

ACCESS TO JUSTICE FOR CHILDREN: MADAGASCAR

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I. What is the legal status of the Convention on the Rights of the Child (CRC)?

A. What is the status of the CRC and other relevant ratified international instruments in the national legal system?

The Preamble of the 2010 Constitution of Madagascar specifically refers to the international commitments of the State. It explicitly mentions the International Charter of Human Rights, the African Charter of Human Rights, and the Convention on the Rights of the Child, considering these instruments as an integral part of the law.¹

B. Does the CRC take precedence over national law?

The CRC and other child rights instruments are considered superior to national law.² However it is not entirely clear whether they would also prevail over a conflicting provisions of the Constitution. In theory, it is not possible to have a treaty provision which contradicts the Constitution, because before ratification of any treaty, the High Constitutional Court is seized to check the constitutionality of the treaty and, if there are contradicting dispositions, the Constitution is amended.³

C. Has the CRC been incorporated into national law?

The CRC and other child rights instruments are directly part of the domestic legal system.

The main piece of national legislation which relates to the rights of the child is Law No 2007-023 on the rights and protection of children,⁴ but there are a number of other laws which are also relevant.⁵

D. Can the CRC be directly enforced in the courts?

¹ Constitution of the Fourth Republic of Madagascar, available at: https://www.constituteproject.org/constitution/Madagascar_2010.pdf.

² Constitution, Article 137.

³ Ibid.

⁴ Law No 2007-023 on the rights and protection of children, Article 75, available in French at: <http://www.justice.gov.mg/wp-content/uploads/textes/1TEXTES%20NATIONAUX/DROIT%20PRIVE/Textes%20sur%20l%20enfance/Loi%202007-023.pdf>.

⁵ For more information, please see <https://www.crin.org/en/library/publications/madagascar-national-laws>.

The CRC may be relied on in any court since its provisions form an integral part of national law, however, it is directly enforceable only in relation to those matters which do not require legislative amendments.⁶

E. Are there examples of domestic courts using or applying the CRC or other relevant international instruments?

Research did not reveal any such examples.

II. What is the legal status of the child?

A. Can children and/or their representatives bring cases in domestic courts to challenge violations of children's rights?

When the child is a victim of abuse, the child himself or a representative (a third party, his parents, or the person having authority over him) can bring a case to the children's judge, seeking compensation for the harm suffered by the child.⁷ Similarly, children victims of offenses relating to trafficking, sexual exploitation, sex tourism and incest may, at any time, signal to competent authority the abuse committed against him and claim compensation for damages.⁸

Anyone with knowledge of abuse attempted or successful, including parents, family members, neighbors, friends, local authorities, teachers, religious leaders, social workers, medical personnel, police, or the child himself, must notify the competent administrative or judicial authorities.⁹ This reporting procedure leads to referral to the children's judge (and further to the Public Prosecutor if a criminal offense is at play).¹⁰

B. If so, are children of any age permitted to bring these cases by themselves in their own names/on their own behalf, or must the case be brought by or with the assistance of a representative?

Full legal capacity is acquired at the same time as civil majority or earlier in the case of marriage.¹¹ Civil majority in Madagascar is reached at the age of 21 years old,¹² although for the purposes of the Law on the rights and

⁶ *National Report for the Universal Periodic Review of Madagascar*, A/HRC/WG.6/7/MDG/1, 3 November 2009, available in French at:

http://lib.ohchr.org/HRBodies/UPR/Documents/Session7/MG/A_HRC_WG6_7_MDG_1_E.pdf.

⁷ Law N° 2007-023 on the rights and protection of children, Article 75.

⁸ Law No. 2007-038 of 14 January 2008 amending the Criminal Code in relation to combatting trafficking of persons and sexual tourism, Article 335.6, available in French at:

<http://www.hsph.harvard.edu/population/trafficking/madagascar.trafficking.08.pdf>. See also, National Confederation of Human Rights Platforms, *Alternative Report on the implementation of the Convention on the Rights of the Child*, pg. 17, available at:

https://www.crin.org/docs/Madagascar_NGOPDH_CRC%20Report.pdf.

⁹ Law N° 2007-023 on the rights and protection of children, Article 69.

¹⁰ Law N° 2007-023 on the rights and protection of children, Article 72.

¹¹ Law No 2007-023 on the rights and protection of children, Article 46.

¹² Decree N° 62-041 of 19 September 1962 on general provisions of national law and private international law, Article 15, available in French at: <http://jafbase.fr/docAfrique/Madagascar/LoiDIP.pdf>.

protection of children, anyone under the age of 18 is treated as a child.¹³

In the case of abuse, children can themselves seize the juvenile court judge or the prosecutor.¹⁴

C. In the case of infants and young children, how would cases typically be brought?

No specific provisions relating to infants and young children could be identified.

D. Would children or their representatives be eligible to receive free or subsidised legal assistance in bringing these kinds of cases?

The Constitution of Madagascar guarantees everybody the right to access to justice stating that lack of resources shall not be an obstacle and the right to comprehensive legal representation in the entire justice process.¹⁵

The Malagasy Code of Civil Procedure provides for legal aid to any person or organisation for whom a lack of resources would make it impossible to exercise their rights in the courts, either as plaintiff or defendant.¹⁶ For more information concerning the application procedure, please refer to part IV.B below.

Children are not always provided with legal assistance in the juvenile justice system.¹⁷

Usually when proceedings are initiated before the children's judge, a notice is sent to the parent or guardian of the child was entrusted or to the child himself, mentioning the party's right to choose counsel or request that counsel be assigned.¹⁸ If a request is made, a counsel must be assigned within eight days.¹⁹

E. Are there any other conditions or limits on children or chosen legal representatives bringing cases (e.g., would a child's parents or guardian have to agree to a case being brought)?

The research did not identify any other conditions or limits on children or their representatives bringing cases.

¹³ Law N° 2007-023 on the rights and protection of children, Article 2.

¹⁴ Law N° 2007-023 on the rights and protection of children, Article 75.

¹⁵ Constitution, Article 13.

¹⁶ Code of Civil Procedure, Book I, Title IV, Article 32, available in French at:

<http://www.justice.gov.mg/wp-content/uploads/textes/1TEXTES%20NATIONAUX/DROIT%20PRIVE/es%20codes/CODE%20DE%20PROCEDURE%20CIVILE.pdf>.

¹⁷ UN Committee on the Rights of the Child, *Concluding Observations on the combined third and fourth periodic reports of Madagascar*, 2 February 2012, CRC/C/MDG/CO/3-4, para. 65, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fMDG%2fCO%2f3-4&Lang=en.

¹⁸ Law N° 2007-023 on the rights and protection of children, Article 76.

¹⁹ *Ibid.*

III. How can children's rights violations be challenged before national courts?

A. If there is a potential violation of the Constitution or other principles established in domestic law, or with the CRC or other relevant ratified international/regional instruments, how can a legal challenge be brought?

Anyone with knowledge of abuse or attempted abuse, including parents, family members, neighbours, friends, local authorities, teachers, religious leaders, social workers, medical personnel, police, or the child himself, must notify the competent administrative or judicial authorities.²⁰ The reporting procedure leads to referral to the juvenile court judge (and further to the Public Prosecutor if a criminal offence is at play).²¹

The High Constitutional Court decides on issues of compatibility of legal provisions with the Constitution referred to it by lower courts. Individuals can submit claims that a legal provision is infringing on their fundamental rights recognised by the Constitution during legal proceedings in other courts, in which case the other court will refer the issue to the High Constitutional Court.²² In addition, the heads of the high institutions such as the Parliamentary Assemblies, the Decentralised Territorial Collectivities (the representation of the local entities), and the High Council for the Defense of Democracy and of the State of Law (which oversees the respect of human rights and democratic principles), can seize the High Constitutional Court with any law they deem unconstitutional. The members of those institutions can also seize the Court on such grounds, if they make up at least a quarter of the institution.²³

Complaints of children's rights violations may also be brought to the National Committee on Human Rights.²⁴ Petitions to the Committee may be submitted by the child or their representative.²⁵ Petitions relating to a matter which is pending before another body will not be admitted.²⁶

Individuals, including child victims, parents or legal representatives, groups, or NGOs recognised by the African Union may submit complaints (known as "communications") to the African Committee of Experts on the Rights and Welfare of the Child ("African Committee") about violations of the African Charter on the Rights and Welfare of the Child ("African Children's Charter").²⁷ All available domestic remedies must have been exhausted before bringing a case to the African Committee.²⁸ The complaint must

²⁰ Law N°2007-023 on the rights and protection of children, Article 69.

²¹ Law N°2007-023 on the rights and protection of children, Article 72.

²² Constitution, Article 118.

²³ Constitution, Article 118.

²⁴ Law N°2014-007 regarding the National Committee on Human Rights, available in French at: <http://www.justice.gov.mg/wp-content/uploads/textes/TEXTES2014/L2014-007.pdf>.

²⁵ Law N°2014-007 regarding the National Committee on Human Rights, Article 21.

²⁶ Law N°2014-007 regarding the National Committee on Human Rights, Article 23.

²⁷ African Charter on the Rights and Welfare of the Child ("African Children's Charter"), Article 44, available at: <http://acerwc.org/?wpdmdl=8410>. For more information about communications, see: <http://acerwc.org/the-committees-work/communications/>.

²⁸ African Committee of Experts on the Rights and Welfare of the Child, 'Communications', available at: <http://acerwc.org/the-committees-work/communications/>.

include, amongst other things, the name of the person filing it or, in the case of an NGO, the name of the legal representative, and whether or not the complainant wishes to remain anonymous and the reasons for this.²⁹ The African Committee will investigate the complaint and decide on the merits of the case, and make recommendations to the State, which may include compensation to the victim(s) and measures to prevent recurrence of the violation.³⁰

Individuals, groups or NGOs may submit complaints (known as “communications”) to the African Commission on Human and Peoples’ Rights (“African Commission”) about violations of the African Charter on Human and Peoples’ Rights (“African Charter”).³¹ All available domestic remedies must have been exhausted before bringing a case to the African Commission.³² The complaint must include, amongst other things: the name of the person filing it or, in the case of an NGO, the name of the legal representative; whether or not the complainant wishes to remain anonymous and the reasons for this; and the name of the victim, in a case where he/she is not the complainant.³³ The African Commission will investigate the complaint and decide on the merits of the case, and make recommendations to the State, which may include compensation to the victim(s) and measures to prevent recurrence of the violation.³⁴ If the case relates to serious or massive human rights violations or if the Commission considers that the State is unwilling to comply with its recommendations in the case, the Commission may refer the complaint to the African Court on Human and Peoples’ Rights.³⁵

B. What powers would courts have to review these violations, and what remedies could they offer?

The juvenile court judge hears testimony from the parents, guardian, person or service to whom the child has been assigned, the child himself if he is capable of understanding, and any other person whose testimony is deemed

²⁹ War Resisters' International, Quaker United Nations Office Geneva, Conscience and Peace Tax International and the CCPR Centre, ‘African Committee of Experts on the Rights and Welfare of the Child: communication procedure’, 2012, available at: <http://co-guide.org/mechanism/african-committee-experts-rights-and-welfare-child-communication-procedure>.

³⁰ Ibid.

³¹ African Charter on Human and Peoples’ Rights (“African Charter”), Article 55, available at: <http://www.achpr.org/instruments/achpr>.

³² Ibid., Article 56(5).

³³ Rules of Procedure of the African Commission on Human and Peoples’ Rights of 2010, Rule 93, available at: <http://www.achpr.org/instruments/rules-of-procedure-2010/>.

³⁴ War Resisters' International, Quaker United Nations Office Geneva, Conscience and Peace Tax International and the CCPR Centre, ‘African Commission on Human and Peoples' Rights: communication procedure’, 2012, available at: <http://co-guide.org/mechanism/african-commission-human-and-peoples-rights-communication-procedure>.

³⁵ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, Article 5, available at: <http://www.achpr.org/instruments/court-establishment>; Rules of Procedure of the African Commission on Human and Peoples’ Rights of 2010, Rules 84(2) and 118, available at: <http://www.achpr.org/instruments/rules-of-procedure-2010>.

useful.³⁶ The juvenile court judge may also, on its own motion or at the request of the parties or public prosecutor, order any information about the living conditions of the child by any of the following means: social investigation, medical examinations, psychiatric and psychological reports or investigative measure and educational guidance.³⁷ The case is then decided as soon as possible and the decision is made public.³⁸ The judge can order educational aid measures, which range from educational promises from the parents, the setting up of temporary educational guidance, and the mandatory enrollment of the child in school, to the child's placement within an institution or another family.³⁹ The Public Prosecutor will start criminal proceedings if a crime was committed.⁴⁰

The penalties for violators - in the case of abuse - are based on their violation of the Penal Code⁴¹ and other laws. For instance, under Article 334 *quater* of Law No. 2007-038, sexual exploitation of a child is punishable by a sentence of five (5) to ten (10) years of imprisonment and a fine of 4,000,000 ariary to 20,000,000 ariary.⁴²

National criminal courts can sentence violators to different criminal penalties, including imprisonment - depending on the crime committed.⁴³ They can also order restitution and / or compensation for the violation which has resulted in a crime.⁴⁴

If the violation is reported to the National Committee on Human Rights, or if it decides to seize itself on an issue⁴⁵, the Committee can designate an investigator to investigate.⁴⁶ That person can be assisted by law enforcement, and its requests for access to documents, testimonies etc must be granted.⁴⁷ In the case a violation is established, the Council will try to resolve the situation amicably if possible. If the parties to the issue cannot find common ground, the Council will suggest seizing the national courts of the issue.⁴⁸

A provision declared unconstitutional by the High Constitutional Court ceases to have legal force.⁴⁹

C. Would such a challenge have to directly involve one or more individual child

³⁶ Law N°2007-023 on the rights and protection of children, Article 77.

³⁷ Law N°2007-023 on the rights and protection of children, Article 79.

³⁸ Law N°2007-023 on the rights and protection of children, Article 78-79.

³⁹ Ibid, art. 50.

⁴⁰ Ibid, art. 71.

⁴¹ Law N°2007-023 on the rights and protection of children, Article 67.

⁴² *Third and fourth periodic reports of Madagascar to the UN Committee on the Rights of the Child*, 16 August 2010, CRC/C/MDG/3-4, pg. 111, available at:

http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.MDG.3-4_en.pdf

⁴³ Criminal Code, Book I, art. 7-8-9, available in French at :

<http://www.justice.gov.mg/wp-content/uploads/textes/1TEXTES%20NATIONAUX/DROIT%20PRIVE/es%20codes/CODE%20PENAL.pdf>.

⁴⁴ Ibid, art. 10.

⁴⁵ Law N°2014-007 regarding the National Committee on Human Rights, art. 21.

⁴⁶ Ibid, art. 22.

⁴⁷ Ibid, art. 27.

⁴⁸ Ibid, art. 28.

⁴⁹ Constitution, Article 118.

victims, or is it possible to challenge a law or action without naming a specific victim?

Research did not identify any provisions allowing for litigation in the national courts without naming a child victim. However, proceedings before the National Committee on Human Rights are held in private and are confidential.⁵⁰

D. Is any form of collective action or group litigation possible, with or without naming individual victims?

Research could not determine whether collective litigation is possible in the civil courts. However, the National Council on Human Rights may receive collective complaints.⁵¹

E. Are non-governmental organisations permitted to file challenges to potential children's rights violations or to intervene in cases that have already been filed?

Research could not determine whether non-governmental organisations (NGOs) may initiate legal proceedings in the national courts. NGOs may, however, petition the National Council on Human Rights in relation to violations of children's rights.⁵² They may also, if recognised by the Organisation of African Unity, send communications to the African Committee.⁵³

IV. Practical considerations. Please detail some of the practical issues, risks and uncertainties that might be involved in bringing a case to challenge a violation of children's rights, such as:

A. Venue. In what courts could a case be filed (e.g., civil, criminal, administrative, etc.)? What would the initial filing process entail?

There are three levels of courts in Madagascar.⁵⁴ Lower courts hear civil and criminal cases carrying limited fines and sentences. The Court of Appeals hears civil cases of higher value and criminal cases carrying sentences of five years imprisonment or more as a court of first instance, as well as appeals from the lower courts. The Court of Cassation is the highest court in the country. The Constitutional Court is autonomous and it reviews laws, decrees, and ordinances and monitors elections.

Although there are designated children's judges to decide cases under the Law No2007-023 on the rights and protection of children, it is reported that judges and prosecutors generally lack specialised training in juvenile justice.⁵⁵

⁵⁰ Law N°2014-007 regarding the National Committee on Human Rights, Article 24.

⁵¹ Law N°2014-007 regarding the National Committee on Human Rights, Article 21.

⁵² Law N°2014-007 regarding the National Committee on Human Rights, Article 21.

⁵³ African Charter on the Rights and Welfare of the Child ("African Children's Charter"), Article 44.

⁵⁴ Globalex, *Law and Legal Systems in Madagascar: A Political Siege*, available at: <http://www.nyulawglobal.org/globalex/Madagascar.htm>.

⁵⁵ UN Committee on the Rights of the Child, *Concluding Observations on the combined third and fourth*

There are also traditional courts, called *dina*, which can hear civil and criminal cases, but do not follow the same procedure as the ordinary courts.⁵⁶

A case in the civil courts is initiated by a petition which may be written or verbal⁵⁷ and must include the names of the parties, details of the claim and a quantum of damages.⁵⁸

- B. Legal aid / Court costs. Under what conditions would free or subsidised legal aid be available to child complainants or their representatives through the court system (i.e., would the case have to present an important legal question or demonstrate a likelihood of success)? Would child complainants or their representatives be expected to pay court costs or cover other expenses?

Applicants for legal aid in civil cases must address their request to the magistrate, who examines the application and forwards it to the appropriate office.⁵⁹ The office, after obtaining all the necessary information, makes a decision containing a summary of facts and arguments, and the decision to grant or refuse assistance.⁶⁰

Research could not determine what fees are applicable to initiating a case in the courts and whether there are any exemptions for cases brought on behalf of children. There are no costs associated with bringing a complaint to the National Committee on Human Rights.⁶¹

- C. Pro bono / Financing. If legal aid is not available, would it be possible for child complainants or their representatives to obtain legal assistance from practising lawyers on a pro bono basis, through a children's rights organisation, or under an agreement that does not require the payment of legal fees up front?

Research did not identify any organisations providing pro bono legal services to children specifically. The Ministry of Justice of Madagascar together with the United Nations Development Programme opened at least six legal clinics throughout the country which resolve individual disputes through conciliation.⁶²

- D. Timing. How soon after a violation would a case have to be brought? Are there any special provisions that allow young adults to bring cases about violations of their rights that occurred when they were children?

periodic reports of Madagascar, pg. 15.

⁵⁶ Globalex, *Law and Legal Systems in Madagascar: A Political Siege*, available at: <http://www.nyulawglobal.org/globalex/Madagascar.htm>.

⁵⁷ Code of Civil Procedure, Book III, Title I, Article 116.

⁵⁸ Code of Civil Procedure, Book III, Title I, Article 117.

⁵⁹ Code of Civil Procedure, Book I, Title IV, Article 35.

⁶⁰ Code of Civil Procedure, Book I, Title IV, Article 36.

⁶¹ Law N°2014-007 regarding the National Committee on Human Rights, Article 24.

⁶² Madagate news article, *Madagascar-PNUD: inauguration de la Clinique Juridique de Toliara*, 25 August 2012, available at:

<http://www.madagate.com/reportages/manifestation/2590-madagascar-pnud-inauguration-du-clinique-juridique-de-toliara.html>.

The limitation period for cases concerning child sexual abuse begins running when the victim reaches the age of majority - 18 years old.⁶³

- E. Evidence. What sort of evidence is admissible/required to prove a violation? Are there particular rules, procedures or practices for dealing with evidence that is produced or presented by children?

The parties are required to provide enough evidence to allow the judge to draw conclusions.⁶⁴ The judge may require the production of any evidence held by a party and the production of all documents held by third parties.⁶⁵

In juvenile court, children can be heard as witnesses if they are capable of understanding. In the case of abuse and in order to avoid putting the children through multiple testimonies, their first one can be recorded for future reference.⁶⁶ However, it is reported that little weight is given to evidence provided by children in Madagascar.⁶⁷

- F. Resolution. How long might it take to get a decision from the court as to whether there has been a violation?

The research has not revealed the average pendency of a court decision. Delays have been noted, however, in relation to criminal proceedings in relation to the sale of children, child prostitution and child pornography.⁶⁸

- G. Appeal. What are the possibilities for appealing a decision to a higher court?

Decisions of children's judges are appealable by (a) the father, mother, guardian, person or service to which the child was entrusted, within ten days following the notification of the decision, (b) the child himself, within ten days following the notification of the decision or from the day he was informed of the decision, or (c) the prosecution, within ten days after being delivered the notification of the decision.⁶⁹

The appeal is heard and determined by the Council Chamber of the Appellate Court responsible for children's affairs following the same procedures as those used by the juvenile court judge.⁷⁰ The appeal is open to the parties and the Public Ministry.⁷¹

- H. Impact. What are the potential short-term and long-term impacts of a negative

⁶³ *Combined third and fourth periodic reports of Madagascar*, pg. 109, available at: http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.MDG.3-4_en.pdf

⁶⁴ Code of Civil Procedure, Book I, Title I, Article 9.

⁶⁵ Code of Civil Procedure, Book I, Title IV, Article 11.

⁶⁶ Law N°2007-023 on the rights and protection of children, Article 77.

⁶⁷ UN Human Rights Council, *Report of the Special Rapporteur on the sale of children, child prostitution and child pornography, Najat Maalla M'jid, Addendum: Mission to Madagascar*, A/HRC/25/48/Add.2, 23 December 2013, at para. 99, available at:

www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session25/Documents/A-HRC-25-48-Add2_en.doc

⁶⁸ *Ibid*, at para. 77.

⁶⁹ Law N°2007-023 on the rights and protection of children, Article 80.

⁷⁰ Law N°2007-023 on the rights and protection of children, Article 81.

⁷¹ Law N°2007-023 on the rights and protection of children, Article 82.

decision? Is there a possibility for political backlash or repercussions from a positive decision?

Backlash against a positive decision is likely. The UN Committee on the Rights of the Child has noted that children witnesses or victims of crime in Madagascar are deterred from seeking access to justice and non-judicial complaints mechanisms due to a fear of repercussions and a limited confidence in the system.⁷² Furthermore, the high levels of corruption in the judiciary have a negative impact on legal accountability for crimes against children.⁷³

- I. Follow up. What other concerns or challenges might be anticipated in enforcing a positive decision?

There are reports of difficulty in enforcing judgements in civil cases due to factors such as corruption and the lack of independence of the judiciary in Madagascar.⁷⁴

- V. **Additional factors.** Please list any other national laws, policies or practices you believe would be relevant to consider when contemplating legal action to challenge a violation of children's rights.

No additional factors were identified.

This report is provided for educational and informational purposes only and should not be construed as legal advice.

⁷² UN Committee on the Rights of the Child, *Concluding Observations on the combined third and fourth periodic reports of Madagascar*, para. 67.

⁷³ UN Committee on the Rights of the Child, *Concluding Observations on the combined third and fourth periodic reports of Madagascar*, para. 67.

⁷⁴ United States Department of State • Bureau of Democracy, Human Rights and Labor, *Country Reports on Human Rights Practices for 2013: Madagascar*, available at: <http://www.state.gov/documents/organization/220342.pdf>.