

ACCESS TO JUSTICE FOR CHILDREN: SWAZILAND

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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?

Swaziland¹ ratified the CRC in September 1995.² It has also acceded to the Optional Protocols to the CRC on children in armed conflict³ and sale of children.⁴

The CRC does not have the force of law in Swaziland. Article 238(4) of the Constitution of Swaziland provides that unless it is self-executing, an international agreement becomes law only when enacted into law by Parliament. As such, the provisions of the CRC must generally be implemented in further legislation in order to be invoked before the courts.⁵ This is confirmed by the High Court case of *R v Mngomezulu* 1977/78 SLR at 159 where the court held that unless an international treaty is incorporated into local law it confers no rights to a citizen of Swaziland. Research shows that since independence in 1968 no international treaty, convention or protocol based on or derived from the principles of human rights has ever been incorporated into the national or domestic laws of Swaziland.⁶

B. Does the CRC take precedence over national law?

As the CRC does not have the force of law in Swaziland and has not been incorporated into national law, it cannot take precedence over existing national law.

C. Has the CRC been incorporated into national law?

The CRC has not been incorporated into national law. However, the Constitution of Swaziland, which was enacted by parliament in 2005 and became operational in 2006, contains provisions for protecting children's rights.⁷ Also, there were two important

¹ Comments on this report provided by Masuku Mzwandile B, Youth and Child Protection Officer, The Council of Swaziland Churches, September 2015.

² UN Treaty Collection, 'Convention on the Rights of the Child', available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en.

³ UN Treaty Collection, 'Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict', available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&lang=en.

⁴ UN Treaty Collection, 'Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography', available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-c&chapter=4&lang=en.

⁵ CRIN, 'Swaziland: national laws', available at: <https://www.crin.org/en/library/publications/swaziland-national-laws>.

⁶ *Initial report of Swaziland to the UN Committee on the Rights of the Child*, CRC/C/SWZ/1, 16 February 2006, para. 21. Available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fSWZ%2f1&Lang=en.

⁷ Article 29 and Chapter III.

pieces of legislation passed in 2011 in Parliament: the Children’s Protection and Welfare Bill 2010 and the Sexual Offences and Domestic Violence Bill 2009.⁸ Both legal instruments seek to promote children’s rights. The Children’s Protection and Welfare Bill 2010 has been enacted by the Children’s Protection and Welfare Act 2012 (Children’s Act). According to its Preamble, the purpose of the Children’s Act is not only to extend Article 29 of the Constitution regarding the rights of the child, but also to extend “other international instruments”. This phrase may be seen as a reference to the CRC. As far as can be seen, the Sexual Offences and Domestic Violence Bill 2009 has not yet been enforced.

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

The CRC cannot be directly enforced in Swaziland courts; however, its principles have been applied and considered (see part I.E below). Also, Part XVI of the Children’s Act sets up jurisdiction of a Children’s Court in the Magistrate Courts, and contains procedural rules to protect children’s rights (see part II below).

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

The CRC has been cited in court decisions in Swaziland in criminal and civil matters, including matters on appeal.⁹

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?

Under the Criminal Procedure and Evidence Act 67 of 1938 (CPEA),¹⁰ prosecution of criminal offences is primarily in the hands of the attorney-general or local public prosecutors. If the attorney-general declines to prosecute for an alleged offence, private prosecution is possible in accordance with section 10 and the following of the CPEA. In case of an offence committed against a child, only his/her legal guardian, and not the victim themselves, has the right of prosecution.¹¹

The Children’s Act further provides procedure and representation in both civil and criminal matters. Part XVI of the Children’s Act sets up jurisdiction of a Children’s

⁸ UNICEF, ‘Big day for Swazi children as parliament passes two bills’, available at: http://www.unicef.org/swaziland/media_9866.html.

⁹ For criminal matters citing the CRC, see *Masinga v. Director of Public Prosecutions and Others*, High Court Case No: 21/07 Media Neutral Citation: [2011] SZHC 58 Judgment Date: 29 April 2011; and *R v. Mndzebele*, Case No: 213/2007 Media Neutral Citation: [2009] SZHC 247 Judgment Date: 25 November 2009; for civil matters citing the CRC, see *Swaziland National Ex-Miners Workers Association and Another v. The Minister of Education and Others*, Case No: 335/09 Media Neutral Citation: [2009] SZHC 104 Judgment Date: 16 March 2009; and *Stapley v. Dobson*, (2240/07) High Court Case No: 2240/07 Media Neutral Citation: [2008] SZHC 11 Judgment Date: 1 February 2008; for matters on appeal citing the CRC, see *Masinga v. Rex*, Supreme Court Case No: 09/2011 Media Neutral Citation: [2012] SZHC 60 Judgment Date: 30 November 2012.

¹⁰ Available at: http://www.africanchildforum.org/clr/Legislation%20Per%20Country/swaziland/swaziland_criproevi_1938_en.pdf.

¹¹ Section 11(1)(b) of the CPEA.

Court in the Magistrate Courts: every Magistrate Court also functions as a Children's Court and has jurisdiction to hear and determine matters in accordance with the provisions of the Children's Act.¹² Such matters include not only proceedings against child offenders, but also proceedings to protect children's rights, i.e. in cases where the victim is a child.

Civil proceedings may be initiated by a child's legal guardian when the child's rights have been violated. Any person or the affected child themselves may make an application to a social worker, chief or police officer for admission into a place of safety.¹³ Moreover, a child themselves as well as his/her parent or guardian may apply to the Children's Court for maintenance orders.¹⁴

Section 12 of the Children's Act provides that a child has the right to express his or her opinion freely and to have his or her opinion taken into account in any matter affecting the child. The opinion of the child must be given due weight in accordance with the age and maturity of the child.¹⁵

- 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?

In general, to initiate civil or criminal proceedings, children must be represented by their legal guardian. Under the Children's Act, a child is defined as a person under the age of 18 years.¹⁶ In certain circumstances, however, children may initiate proceedings under the Children's Act in his/her own name and on his/her own behalf (see part II.A above).

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

For cases where the victim is a child, the Children's Act does not differentiate with regard to the age of the child. Therefore, any child may initiate proceedings under the Children's Act in his own name and on his own behalf, irrespective of age (see part II.A above). In practice, however, eligible persons (e. g. a parent, guardian or social worker) are likely to bring the case on behalf of the child.

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

Swaziland does not have a legal aid system, except for counsel appointed by the court at the state's expense in certain cases.¹⁷ Section 21(2)(c) of the Constitution provides that a person charged with a criminal offence shall be entitled to legal representation at the expense of the government in the case of any offence which carries a sentence of death or life imprisonment.

¹² Section 132(1) of the Children's Act.

¹³ Sections 24(2) and 41(2) of the Children's Act.

¹⁴ Section 213(1)(a), (b), (c) of the Children's Act.

¹⁵ Section 12 (1) and (2) of the Children's Act.

¹⁶ Section 2 of the Children's Act.

¹⁷ GlobalLex, 'Update: 'The law and legal research in Swaziland', June 2012, available at: <http://www.nyulawglobal.org/Globalex/Swaziland1.htm>.

With respect to children specifically, a child has a right to legal representation in any legal proceedings and at any stage of proceedings.¹⁸ The legal representative must allow the child to give independent instruction on the manner in which the case is to be conducted and must encourage an informed decision-making by explaining possible options and the consequences of decisions.¹⁹ The child, his/her parent or guardian may appoint a legal representative of their choice and, consequently, is responsible for the payment of the representative's services.²⁰

When a child exercises his/her right to legal representation at the state's expense, a social worker, police officer, prosecutor or officer presiding in the Children's Court shall request a court-appointed attorney to represent the child on a pro bono basis.²¹ After the preliminary inquiry, if a legal representative has not yet been appointed and the child, his/her parent or guardian has indicated that they do not intend to select a legal representative of his/her own choice, such child shall be represented by a court-appointed attorney pro bono if the child is remanded in detention or the charges are to be instituted in the Children's Court and there is a likelihood of a sentence.²²

In practice, the state does not offer legal aid in civil matters.²³ It is reported that legal aid is "mainly provided on an ad hoc basis by some NGOs and by the government for accused persons who are charged with offences which might attract capital punishment".²⁴ Furthermore, certain cases are submitted to the Swazi National Courts ("Swazi Courts") under customary law where no legal representation is allowed.²⁵

- 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)?

Apart from those stated above, there are no other conditions or limits on children or chosen legal representatives bringing cases.

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?

The Constitution declares and guarantees fundamental rights and freedoms in Chapter III.²⁶ In particular, Article 29 of the Constitution establishes children's rights. According to Article 14(2) of the Constitution, the fundamental rights and freedoms shall be

¹⁸ Sections 146(1) and 147(1) of the Children's Act.

¹⁹ Cf. Section 146(2) of the Children's Act.

²⁰ Section 147(3) of the Children's Act.

²¹ Section 147(4) of the Children's Act.

²² Section 147(5) of the Children's Act.

²³ GlobalLex.

²⁴ AfriMAP and the Open Society Initiative for Southern Africa, 'Swaziland: justice sector and the rule of law', 2013, available at:

http://www.osisa.org/sites/default/files/afrimap_swz_justice_sector_main_text_web.pdf.

²⁵ GlobalLex.

²⁶ Article 14(1) of the Constitution.

respected and upheld by the Executive, the Legislature and the Judiciary, and shall be enforceable by the courts.

Where a person, including a child, alleges that any of his/her rights in Chapter III has been, is being, or is likely to be, contravened in relation to that person or a group of which that person is a member then he/she may apply to the High Court for redress. In the case of a person, including a child, who is detained, any other person alleging such a contravention in relation to the detained child may apply to the High Court for redress.²⁷ Research has not led to procedural rules on how a child or his/her representatives can initiate a legal challenge in case of violation of his/her constitutional rights.

Alternatively, complaints may be made to the Commission on Human Rights and Public Administration (“Commission on Human Rights”), which investigates complaints concerning alleged violations of fundamental rights and freedoms granted by the Constitution,²⁸ as well as complaints of injustice, corruption, abuse of power in office and unfair treatment of any person by a public officer in the exercise of official duties.²⁹ In order to remedy, correct or reverse the instances mentioned above, the Commission on Human Rights can take appropriate action through such means as are fair, proper and effective.³⁰ It can conduct negotiation and compromise between the parties concerned,³¹ report the complaint and its findings to the superior of an offending person or institution,³² and refer matters to the Director of Public Prosecutions or the Attorney General for appropriate action to end the offending action or conduct.³³ It may also bring proceedings to restrain the enforcement of any legislation or regulation where the offending action or conduct is sought to be justified by reference to that legislation or regulation.³⁴

African Commission

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”).³⁵ All available domestic remedies must have been exhausted before bringing a case to the African Commission.³⁶ 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.³⁷ 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)

²⁷ Article 35(1) of the Constitution.

²⁸ Article 164(1)(a) of the Constitution.

²⁹ Article 164(1)(b) of the Constitution; see also Article 164(1)(c), (e)-(i) of the Constitution.

³⁰ Article 164(1)(d) of the Constitution.

³¹ Article 164(1)(d)(ii) of the Constitution.

³² Article 164(1)(d)(iii) of the Constitution.

³³ Article 164(1)(d)(iv) of the Constitution.

³⁴ *Ibid.*, Article 164(1)(d)(v).

³⁵ African Charter on Human and Peoples’ Rights (“African Charter”), Article 55, available at: <http://www.achpr.org/instruments/achpr>.

³⁶ *Ibid.*, Article 56(5).

³⁷ 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/>.

and measures to prevent recurrence of the violation.³⁸ 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.³⁹

An example case filed with the African Commission is the complaint brought by Lawyers for Human Rights, a human rights NGO based in Swaziland, in 2002, alleging that freedom of association, expression and assembly under the African Charter had been violated.⁴⁰

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

The High Court has unlimited original jurisdiction in civil and criminal matters, including matters relating to the Constitution.⁴¹ It also has appellate and revisional jurisdiction according to the Constitution and national laws⁴² over all subordinate courts and tribunals.⁴³ Furthermore, the High Court has original jurisdiction to hear and determine applications to enforce fundamental rights under the Constitution and to hear and determine any matter of a constitutional nature.⁴⁴ The High Court may “make such orders, issue such writs and make such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of [Chapter III]” regarding fundamental rights.⁴⁵ If any law is found to be inconsistent with the Constitution, it will to the extent of the inconsistency be void.⁴⁶

The Supreme Court is the final court of appeal.⁴⁷ Accordingly, it has appellate jurisdiction to hear and determine appeals from the High Court in civil and criminal matters, including matters relating to the Constitution.⁴⁸ The Supreme Court also has power to hear and determine, with the leave of the High Court, any other cause or matter where the case was commenced in a court lower than the High Court and where the High Court is satisfied that the case involves a substantial question of law or is in the public interest.⁴⁹ Where the High Court has denied leave to appeal the Supreme Court may entertain an application for special leave to appeal to the Supreme Court in

³⁸ 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>.

³⁹ 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>.

⁴⁰ See *Lawyers Human Rights v. Swaziland* (2005) AHRLR 66 (ACHPR 2005), available at: <http://www1.chr.up.ac.za/index.php/browse-by-subject/459-swaziland-lawyers-for-human-rights-v-swazil-and-2005-ahrlr-66-achpr-2005.html>.

⁴¹ Articles 139(2), 151(1)(a) of the Constitution.

⁴² Article 151(1)(b), (c) of the Constitution.

⁴³ Article 152 of the Constitution.

⁴⁴ Articles 35(2) and 151(2) of the Constitution.

⁴⁵ Article 35(2) of the Constitution

⁴⁶ Article 2(1) of the Constitution.

⁴⁷ Article 146(1) of the Constitution.

⁴⁸ Articles 139(2), 146(1), (2), 147(1)(a) of the Constitution.

⁴⁹ Article 147(1)(b) of the Constitution.

any cause or matter, civil or criminal, and may grant or refuse leave accordingly.⁵⁰ In addition, the Supreme Court has supervisory and revisional jurisdiction over all courts of judicature and over any adjudicating authority and may, in particular, issue orders and directions for the purposes of enforcing or securing the enforcement of its powers.⁵¹

Magistrates Courts are established by provisions of the Magistrates Courts Act 66 of 1938.⁵² Magistrates Courts may award damages up to a certain amount in civil cases (see part IV.A below).

A judicial officer conducting a review of a child's sentence under the Children's Act involving a residential element or imprisonment imposed on a child has the power to: confirm, alter or quash the proven charge(s), alternative charge(s), sentence or any court order; correct the proceedings of a lower court; declare judgment, impose a sentence or make an order; or increase the sentence or impose any form of sentence.

Swazi National Courts may impose fines, order compensation for the victim (such as return of stolen items or their monetary value) or impose custodial sentences.⁵³

- C. Would such a challenge have to directly involve one or more individual child victims, or is it possible to challenge a law or action without naming a specific victim?

Court proceedings would necessarily involve individual victims. The Commission on Human Rights, however, may take action in the interest of child victims without naming them.

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

Collective action in the way of a class action does not appear to be possible in Swaziland. However, joinder of parties and causes of action is allowed under rule 10 of the High Court Rules, so long as the right to relief of the persons proposing to join as plaintiffs depends on the determination of substantially the same question of law or fact. Furthermore, rule 11 provides that the court may consolidate multiple actions out of convenience.

- 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?

Under Article 14 of the High Court Rules, an "association" may sue in its name. It is unclear whether procedural provisions referring to "any person" (e.g. sections 24(2) and 41(2) of the Children's Act) also include NGOs.

As a general rule, a litigant has legal standing only if he/she can show a "direct and substantial interest in the subject matter".⁵⁴ However, traditionally courts have not heard

⁵⁰ Article 147(2) of the Constitution.

⁵¹ Article 148 of the Constitution.

⁵² GlobalLex.

⁵³ GlobalLex.

⁵⁴ *Lawyers for Human Rights (Swaziland) and Another v. Attorney General*, unreported Civil Appeal 1822 of 2001; see also *Sithole NO and Others v. The Prime Minister and Others* (35/2007) [2008] SZSC 22 (23 May 2008).

the merits of a human rights case, deciding on *locus standi*. Regarding actions to enforce fundamental rights, the courts have ruled that charitable trusts or human rights organisations lack standing to bring a constitutional suit as they are not a “citizen”.⁵⁵ On the other hand, in the High Court case of *Swaziland National Ex-Miners Workers Association and Others vs The Minister of Education and Others*⁵⁶ concerning the enforcement of the right to free primary education under section 29(6) of the Constitution, it was stated that any person or group has legal standing in constitutional litigation. This interpretation is, however, subject to the Supreme Court’s confirmation before it can be regarded as precedent.⁵⁷

NGOs may be able to join proceedings as *amicus curiae*.⁵⁸

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?

High Court

See part III.B for a description of the High Court’s jurisdiction. Except where proceedings by way of petition are prescribed by law, every application to the High Court shall be brought on notice of motion supported by an affidavit(s) as to the facts upon which the application relies for relief. Further details are set out in section 6 of the High Court Rules.

Magistrates’ Courts

According to Practice Directive No. 2/2011 of 25 May 2011,⁵⁹ the Chief Justice has directed that all civil cases falling within the jurisdiction of the Magistrates Courts shall be filed in those courts and not in the High Court. The Magistrates Courts’ jurisdiction in civil matters is as follows:

- in the case of principal magistrate’s courts, all actions permitted by law or practice and actions where the claim or value of the matter in dispute does not exceed 30,000 Emalangeni;
- in the case of senior magistrate’s courts, all actions permitted by law or practice and actions where the claim or value of the matter in dispute does not exceed 20,000 Emalangeni; and
- in the case of any magistrate’s courts lower than a senior magistrate’s court, all actions permitted by law or practice and actions where the claim or value of the matter in dispute does not exceed 10,000 Emalangeni.

⁵⁵ *Swaziland Coalition of Concerned Civic Organizations Trust and Others v. Elections and Boundaries Commission and Others* (2783/2008) [2009] SZHC 114 (26 March 2009). The appeal was dismissed by the Supreme Court.

⁵⁶ (335/09) [2009] SZHC 104 (16 March 2009).

⁵⁷ AfriMAP and the Open Society Initiative for Southern Africa.

⁵⁸ For example, in June 2011 the High Court allowed Save the Children, represented by the University of Swaziland Law Clinic, to be joined as *amicus curiae* in proceedings for the eviction of families at Madonsa in Manzini, though the matter remains pending in court: see AfriMAP.

⁵⁹ Available at: <http://www.swazilii.org/practice-directive/2011/2>.

Children's Court

Swaziland does not currently have dedicated children's courts.⁶⁰ The High Court has a children's section facilitating all matters involving minors.⁶¹ This is a child-friendly wing that allows minors to participate in judicial proceedings in conditions that are favourable to them.⁶²

Under section 132(1) of the Children's Act, every Magistrates Court shall have a children's court within its area of jurisdiction and shall have jurisdiction to hear and determine matters in accordance with the provisions of the Children's Act. It is unclear, however, whether this has been implemented in practice. Furthermore, under section 133(1) of the Children's Act, a court, other than a children's court, has jurisdiction to try the case of an accused child for certain serious offences.

Swazi National Courts

The Swazi National Courts have jurisdiction in matters falling under customary law, and can only handle matters involving Swazi nationals, though these courts have increasingly been handling cases involving non-nationals.⁶³ These traditional courts hear both civil and minor criminal matters. Although the courts are authorised to impose fines of up to 240 emalangenani (\$24) and prison sentences of up to 12 months, there were reported cases in which traditional courts imposed sentences exceeding these limits. According to Practice Directive No. 2/2011, all cases falling within the jurisdiction of the Swazi National Courts shall be filed in those courts and not in the High Court (see part V below for more information).

- 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?

See part II.D. above.

- 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?

Lawyers are bound by law and ethics to charge adequately and properly for professional services unless they act on a pro bono basis. The Legal Practitioners Act does not currently allow for contingency-fee arrangements between an attorney and a client.⁶⁴

⁶⁰ GlobalLex.

⁶¹ *Simelane v. Principal Secretary Deputy Prime Ministers Office & Another*, High Court Case No: 60/2013 Media Neutral Citation: [2013] SZHC 32 Judgment Date: 28 February 2013.

⁶² GlobalLex.

⁶³ GlobalLex.

⁶⁴ AfriMAP and the Open Society Initiative for Southern Africa.

Private institutions such as non-governmental organisations (NGOs) provide some form of free legal assistance to persons in need, mostly in matters of maintenance, inheritance and domestic or sexual abuse. Since these are donor-funded entities, their interventions are usually limited by donor preferences and scarcity of funds. There is a great need for an increase in the number of such organisations.⁶⁵

- 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?

Prosecution for murder, whether by the state or by a private party, is not limited by time. Prosecution for any other offences must be brought within 20 years of the offence being committed.⁶⁶

With respect to other matters, the Constitution, the High Court Rules and the Children's Act are all silent regarding this issue.

- 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 Children's Act provides that:

- evidence of admissions, confessions and accusations made under coercive circumstances or in the absence of a child's parent, guardian or legal representative is inadmissible in proceedings in the Children's Court or any other court acting under the provisions of the Children's Act;⁶⁷
- no evidence of admission nor confession made by a child during an assessment or during the course of a preliminary inquiry is admissible at bail or trial proceedings in the Children's Court;⁶⁸ and
- the officer presiding in the Children's Court may, if it would be in the best interests of the child, actively⁶⁹ participate in eliciting evidence from any person involved in the proceedings.

With regard to proceedings against child offenders, the Children's Act establishes procedural rights of children, taking into account their special needs. For example, section 134 of the Children's Act calls for assistance to children who appear in court, namely by the presiding officer of the Children's Court and the child's parent or guardian.

The proceedings of the Children's Court shall be conducted in an informal manner to encourage the maximum participation of the child, his/her parent or guardian and other child witnesses. Where the presence of a parent, guardian or any other person who is not an officer of the Children's Court is likely to discourage the maximum participation of the child, the Children's Court shall order that person to recuse themselves from the

⁶⁵ GlobalLex.

⁶⁶ CPEA, section 20.

⁶⁷ Section 138(1)-(2) of the Children's Act.

⁶⁸ Section 138(1)-(2) of the Children's Act.

⁶⁹ Section 137(1) of the Children's Act.

proceedings.⁷⁰ All proceedings conducted in the Children's Court shall be closed to respect the privacy of the child concerned and other child witnesses.

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

Research has not led to a sufficient number of court decisions to determine a time period within which Swaziland courts usually decide on whether there has been a violation. Under the Children's Act, it is possible to bring an application on a certificate of urgency.⁷¹ However, various reports have commented on the backlog of cases in the court system and delays during trials in courts.⁷²

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

The appellate and revisional jurisdiction of the High Court and the Supreme Court have been set out in part III.B above. The Court of Appeal Rules of 1971 establish the formal and material requirements of criminal and civil appeals.

- H. Impact. What are the potential short-term and long-term impacts of a negative decision? Is there a possibility for political backlash or repercussions from a positive decision?

The Swaziland legal system is based on common law and precedent. Therefore, negative decisions of higher courts will be binding on lower courts in similar decisions, and therefore may have long-term impacts.

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

According to Freedom House, the judiciary is independent in most civil cases, though the King has ultimate judicial powers, and the royal family and government often refuse to respect rulings with which they disagree. The Swazi High Court has made a number of notable anti-government rulings in recent years. For example, in 2011 a judge - and head of the Judicial Services Commission - was suspended for allegedly insulting the King in a ruling.⁷³ This led to the Lawyers for Human Rights of Swaziland filing a complaint with the African Commission alleging the country lacked an independent judiciary.⁷⁴ In these circumstances, it may be difficult to enforce a decision upholding children's rights against the government.

- 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.

⁷⁰ Section 137(2)-(4) of the Children's Act.

⁷¹ *Simelane v. Principal Secretary Deputy Prime Ministers Office & Another*, High Court Case No: 60/2013, Media Neutral Citation: [2013] SZHC 32 Judgment Date: 28 February 2013.

⁷² US State Department, 'Swaziland 2013 human rights report', available at: <http://www.state.gov/documents/organization/220377.pdf>; AfriMAP and the Open Society Initiative for Southern Africa.

⁷³ Freedom House, 'Swaziland', available at: <https://freedomhouse.org/report/freedom-world/2014/swaziland#.VXhjoryYO1E>.

⁷⁴ US State Department.

Traditional courts and customary law

The dual judicial system in Swaziland includes courts based on Roman-Dutch law and traditional courts using customary law. Under the Constitution, the principles of Swazi law and custom are recognised and adopted and shall be applied and enforced as part of the law of Swaziland, except where they are inconsistent with a provision of the Constitution or a statute.⁷⁵ Under the Swazi Courts Act of 1950, where customary law is “repugnant to natural justice”, it shall to the extent of that repugnancy be void. Neither the Supreme Court nor the High Court has jurisdiction in matters concerning the office of the king or queen mother, the regency, chieftaincies, the Swazi National Council, or the traditional regiments system; traditional law and custom govern all of these institutions.⁷⁶

Traditional courts consist of both the statutory Swazi National Courts, established by the Swazi Courts Act, and the chiefs’ courts. The traditional courts operate under traditional authorities, including local chiefs which preside over the courts as presidents appointed by the king. Although chiefs do not have formal judicial power, in practice they exercise a wide range of powers that are, in effect, judicial in nature.⁷⁷ Authorities may bring citizens to these courts for minor offences and violations of traditional law and custom, and have also tried cases involving non-Swazis in these courts. Traditional law and custom provide for an appeals process. Judicial commissioners within the traditional legal system may adjudicate appeals or refer appeals to a court within the civil judicial system on their own initiative or if requested by the plaintiffs or defendants. Authorities generally respected court rulings.⁷⁸

It is reported that most citizens who encountered the legal system did so through the traditional courts, as they are more comfortable taking their case to the person who has traditionally been performing this function rather than to the general courts.⁷⁹ However, the dual judicial system does not offer equal legal protection to people in Swaziland. It is reported that some traditional laws and practices violate civil laws, particularly those involving women’s and children’s rights. Defendants in these traditional courts are not permitted formal legal counsel but may speak on their own behalf, call witnesses, and be assisted by informal advisors.⁸⁰ Swazi National Courts are perceived to be lenient towards male offenders, especially in matters of domestic violence.⁸¹ Corporal punishment such as caning, while no longer used in practice, still remains in the law as a constitutionally viable sentence.⁸²

There is an opportunity for stronger protection under section 3(4) of the Children’s Act, which provides that “[w]here there is anything to the contrary or less protective or less promotive in any law, the provisions of [the Children’s Act] shall apply”. However, the courts have yet to decide the current position on interpreting this section.

⁷⁵ Article 252 of the Constitution.

⁷⁶ US State Department.

⁷⁷ AfriMAP and the Open Society Initiative for Southern Africa.

⁷⁸ US State Department.

⁷⁹ US State Department; AfriMAP and Open Society Initiative for Southern Africa.

⁸⁰ US State Department.

⁸¹ AfriMAP and Open Society Initiative for Southern Africa.

⁸² International Bridges to Justice, ‘JusticeMakers team visits Swazi traditional courts’, 2009, available at: <http://www.ibj.org/2009/07/13/justicemakers-team-visits-swazi-traditional-courts/>.

Family justice

It is reported that the family is considered “the most important and immediate justice-delivery structure for many people” in Swaziland, and is an “important centre for mediating and settling conflicts” of a private nature. Regarding children, the family is usually approached to settle conflicts between parents and children, inheritance conflict, and child maintenance issues. In cases concerning family matters, the chief’s court will only hear the matter once it has been deliberated upon by the family.⁸³

In practice, men who are perpetrators of domestic violence are shielded by the family. In the absence of a comprehensive Sexual Offences and Domestic Violence Act, women and children suffer violations of their rights and cannot obtain protection from the perpetrators.⁸⁴

Other barriers to access to justice

It is reported that access to justice in Swaziland is hindered by poor physical access to courts, particularly for citizens who live in the rural areas, where there are no common law courts. Language is also a barrier, with English being the language used in common law courts (as opposed to the local language in proceedings in the traditional courts). In practice, court proceedings are postponed when an interpreter is not available.⁸⁵ There is no statutory legal aid system, and most people are unable to afford lawyers’ fees, which leads in practice to most people appearing in court without a lawyer. However, their limited capacity to handle the procedural technicalities and the language, as well as the alienating atmosphere of the common law court system, mean that their ability to represent themselves effectively is constrained.⁸⁶

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

⁸³ AfriMAP and Open Society Initiative for Southern Africa.

⁸⁴ AfriMAP and Open Society Initiative for Southern Africa.

⁸⁵ Section 8(2) of the High Court Act; AfriMAP and Open Society Initiative for Southern Africa.

⁸⁶ AfriMAP and the Open Society Initiative for Southern Africa.