 042/2020, African Court on Human and Peoples' Rights (Case pending).

Women Against Violence and Exploitation in Society (WAVES) v The Republic of Sierra Leone, Suit ECW/CCJ/APP/22/18, ECOWAS Community Court of Justice (2019).

INTERNET SOURCES

Advancing Child Rights in Strategic Litigation (ACRiSL) https://www.acrisl.org/ (accessed 24 October 2021).

Habib, J 'Sierra Leone reverses ban on pregnant students' (8 September 2020) https://www.care.org/news-and-stories/news/sierra-leone-reverses-ban-on-pregnant-students/ (accessed 28 October 2021).

https://www.tawla.or.tz/ (accessed 25 October 2021).

Human Rights Watch 'Tanzania: pregnant student ban harms thousands' 6 October 2021 https://www.hrw.org/news/2021/10/06/tanzania-pregnant-student-ban-harms-thousands (accessed 24 October 2021).

Mahtani, S 'What do African courts say about banning pregnant girls from school?' 10 December 2019 https://www.africaportal.org/features/what-do-african-courts-say-about-banning-pregnant-girls-school/ (accessed 29 October 2021).

UNICEF 'Early childbearing' May 2021 https://data.unicef.org/topic/child-health/adolescent-health/ (accessed 17 October 2021).

World Bank 'Adolescent fertility rate (births per 1,000 women ages 15-19)' 2019 https://data.worldbank.org/indicator/SP.ADO.TFRT (accessed 24 October 2021).

Worldometer 'Africa Population Live' 24 October 2021 https://www.worldometers.info/world-population/africa-population/ (accessed 24 October 2021).

INTERVIEWS

Interviews held with informants 1, 2, 3 and 4 in October 2021.