

SEXUAL EXPLOITATION AND ABUSE OF THE GIRL CHILD THROUGH
CULTURAL PRACTICES IN UGANDA

BY

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DECLARATION

I, Nambooze Sarah, do hereby declare that this work is original and has never been submitted to any other institution for a ward of any Degree or Diploma. Where the work of others has been used, reference has been made there of.

Signed: 

Date: 17th/07/2017

APPROVAL

This is to certify that this research work of Sara titled, "*Sexual Exploitation and abuse of the girl child through Cultural Practices in Uganda*" has been submitted to the Faculty of Law with my approval as a University supervisor.

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DEDICATION

This book is dedicated to the following people for having been there for me up to my final report in my academics with financial and spiritual support.

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ABBREVIATIONS

CRC	Convention on the Rights of the Child
ACRWC	African Charter on the Rights and Welfare of the Child
UN	United Nations
CEDAW	Convention on the Elimination of Discrimination against Women
AIDS	Acquired Immune Deficiency Syndrome
HIV	Human immune virus
ICESCR	International Covenant of Economic Social and Cultural Rights
LSA	Law Society of Uganda
NGOs	Non Governmental Organizations
CRESS	Children's Right Education Support Services
CCAs	Child Care Advocates

ABSTRACT

The study aimed at observing the sexual exploitation and abuse of the girl child through cultural practices in Uganda. Recently the state has acknowledged the problem of sexual abuse and exploitation of the girl child and has indicated the willingness to step up campaigns against it. This campaign, however, targets school children in primary and secondary schools. There has also been an increase of sexual abuse of children in schools by the teachers and other staff members. The family as an institution has facilitated child abuse and exploitation in Uganda through cultural practices and customs as a survival tactic. Some commentators have directly linked the revival of these cultural practices to the economic crisis that has resulted in food shortages around the country. These traditional practices include the marriages of the child to older men in exchange for food or money known as pledging a girl into marriage and virginity testing. Some of the practices are, however, not directly linked to the prevailing economic crisis, but are just practiced as a tradition. These practices have become more common amongst the Baganda, the largest tribe constituting at least 76% of the population, and predominantly patriarchal. Theorists of patriarchy have directed their attention to the subordinate status of women and found their explanation in the male need to dominate the female. Although Uganda as a state has shown a commitment to protecting children against sexual abuse by enactment of laws criminalising involvement of the girl child in prostitution, incest and rape of girls, little has been done to ensure that forced and early marriages of the girl child are curtailed. Virginity testing is not criminalised and is also currently being practised in rural parts of the country on a wide scale. ... Chapter one introduces the problem of child sexual abuse and exploitation of the girl child as a universal problem and gives a structure of the study. Chapter two discusses the concept of a child, sexual abuse and exploitation as a human rights problem. It analyses the protection of children under international human rights law. The legal framework protecting children from sexual abuse and exploitation and the shortcomings will be highlighted. The impact of such sexual abuse and exploitation on the overall development of the child will also be discussed. Chapter five makes recommendations by looking at the developments from other countries on the rights of the girl child and cultural practises that result in sexual abuse."

CHAPTER ONE

INTRODUCTION

1.1 Background

Sexual exploitation and abuse of children has occurred throughout history.¹ The problem of child sexual victimisation is universal.² It is universal because of the subordinate status of children.³ Children are victims of sexual abuse and exploitation due to their social, psychological, economic and intellectual positions.⁴

Sexual abuse did not form part of international human rights law until the coming into force of the Convention on the Rights of the Child (CRC).⁵ The international law on child sexual exploitation on the other hand can be traced back to the League of Nations.⁶ The denial of sexual abuse of children for a long time throughout history has been attributed to disbelieving children.⁷ Sexual abuse of children within the home is also regarded as a form of violence by the United Nations.⁸

¹ K D Clark 'Innocent victims and blind justice, children's rights to be free from sexual abuse' *New York Law school journal for human rights* (1990) 214; Sexual abuse of children was practiced in ancient Greece, prostitution of children was widespread in 14 century, historical records from the 18 century indicate that homosexual child sex was accepted practice in Asia and Africa see D Kenny 'Opinion policy and practice in child sexual abuse: implications for detection and reporting' in M James (ed) *Paedophilia policy and prevention Research and public policy series 14&15* available at <http://0-www.fhs.usyd.edu.au/innopac.up.ac.za/bach/staff/kenny/Documents%20psych> (accessed on 27 September 2006).

² KC Faller *Child sexual abuse: an interdisciplinary manual for diagnosis case management and treatment in society* (1989) x; According to the World Health Organisation (WHO) the overall prevalence of child sexual abuse is 25% for girl and 8% for boys see Family Health International 'Non-consensual sex' 23 *Network* (2005) 3.

³ G van Bueren 'Child sexual abuse and exploitation: a suggested human rights approach' 2 *International journal of children's rights* (1994) 45.

⁴ N Bala 'Double victims: child sexual abuse and the criminal justice system' *Queens law journal* (1990) 233.

⁵ The Convention on the Rights of the Child (CRC) 34 came into force on 2 September 1990 it has been ratified by 192 countries see T van Banning et al *Human rights instruments* (2004); Art 19(1); art 34 & art 36 of CRC.

⁶ G van Bueren (n 3 above) 52; protection against sexual exploitation has also developed from international law prohibiting the exploitation of women and children these include art 4 of the Geneva Declaration of the Rights of the Child of 1924 and principle 9 of the Declaration on the Rights of the Child 1959 available at <http://www1.umn.edu/humanrts/instree/auok.html> (accessed on 24 August 2006).

⁷ AH Young 'Recent Canadian law development in the treatment of children and their evidence in child sexual abuse cases' 1 *Annals of health law* (1992) 158.

⁸ Art 2 (a) of Declaration on the Elimination of Violence against Women available at <http://www.un.org/documents/ga/res/48/a48r/104.htm> (accessed on 23 September 2006).

The protection of the girl child against sexual abuse and exploitation is also found in the African Charter on the Rights and Welfare of the Child (ACRWC),⁹ the Women Protocol to the African Charter on Human and People's Rights (the Protocol).¹⁰ Sexual abuse remains a problem in most parts of the world.¹¹ All states that have ratified these instruments have an obligation to protect children from sexual abuse or exploitation. The obligation to protect children against sexual abuse cannot be fulfilled unless the state ensures that cultural practices that condone and facilitate sexual abuse and exploitation are discouraged and prohibited.¹² The ACRWC specifically prohibits traditional practices that are harmful to girls.¹³ It also prohibits customs and practices that are prejudicial to the health of the child.¹⁴

The need to enjoin states to prohibit cultural practices that are harmful was initially acknowledged by the United Nations (UN) in the 1950's after colonial administrators were concerned about harmful customs practiced in their colonies.¹⁵ Other international instruments such as the Convention on the Elimination of Discrimination against Women (CEDAW) have condemned these practices.¹⁶ Some of the practices that have been regarded as harmful include female genital mutilation, early marriage that results in early pregnancy and dowry price or bride wealth.¹⁷ Recently the practice of virginity testing has been identified as being harmful to the girl child.¹⁸ All of these practices are not only harmful but result in sexual abuse and exploitation.

The involvement of children in sexual activities is detrimental to the survival and development of the child as articulated in ACRWC.¹⁹ Sexual abuse of children has a direct and potentially

⁹ The African Charter on the Rights and Welfare of the Child (ACRWC) Centre for Human Rights *Compendium of key human rights documents of the African Union* (2005); ACRWC was adopted by the 26th Ordinary Session by the Assembly of Heads of State and government of the Organisation of African Unity in 1990 and came into force in 1999; art 16(1) & art 27 of ACRWC.

¹⁰ The Women's protocol to the African Charter on Human and Peoples' Rights (the protocol) Centre for Human Rights *Compendium of key human rights documents of the African Union* (2005); came into force on the 25 November 2005.; art 4(2) of the Protocol.

¹¹ International Labour Organisation 'Sexual exploitation of children' World of Work (42) 2002 available at <http://www.ilo.org/public/english/bureau/inf/magazine/42/yokohama.htm> (accessed on 24 August 2006).

¹² Art 21 of ACRWC.

¹³ Art 21(1)(b) & art 21(2) of ACRWC.

¹⁴ Art 21(1)(a) of ACRWC.

¹⁵ B Winter et al 'UN approach to harmful traditional practices: some conceptual problems' *International feminist journal of politics* (2004) 74.

¹⁶ Art 5(a) of the Convention on the Elimination of Discrimination against Women (CEDAW) it came into force on 3 September 1981 available at <http://www.unhcr.ch/html/menu3/b/61cedaw.htm> (accessed on 26 August 2006).

¹⁷ B Winter (n 15 above).

¹⁸ L Vincent 'Virginity testing in South Africa: re-traditioning the post-colony' *Culture health and sexuality* (2006) 19.

¹⁹ Art 5(1) of ACRWC.

permanent impact on the self-esteem of the victim.²⁰ Few victims enter adulthood without the symptoms of the crime perpetuated against them as children.²¹ Extensive research has been conducted which focuses on the individual psychopathology associated with child sexual abuse.²² Sexual abuse is associated with disorders such as depression, anxiety, personality disorder, substance abuse and low self-esteem.²³ Sexual abuse is also associated with suicidal thoughts, plans and behaviour.²⁴ Some of the victims of sexual abuse have been infected with sexually transmitted infections such as H.I.V.²⁵

The European Commission of Human Rights specifically commented on the mental suffering of children because of sexual abuse. It concluded that sexual abuse results in acute psychiatric disturbances that fall in the category of treatment prohibited under article 3 that prohibits torture inhuman and degrading treatment.²⁶

In Uganda the sexual abuse and exploitation of the girl child remains high.²⁷ Recently the state has acknowledged the problem of sexual abuse and exploitation of the girl child and has indicated the willingness to step up campaigns against it.²⁸ This campaign however targets

²⁰J Steel et al 'Psychological sequelae of childhood sexual abuse, related characteristics coping strategies and attribution style' *Child abuse and neglect* (2004) 576; R Roberts 'The effects of child sexual abuse in later life' 28 *Child sexual abuse and neglect* (2000) 525.

²¹As above.

²²R Roberts (n 20 above) 525.

²³As above.

²⁴RK Oates 'Sexual abuse and suicidal behaviour' *Child Abuse and Neglect* 28 (2004) 487; R Roberts (n 22 above).

²⁵BA Davar 'Rethinking gender persecution, sexual violence and women's rights: a new conceptual framework for political asylum in international human rights law' 6 *Texas law journal of women and the law* (1997) 489; There is a myth that sex with a virgin cures HIV infections see R Jewkes 'The virgin cleansing myth: cases of child rape are not exotic' *The Lancet* (2002) 11; L Ackermen et al 'Social factors that make South African women vulnerable to HIV infection (2002) 102; A high school teacher in Uganda was recently convicted of raping a six year old girl whom he infected with HIV he was sentenced to 17 years imprisonment. available at <http://www.unicef.org/media/media_35154.html> UNICEF shocked and outraged at latest case of child rape in Uganda (accessed on 3 September 2006); at least 1800 children are infected by HIV/ AIDS they are below the age of 15 years and they account for 13% of the HIV/ AIDS global infections see UNICEF 'State of the world's children: 2006' (2006) 16 available at <<http://www.unicef.org/sowc06/pdfs/sowc06fullreport.pdf>> (accessed on 14 October 2006).

²⁶X and Y v Netherlands available at <<http://worldii.org/eu/cases/ECHR/1985/4.html>> (accessed on 3 September 2006).

²⁷Unicef 'Unicef' outraged and shocked with latest case of child rape in Uganda' available at http://www.unicef.org/media/media_3514.html accessed on 17 August 2006; in 1997 a report released by J Raath indicated that at least 3 in very ten children in Uganda is sexually abused available at <http://pangea.org/street_children/africa/zimba3htm> (accessed on 3 September 2006).

²⁸Uganda- campaign against child sexual abuse available at <<http://www.sadivnormal.wordpress.com/2006/09/20-zimbabwe-campaign-against-child-sexual-abuse-welcome/>> (accessed on 2 October 2006).

school children in primary and secondary schools.²⁹ There has also been an increase of sexual abuse of children in schools by the teachers and other staff members.³⁰

The family as an institution has facilitated child abuse and exploitation in Uganda through cultural practices and customs as a survival tactic.³¹ Some commentators have directly linked the revival of these cultural practices to the economic crisis that has resulted in food shortages around the country.³² These traditional practices include the marriages of the child to older men in exchange for food or money known as traditional introduction, Visiting the Auntor pledging a girl into marriage and virginity testing. Some of the practices are however not directly linked to the prevailing economic crisis but are just practiced as a tradition like visiting the Aunt.³³ These practices have become more common amongst the Baganda, the largest tribe constituting at least 76% of the population and predominantly patriarchal.³⁴ Theorists of patriarchy have directed their attention to the subordinate status of women and found their explanation in the male need to dominate the female.³⁵ Although Uganda as a state has shown a commitment to protecting children against sexual abuse by enactment of laws criminalizing involvement of the girl child in prostitution, incest and rape of girls, little has been done to ensure that forced and early marriages of the girl child are curtailed.³⁶ Virginity testing is not criminalized and is also currently being practiced in rural parts of the country on a wide scale³⁷.

²⁹ As above.

³⁰ Reports by UNICEF indicate that sexual abuse of children in Uganda has greatly increased in schools in 2005, at one primary school in Marondera 52 children were abused whilst 14 children were sexually abused at another school in Harare. At least 11 girls were abused every day in 2005 with at least 4 146 cases of sexual abuse being recorded by one local Non Governmental Organisation that is dealing with sexual abuse of girls available at <http://www.unicef.org/media/media_3514.html> (accessed on 17 August 2006).

³¹ Practices done in the name of culture in Uganda include virginity testing, child marriages, *lobola*, *kuripangozi* and *kuzvarira*.

³² D Moore 'Neo-liberal globalisation and the triple crises of modernization in Africa Uganda, Democratic Republic of Congo and South Africa' 22 *Third World Quarterly* (2001) 916; Zimonline 'Girl children sacrificed into marriage as hunger bites Uganda' 2006 available at <http://www.zimonline.co.za/headdetail.asp?ID=12104> (accessed on 23 August 2006).

³³ This is a traditional practice whereby a husband is allowed to fondle the young sisters of his wife in other instances the maternal uncle is allowed to do this as a form of socialisation, see J Raath (n 27 above) 'Study finds three out of ten girls are sexually abused' available at http://www.pangea.org/street_children/africa/zimba3.htm (accessed on 3 September 2006); other efforts have been directed towards the treatment of victims of sexual abuse in court by the setting up of victim friendly courts that have resulted in the increased use of the closed circuit television. This has had the effect of reducing the trauma that was suffered by children in giving evidence due to confrontation with the accused person see the Criminal Procedure and Evidence Act.

³⁴ J Decosas et al the profile and context of the epidemics of the sexually transmitted infections including H.I.V in Uganda *Sexually transmitted infections* (2002) 1.

³⁵ J W Scott 'Gender as a useful category of historical analysis' in (ed) R Parker et al *Culture, sexuality and society: a reader* (1999).

³⁶ The Criminal Law (Codification and Reform) Act Chapter 9.23.

³⁷ The traditions Handbook (2005) The nature of Uganda's traditional settings.

1.2 Statement of the problem

Although Uganda has ratified several international and human rights instruments that protect the girl child against sexual abuse and exploitation the prevalence remains high in the country.³⁸ This is attributable to several factors that are social, cultural and economic. The recent steps that the state proposes to take to eradicate sexual abuse by empowering the victims in schools will not eradicate sexual abuse and exploitation in Uganda as education is not free at all. Not all girl children are attending schools at present as educational costs are very high,³⁹ due to the current inflation levels most families cannot afford to send their children to school.⁴⁰ The possible victims of sexual abuse and exploitation can be left out in this campaign. Poverty is one of the root causes to sexual abuse and exploitation of children. Poverty has to be addressed in order to obtain a lasting solution to the problem of child sexual abuse and exploitation in Uganda.

The state has to realise that most of the sexual abuse and exploitation of children is done within the family through cultural practices such as early forced marriages and virginity testing and not reporting cases of sexual abuse that occur in the family.

Not all marriages are registered in Uganda, virginity testing is not criminalized, and adequate measures have not been put in place to ensure that cases of incest are brought to light. Although the state has criminalised sex with young girls of a particular age, these laws have not deterred the offenders at all. Most of the sexual abuse is not perpetrated by strangers to the child but by acquaintances. Girl children still continue to be sexually abused at schools in Uganda and this has become a major problem with one of the victims being infected with H.I.V recently.⁴¹

1.3 Purpose of study

The main aim of the study is to examine the sexual exploitation and abuse of the girl child through cultural practices in Uganda.

³⁸ Uganda ratified CRC on 11 September 1990 with no reservations, ACRWC on 1 January 1995 with no reservations.

³⁹ In 1996 the Committee on the Rights of the Child stated that primary education was not free or compulsory in Uganda see U.N. Doc.CRC/C/15/Add.55(1996), para.19 available at <<http://www.umn.edu/humanrts/crc/crc-Uganda96.htm>> (accessed on 14 August 2006).

⁴⁰ K Tomasveski 'The state of the right to education worldwide free or fee:2006 global report' (2006) 69 available at http://www.katarinatomasevski.com/images/Global_Report.pdf (accessed on 24 September 2006).

⁴¹ UNICEF 'UNICEF outraged and shocked with latest case of child rape in Uganda' available at http://www.unicef.org/media/media_3514.html (accessed on 17 August 2006).

1.4 Research Questions

1. Why and how has the family as an institution facilitated the sexual abuse of the girl child?
2. What measures if any, have been taken by the state to eradicate sexual abuse and exploitation of children perpetuated by cultural practices in Uganda?
3. What measures should the state take in terms of law and policy to stop child sexual abuse and exploitation of children caused by cultural practices in the Ugandan families?

1.5 Scope of the study

1.5.1 Content scope

This paper seeks to show how the family has facilitated sexual exploitation and abuse of the girl child in Uganda under the guise of culture through practices like Buganda, virginity testing, bride wealth and early marriages. Child sexual abuse is said to originate in an essentially patriarchal society in which both women and children are victims of unequal distribution of power.⁴² The present role of the state in Uganda is to ensure that the girl child is not sexually abused and exploited. This obligation cannot be fulfilled by promulgating laws to enforce the rights of the girl child or by educating the school going girl child only in Uganda. There is a need for the state to address the root cause of why the family is resorting to these cultural practices in the first place. After addressing this, the state can come up with laws and regulatory frameworks to stop child sexual abuse in Uganda.

Present shortcomings in legislation and implementation will also be explored. The possibility of reform in law and policy and regulation to ensure the protection of girl child against sexual abuse and exploitation will be discussed.

1.5.2 Time scope

The study will be covered within a period of 4 month March 2017-June 2017.

⁴² R Gunn and R Linden 'The processing of child sexual abuse cases' in (eds) JV Roberts et al *Informing sexual assault a decade of legal and social change* (1994) 85.

1.6 Methodology

Methodology utilized was qualitative in nature as, according to Leedy⁴³, this methodology is aimed at description. By utilizing qualitative methodologies the research is able to evaluate both formal and normative aspects of political activity. Qualitative research is used in several academic disciplines, including political science, sociology, education and psychology. According to Peshkin (200:134) in Patton, it usually serves one or more of a set of four purposes: description and interpretation.

According to QSR (a, 2011:115), qualitative research “is used to gain insight into people’s attitudes, behaviors, value systems, concerns, motivations, aspirations, culture or lifestyles.” QSR continues to explain qualitative research as a method of making informed decisions in both business and politics.

This study utilized a descriptive approach as it was necessary to observe and describe the sexual exploitation and abuse of the girl child through cultural practices in Uganda. Thus the researcher utilized a descriptive approach so as to be able to assess the protection of the sexual and drug exploitation. The descriptive approach may be considered as inductive, according to Rhodes (1995:44) as conclusions are drawn from repeated observations that is letting facts speak for themselves. Statements are made about Causes and consequences of the phenomenon being observed.

1.7 Literature Review

1.7.1 Over view

The phenomenon of cross-generational sex defined as sexual relationships between an adolescent and a partner who is older, usually by 10 or more years can be linked to many immediate and life-long negative consequences for both girls and boys. These can include entering into transactional sexual relationships one in which the exchange of commodities and obligations can be considered as payment as well as increased exposure to major health risks and several foregone opportunities. In development studies and other disciplines, the study of these

⁴³ Established on 2001:148

exploitative relationships has largely been neglected, or examined as a public health issue most often with respect to HIV&AIDS.⁴⁴

Systematic examinations of cross-generational sex as a child protection issue in which the impacts of violence, abuse, neglect and exploitation are highlighted are negligible, and are desperately needed to help development practitioners understand the issue and find long-lasting solutions. Similarly, where issues such as abuse and neglect have been addressed, they have largely focused on the causes and consequences of child rights violations and the associated legislative environment, rather than on providing the additional attention that is needed to develop and test responses and interventions.

1.7.2 Related Literature

The most controversial issue in child sexual abuse has been the role of the family.⁴⁵ Extensive research conducted has shown that contrary to popular beliefs, sexual abuse of children by strangers accounts for a small percentage.⁴⁶ Epidemiological studies show that abuse of children by strangers is low compared to the abuse perpetrated by relatives or acquaintances.⁴⁷ Kitzinger thus criticizes those who state that the home is the sanctuary for children against sexual abuse and warn children to say 'no to strangers' since most sexual abuse and exploitation is within the family.⁴⁸

Events that occur within the family were not subject to international law until recently.⁴⁹ Developments in international law challenge the numerous traditional practices that sexually involve children or that affect the child's sexual development in ways inconsistent with the emerging international law norms yet fully consistent with theories of sexuality and cultural life.⁵⁰

⁴⁴ Luke and Kurz, 2002; Dupas, 2011

⁴⁵ RJR Levesque 'Sexual use, abuse and exploitation of children; challenges in implementation of human rights' 60 *Brooklyn Law Review* (1994) 994.

⁴⁶ As above.

⁴⁷ RJR Levesque (n 42 above).

⁴⁸ J Kitzinger 'Defending innocence ideologies of childhood' 28 *Feminist review* (1988) 82.

⁴⁹ *ibid*

⁵⁰ RJR Levesque *Sexual abuse of children a human rights perspective* (1999) 100.

Culture has been identified to be one of the major obstacles in enforcing children's human rights in African countries.⁵¹ The state has an obligation under the ACRWC to protect the child against cultural practices that will result in sexual abuse and exploitation while in the care of parents, guardians or others under the guise of culture.⁵² Rwezaura states that one of the causes of abuse of children in Africa is the perception of the child as a family resource, this conflicts with the rights of the child.⁵³

The state has an obligation to protect the child against sexual abuse and exploitation. Protection of children can only be achieved by assisting families to carry out their protective mandate towards the girl child. G van Bueren states that other than adopting legislation against child sexual abuse and exploitation the state should support the family when it is in need.⁵⁴

The state must take all measures to curb child sexual abuse and exploitation of the girl child as this violation can be linked to violations of other rights such as rights to bodily, sexual integrity and right to life. It can have fatal health consequences that include infections of sexually transmitted diseases such as H.IV that will cause the child not to fully enjoy other rights guaranteed in the international instruments.⁵⁵

⁵¹ C Himonga 'Implementing the rights of the child in African legal systems: the Mtembu journey in search of justice' 9 *International journal of children's rights* (2001) 90.

⁵² Art 21 of ACRWC.

⁵³ B Rwezaura 'Competing images of childhood in the social and legal systems of contemporary Sub Saharan Africa' 12 *International journal of law, family and policy* (1998) 253.

⁵⁴ G van Bueren (n 3 above) 51.

⁵⁵ UNICEF (n 27 above).

CHAPTER TWO

CHILD SEXUAL EXPLOITATION AND ABUSE; CONCEPTUAL AND INTERNATIONAL PROTECTION

2.1 Introduction

This chapter introduces the concept of childhood. In so doing the meaning of childhood will be discussed from psychological, sociological, international human rights law and domestic perspectives. The concepts of sexual abuse and exploitation are discussed.

Various forms of sexual exploitation and abuse are also canvassed together with the consequences of such acts on the health of the girl child. It highlights the protection of children from sexual abuse and exploitation in international law. It concludes by showing how sexual abuse is detrimental to the healthy growth and development of the girl child and its potential impact on other rights.

2.2 The concept of childhood

Children are individuals, but childhood is a social institution.⁵⁶ Childhood as a social status is defined within the generational order as inferior to adulthood.⁵⁷ The dominant notion has been of childhood as a stage in the development of a human being.⁵⁸

Childhood is defined as that which lacks skills and capacities of adulthood.⁵⁹ Ennew states that children are immature human animals.⁶⁰ Childhood has been conceptualized as the period of preparation for the autonomous individuality of adulthood.⁶¹ It is a period of rapid growth of the child physically, mentally and emotionally.

⁵⁶ J Ennew *The next generation* (1989) 8.

⁵⁷ B Mayall 'The sociology of childhood and children's rights' *International journal of children's rights* (2001) 248.

⁵⁸ D Archard *Children: rights and childhood* (2004) 39.

⁵⁹ Ibid

⁶⁰ D Archard (n 55 above).

⁶¹ WA Fitzgerald 'Maturity, difference and mystery; children's perspectives and the law' 36 *Arizona Law Review* (1994).

There is a conception of children that is implicit in moral and legal practice.⁶² According to this conception children as a legal class do not have the same status as adults.⁶³ Anthropological evidence shows that children are universally regarded as relatively weak, helpless and in need of protection.⁶⁴ Childhood is a process when children are, as Archard states in the 'continued process of becoming, an never ended maturity'⁶⁵ They are therefore weak, inadequate, inexperienced and immature,⁶⁶ they are to be measured against an unexplained unproblematic rational adult world that is complete and desirable in contrast to childhood is static.⁶⁷ Childhood has also been described as a period of protection with the absence of responsibility when the child has a right to protection and training but not to autonomy.⁶⁸

The terms child and adult are flexible social categories that are defined according to the stereotypes of aging.⁶⁹ Cultural variations and diversity do however limit the exact setting of childhood boundaries.⁷⁰ Different criteria define child the development and period of childhood.⁷¹ The CRC that has been ratified by many states and considered to be universal introduces the notion of childhood from a western point of view.⁷² The ACRWC on the other hand seeks to define childhood from an African perspective although it sets out 18 years as the cut off point to adulthood just like the CRC.⁷³ In Africa childhood is comparatively shorter than in western regions.⁷⁴ The child is also socialized to respect the parents, elders, those in a position of authority, to be cautious and generous to strangers.⁷⁵ It is viewed as a time to learn, build a character and to acquire social and technical skills necessary to perform the future roles of

⁶²T Shapiro 'Childhood and personhood' 45 *Arizona Law Review* (2003) 575.

⁶³ Ibid

⁶⁴ DT Evans 'Falling angels: the material construction of children as sexual citizens 2 *International journal of children's rights* (1994) 16.

⁶⁵ AT Donso 'The political child' in (ed) A McIntyre *Invisible stakeholders: the impact of war on children*(2004) 12.

⁶⁶ M Freeman 'The sociology of childhood and children's rights' *International Journal of children's rights* (1998).

⁶⁷ Ibid

⁶⁸M Freeman (n 63 above).

⁶⁹TW Bennett *Human rights and African customary law* (1995) 101.

⁷⁰B Mayall (n 54 above).

⁷¹ RJR Levesque *Sexual abuse of children a human rights perspective* (1999) 14.

⁷² Art 1 of the CRC states that a child shall be anyone below the age of 18 years.

⁷³ Art 1 of CRC; art 2 of the ACRWC also defines a child as any person below the age of 18.

⁷⁴B Rwezaura (n 50 above) 255.

⁷⁵As above 257.

adulthood.⁷⁶ Chronological age in these societies does not indicate childhood at all.⁷⁷ It has more to do with physical capabilities of the child.⁷⁸

Bennett states that a particular economy may prove crucial in shortening or lengthening the duration of childhood. He further elaborates that in those societies where survival is a struggle, the child cannot enjoy dependency for long as a child is a luxury that a family cannot afford.⁷⁹ In most African societies like the Shona, a child has been seen as a family asset or resource.⁸⁰ Thus, a child can be married off at an early age to ensure that her family does not starve. As such, the child is no longer a child but becomes an adult.⁸¹

This traditional image of the child as a resource to the family has been challenged in recent years and this has resulted in tensions between the young and the older generations.⁸² There has been a radical shift of perceptions of children as property of their parents. Modern children's rights movement aims at viewing children as persons in their own right.⁸³ The concept of a child as property in African societies conflicts with contemporary ideas about childhood in international human rights law.⁸⁴

Since childhood is defined according to the stereo-types of aging of different societies, in an attempt to harmonise the definition of a child, the CRC and ACRWC define a child as every human being below the age of 18 years.⁸⁵ This age limit of childhood has been incorporated by many states into their domestic legislations such as Uganda,⁸⁶ South Africa⁸⁷ and Uganda⁸⁸. The child is afforded protection and certain rights against abuse and exploitation. Rwezaura states that the co-existence of two images of childhood, whereby a child is afforded rights and

⁷⁶B Rwezaura (n 50 above) 255.

⁷⁷AT Donso (n 62 above) 12.

⁷⁸As above.

⁷⁹TW Bennet 'Using children in armed conflict; a legitimate African tradition? Monogram No. 32 Institute of Security studies, Pretoria (1998) 19.

⁸⁰B Rwezaura (n 50 above) 253.

⁸¹AT Donso (n 62 above).

⁸²B Rwezaura (n 50 above) 257.

⁸³Ibid

⁸⁴B Rwezaura (n 50 above) 255.

⁸⁵RJR Levesque (n 69 above).

⁸⁶Sec 15 of the General Laws Amendment Act Chapter 8: 07 that amended the provisions of the Legal Age of Majority Act No. 15 of 1982.

⁸⁷Sec 28(3) of the Constitution of South Africa.

⁸⁸Sec 2 of the Children Act Chapter 59 of Uganda.

protection under international law and the concept of a child as a resource in African societies has undermined the protective role of the law.⁸⁹

Childhood is regarded as a distinct idyllic and a-sexual stage in the pre-adult personal development.⁹⁰ Cross cultural and historical evidence show that there is a customary separation of childhood and sexuality.⁹¹ This position is however not true to some cultures in Africa like the Shona people of Uganda. Under local customs, girl children can be married off at puberty stage. Although this is compatible with custom it does amount to sexual abuse and exploitation under international law. Recently in international law childhood and sexuality have become separated their boundaries are rigorously policed.⁹²

2.3 Concept of child sexual abuse

There is no universally accepted definition of child sexual abuse.⁹³ There are differences in how far sexual extends.⁹⁴ Sexual encounters are intercourse, genital contact, fondling or an encounter with an exhibitionist.⁹⁵ Others include anything that brings sexual gratification to the adult as sexual abuse.⁹⁶ Sexual abuse remains even if the child is not capable of knowing that it is.⁹⁷ It includes paedophilia,⁹⁸ incest and any intra-familial relationship which risks damaging the healthy sexual growth of the child.

A popular definition of sexual abuse is one by Schether and Roberge who have defined it as;

*... ..the involvement of dependant developmentally immature children and adolescents in sexual activities that they do not fully comprehend, to which they are unable to give informed consent or that violate the social taboos of family roles.*⁹⁹

⁸⁹B Rwezaura (n 50 above) 260.

⁹⁰DT Evans 'Falling angles the material construction of children as sexual citizens' 2 *International Journal of children's rights* (1994) 1.

⁹¹As above 2.

⁹²DT Evans (n 87 above) 3.

⁹³M Freeman *The moral status of children: essays on the rights of the child* (1997) 261.

⁹⁴As above.

⁹⁵M Freeman (n 90 above) 261.

⁹⁶As above.

⁹⁷M Freeman (n 90 above) 262.

⁹⁸A word used to describe those that are sexually attracted to children.

⁹⁹M Freeman (n 90 above) 261; G van Bueren (n 3 above)46.

Child sexual abuse represents a key site in which unequal gender power relations play out.¹⁰⁰ It is noted that accurate statistics for the prevalence of intra familial and extra familial abuse of children are difficult to obtain.¹⁰¹ This study will focus on sexual abuse and exploitation where the perpetrators are male and the victims are girl children.

Sexual abuse of children can be in various forms. It can be non-contact sexual abuse that is done to the child, voyeurism falls within this branch whereby the offender observes the child when the child is naked.¹⁰² Exposure is another form of sexual abuse this occurs when an offender exposes his private parts to a child.¹⁰³ Sexy talk can also occur when the offender tells the child about its sexual attributes.¹⁰⁴

It can include sexual contact. It can be oral when the child is kissed or the offender orally copulates with the child. In other cases it can be the touching of the intimate body organs of the child or inserting a finger in the vagina of a child. This can be done whether the victim is wearing clothes or not.¹⁰⁵ Oral genital sex can occur when the child is kissed, sucked or licked. In this case penetration can occur. The offender can have sexual intercourse with the child where there is actual penetration of the vagina or anus.¹⁰⁶

2.4 Concept of child sexual exploitation

Some authors such as Kempe have equated sexual exploitation of children to sexual abuse.¹⁰⁷ All forms of sexual exploitation are abusive.¹⁰⁸ However sexual exploitation is usually done for financial gain.¹⁰⁹ The Declaration and Agenda for Action of the World Congress against Sexual Exploitation of Children of 1996 has defined sexual exploitation of children as;

¹⁰⁰ S Warner 'Disrupting identity through visible therapy: a feminist post structuralist approach to working with women who have experienced child sexual abuse' 68 *Feminist review* (2001) 115.

¹⁰¹ DT Kenny 'Opinion, policy and practice in child sexual abuse: implications for detection and reporting in ed M James Paedophilia: policy and prevention Research and public policy series no. 12 Australian series of criminology available at <<http://www2.fhs.usyd.edu.au/bach/staff/kenny/developmental.html>> (accessed on 2 October 2006).

¹⁰² KC Faller *Child sexual abuse* (1989) 12.

¹⁰³ *Ibid*

¹⁰⁴ KC Faller (n 99 above).

¹⁰⁵ KC Faller (n 99 above) 13.

¹⁰⁶ G van Bueren (n 3 above) 14.

¹⁰⁷ *Ibid*

¹⁰⁸ G van Bueren (n 3 above) 14.

¹⁰⁹ Family Health International (n 2 above) 52.

*...comprising sexual abuse by an adult and remuneration in cash or kind to the child or third person or persons. The child is treated as a sexual and commercial object.*¹¹⁰

Sexual exploitation of children is in various forms, it includes child pornography, child prostitution when the child is enticed into such activities by the adults or is employed as a prostitute. Child marriages are also regarded as a form of sexual exploitation due to the financial gain the parents get from bride wealth.¹¹¹ In this research sexual exploitation of children will be viewed from the exploitative nature of child marriages.

2.5 International and regional protection against sexual abuse and exploitation

The response of the international community to sexual abuse of children does not have a long history.¹¹² Child sexual abuse has recently been recognized as a significant social problem.¹¹³ The hesitancy of international law to address child sexual abuse has been attributed to the dichotomy of the private and public spheres.¹¹⁴ International law is primarily concerned with the public sphere whilst domestic law deals with the private sphere.¹¹⁵ Events that happen within families are usually not subject to international law.¹¹⁶ International law respects familial autonomy as articulated in the International Covenant of Economic Social and Cultural Rights (ICESCR).¹¹⁷ However, Child sexual abuse facilitated in the family under the guise of culture is now prohibited under international law by the CRC and the ACRWC.

Under the CRC, the child is protected from abuse whilst in the care of parents, guardians or others who care for the child.¹¹⁸ The state is required to take all appropriate legal, administrative,

¹¹⁰ See para 5 of Declaration and Agenda for Action of the World Congress against Sexual Exploitation of children available at <<http://www.ilo.org/public/english/comp/child/standards/resolution/stockholm.htm>> (accessed on 1 October 2006).

¹¹¹ SLB Mikhail 'Child marriage and child prostitution: two forms of sexual exploitation' 10 *Gender and development* (2002) 44.

¹¹² RJR Levesque 'Sexual use, abuse and exploitation of children: challenges in implementing children's rights' *Brooklyn Law Review* (1994) 994.

¹¹³ *ibid*

¹¹⁴ RJR Levesque (n 109 above).

¹¹⁵ *Ibid*

¹¹⁶ KC Faller (n 99 above).

¹¹⁷ Art 10 of the International Covenant on Economic Social and Cultural Rights (ICESCR) that came into force on 3 January 1976 see T van Banning et al *Human rights instruments* (2004).

¹¹⁸ Art 19 of CRC.

social and educational measures to protect the child.¹¹⁹ Sexual exploitation of children is also prohibited.¹²⁰

At the regional level, ACRWC expressly prohibits child sexual abuse and exploitation.¹²¹ It compels states to amongst the same grounds articulated in the CRC to protect children against sexual abuse by school authorities.¹²² ACRWC is applicable to all children under the age of 18 years regardless of national ages of majority.¹²³ It seeks to eliminate the possibility of sexual abuse of children within marriages by establishing 18 years as the minimum age of marriage.¹²⁴ To reinforce this, states are obliged to make registration of all marriages compulsory in an official register.¹²⁵ Child marriages are to be prohibited by enacting the necessary legal measures that sets a minimum age of marriage at 18 years.¹²⁶

The international community appears to have accepted that in order to protect children against sexual abuse and exploitation there is a need to support the family when it is in need.¹²⁷ It is regarded as the principal preventive measure.¹²⁸ There is an additional duty on the state to establish social programmes for the prevention, identification and reporting of child sexual abuse.¹²⁹ The CRC regards it to be in the best interests of the child for the cooperation of health officials and law enforcement agents and the judiciary.

State reporting is one of the strategies that have been introduced by the international community to ensure compliance with international norms.¹³⁰ There are reporting procedures in the CRC and ACRWC to oversee compliance, state reporting is not a form of enforcement mechanism as such.¹³¹ Reporting procedures have not been effective in ensuring that child sexual abuse and

¹¹⁹ Art 19(1) of CRC.

¹²⁰ Art 34 & 36 of CRC.

¹²¹ Art 16(1) of ACRWC.

¹²² Art 16(1) of ACRWC.

¹²³ G van Bueren (n 3 above) 51.

¹²⁴ Art 21(3) of ACRWC.

¹²⁵ Art 21(2) of ACRWC.

¹²⁶ Art 21(2) of ACRWC.

¹²⁷ G van Bueren (n 3 above) 51.

¹²⁸ *Ibid*

¹²⁹ Art 19(2) of CRC.

¹³⁰ M Evans et al 'Reporting mechanism of the African Charter on Human and Peoples' Rights' in (eds) M Evans and R Murray *The African Charter on Human and Peoples' Rights: the system in practice 1986 – 2000* (2004) 37.

¹³¹ As above; states are supposed to report to the Convention on the Rights of the Child as stipulated in art 44 of CRC, art 42 of ACRWC provides for state reporting to the Committee on the African Charter on the Rights of the Welfare of the Child.

exploitation of the child is curtailed. There has been a general lack of political will to implement the comments of the relevant Committee.¹³²

2.6 Conclusion

Child sexual abuse is currently a human rights issue, children's rights to be protected against sexual abuse and exploitation is now part of international human rights law. Child sexual abuse is violence against the girl child, international law seeks to protect individuals from private violence.¹³³ Under this regime children are regarded as those who are below 18 years of age. State parties to instruments that protect children against sexual abuse and exploitation have an obligation to ensure that children are not sexually abused within the family.

¹³² This is particularly true in the case of most African countries such as Uganda. Uganda has submitted a number of reports to the Committee on the Rights of the Child and despite recommendations to take action of eradicating harmful practices such as *lobola* and child marriages that result in girl children being sexually abused and exploited this practice remains high see para 13 of the Committee on the Rights of the Child 12th session concluding observations on Uganda available at < <http://www.law.wits.ac.za/humanrts/crc/crc-Uganda96.htm> > (accessed on 15 October 2006); the Committee of Experts on the African Charter on the Rights and Welfare of the Child has not considered any country reports from yet.

¹³³ RJR Levesque 'Piercing the family's private veil: family violence, international human rights and cross cultural record' *Law and policy* (1999) 162.

CHAPTER THREE

FAMILY, CULTURE AND CHILDREN'S RIGHTS; AN OVERVIEW

3.1 Introduction

Culture is one of the obstacles to the enjoyment of children's rights in Africa as communities where children live do not always observe the relevant human rights instruments that protect children from harmful cultural practices or are not aware of them.¹³⁴ The family is the custodian of culture.¹³⁵ It is through the family that children are taught or experience cultural values. Not all cultural practices are compatible with human rights norms protecting rights of children, the girl child in particular. Some cultural practices that are harmful are female genital mutilation and early marriages. This chapter discussed the family, culture and children's rights be covered.

3.2 The family defined

The term family has not been defined in international law.¹³⁶ A family has been described as the smallest unit of society that has to be protected and supported.¹³⁷ Families vary from culture to culture and from one historical period to another.¹³⁸ A dichotomy surrounds the notion of family, it is conceptualized as both a cohesive association of autonomous people and as a group of individuals subject to a higher law that protects competing claims.¹³⁹ Commenting on the term family the Human Rights favored a broad interpretation that includes all those considered to be family by the society of the state party.¹⁴⁰ There are a variety of family forms that differ from the

¹³⁴ C Himonga 'Implementing the rights of the child in African legal systems: the Mthembu journey in search for justice' 9 *International Journal of children's rights* (2002) 90.

¹³⁵ Art 18(1) of ACHPR; art 18(2) states that the state has a duty to assist the family in safeguarding the moral and traditional values; ACHPR has however been criticised as according too much weight to the protection of culture that results in the human rights violations of rights of women and children within the family see Center for reproductive law and policy Briefing paper on the Protocol on the Rights of Women in Africa (2006) available at <http://www.reproductiverights.org> (accessed on 14 May 2006).

¹³⁶ B Rwezaura et al 'Parting the long grass: the African family' 35 *Journal of legal pluralism and unofficial law* (1995) 27; The European Commission has however defined the concept family life in a number of cases that include X & Y v Switzerland 1977 Y.B Euro. Conv on HR 168(Eur. Ct. HR) in G van Bueren 'International protection of family members' rights as the 21st century approaches' 17 *Human rights quarterly* (1995) 735.

¹³⁷ B Rwezaura (n 133 above) 26; art 10 of ICESCR; art 23(1); G van Bueren (n 133 above) 733.

¹³⁸ B Rwezaura (n 133 above) 27; Recently there has been a move by some human rights activists for same sex marriages to be recognised as family international law still regards family as consisting of heterosexual couples. In X & Y v United Kingdom the European Commission for Human Rights stated that despite the evolution of attitudes towards homosexuality, homosexuality could not be regarded as family life but as private life see G van Bueren (n 133 above) 737.

¹³⁹ G van Bueren (n 133 above) 733.

¹⁴⁰ G van Bueren (n 133 above) 734.

western concept to the African concept.¹⁴¹ In most African cultures the term family is used to define blood relations.¹⁴² In patrilineal societies to which the Shona family identifies itself, a description of family is found through the tracing of male descendants that include a father, his brothers and sisters whether half or full and other blood relatives.¹⁴³ In cases where the patrilineal family is not able to provide, the child will turn to his matrilineal family who are usually related to the mother through blood relations.

3.3 The family under international law

The family is recognized and protected under international law.¹⁴⁴ It is the foundation of society and the natural environment for the growth and well being of its members.¹⁴⁵ The family has rights and duties to nurture, socialize and develop children in a manner consistent with local customs and traditions.¹⁴⁶ All family members have a role to play in ensuring that the girl child is protected against sexual abuse and exploitation, in so doing, the family will be ensuring that the girl child enjoys childhood as a time of play that is a-sexual and peaceful within its protective bosom.¹⁴⁷ The survival, development and protection of children are dependant on their parents.¹⁴⁸ Parents have equal responsibility for the upbringing and development of children.

Most African families identify themselves with certain ethnic groups that adhere to certain cultural practices. Family members do have a right to practice their culture.¹⁴⁹ However, this right is not absolute, cultural practices should not interfere or violate the rights of the girl child as enshrined in the human rights instruments. Some of the cultural practices are harmful to the healthy growth and development of the girl child and there is a need for the states to move away from peeping or piercing the family 'privacy veil'¹⁵⁰ to lifting it, in order to regulate the activities that can be prejudicial to the growth of the girl child. When considering the family in the context

¹⁴¹B Rwezaura (n 133 above) 27.

¹⁴²B Rwezaura (n 133 above) 28.

¹⁴³ Ibid

¹⁴⁴ Art 23(1) of the International Covenant of Civil and Political Rights (ICCPR), art 10 of the International Covenant of Economic Social and Cultural Rights; the extend of the recognition and importance of the family can be seen in the International Year of the Family as proclaimed by the United Nations in 1994; G van Bueren (n 133 above) 733.

¹⁴⁵ See para 5 of preamble to CRC; art 18 of ACRWC states that the family is the natural unit and basis of society.

¹⁴⁶ T Khaime 'The Convention on the Rights of the Child and the cultural legitimacy of children's rights in Africa' 5 *African human rights law journal* (2005) 226.

¹⁴⁷ J Kitzinger (n 45 above) 78; family has a primary role of caring and protecting children see UNICEF (n 25 above) 39.

¹⁴⁸ T Khaime (n 143 above); art 19(1) & 20(1) of ACRWC.

¹⁴⁹ Art 22 & 27(1) of the Universal Declaration of Human Rights (UDHR); art 15(1) of ICESCR; art 27 of ICCPR.

¹⁵⁰ See RJR Levesque (n 130 above).

of African societies as they exist today and operate on a daily basis, account has to be taken of the various forces that influence the obligations and rights, relationships and affiliations that family membership entails.¹⁵¹ Forces that may influence obligations of the family include prevailing economic conditions that can be a driving force for the family members to engage in certain cultural practices.¹⁵²

3.4 Culture

Culture may be defined as the integrated pattern of human knowledge, belief and behaviour, which is dependent upon the capacity of human society to learn and transmit knowledge about their values, ideas and beliefs to succeeding generations.¹⁵³ Culture can also be defined as the customary beliefs, social forms and material traits of a racial, ethnic or linguistic, or religious or social group.¹⁵⁴ For the purpose of this discussion, culture will be defined as a set of attitudes, values, beliefs and behavior shared by a group of people communicated from one generation to the next by way of language or some other means of communication.¹⁵⁵

Culture is recognized in international and regional instruments such as the ACHPR,¹⁵⁶ ICESCR¹⁵⁷ and the Women's Protocol in Africa.¹⁵⁸ However, culture reflects patriarchal values and has proved to be insensitive to the rights of women and children in general. Onyango states that culture or tradition as it exists today is 'made for, of and by men.'¹⁵⁹

The notion of culture or tradition has been used to justify human rights violations.¹⁶⁰ Various families adhere to and practice different cultures, of which, some result in sexual abuse and exploitation of girl children. This paper will focus on the cultural practices of the typical Shona family in Uganda and the impact on the right not to be sexually abused or exploited of the girl.

¹⁵¹ B Rwezaura (n 133 above) 30.

¹⁵² In Uganda the rise in cases of sexual abuse and exploitation of children has been largely attributed to the harsh economic conditions currently facing the country see The Uganda Situation 'girl children forced into marriage as hunger bites Uganda' available at <http://www.zimbabwejournal.com/may16_2006.html> (accessed on 24 August 2006).

¹⁵³ J Oloka-Onyango 'Who's watching 'big brother' globalisation and the protection of cultural rights in present day Africa' 5 *African human rights law journal* (2005) 2.

¹⁵⁴ Ibid

¹⁵⁵ D Ahn 'Profiling culture an examination of American and Asian gang bangers in Southern California' *Asian law journal* (2004) 65.

¹⁵⁶ Art 17(3) of ACHPR.

¹⁵⁷ Art 15 of ICESCR.

¹⁵⁸ Art 17 recognises the right to live in a positive cultural context.

¹⁵⁹ Onyango (n 150 above) 21.

¹⁶⁰ D Ahn (152 above).

3.5 The family, culture and observance of children's rights

Children's rights are now considered to be universal due to the wide acceptance of CRC by nations.¹⁶¹ The implementation of the CRC should not be hampered by the particular socio-cultural experiences of the diverse societies that have subscribed to its normative framework.¹⁶² There is tension between culture and children's rights, as with culture and human rights generally.¹⁶³ The CRC gives rights to children and at the same time acknowledge rights and duties of the family.¹⁶⁴ The child has a right to survival and development, is dependant on the family and this can only be achieved under a stable, caring family environment that does not subject the child to cultural practices that will perpetuate sexual abuse or exploitation of the child.¹⁶⁵

CRC acknowledges the rights and duties of the family to nurture, socialize and develop their children in a manner consistent with the local values, customs and traditions.¹⁶⁶ The family has a role to provide direction and guidance to the child in the exercise of his other rights in a manner consistent with the child's evolving capacities.¹⁶⁷ The child is introduced to values and norms of society within the family environment as the family is the custodian of traditional and moral values recognized by the community as articulated in ACHPR.¹⁶⁸ The state has a duty to assist the family to safeguard these moral and traditional values.¹⁶⁹ The approach of the above instruments demonstrates that there is consensus that the family is central in the socialization of children from childhood to adulthood.¹⁷⁰

¹⁶¹T Khaime (n 143 above) 221.

¹⁶²Ibid

¹⁶³T Khaime (n 143 above)

¹⁶⁴Ibid

¹⁶⁵The right to survival and development of the child is articulated in art 27 of CRC and art 5 of ACRWC.

¹⁶⁶art 5 of CRC: although the family has the duty to ensure that a child interacts with society and observes relevant cultural practices such parental decision making powers are not unrestricted hence the family cannot be allowed to engage in cultural practices that facilitate sexual abuse of the child see G van Bueren (n 116 above) 741; ACRWC recognises the duty of the parents to care and protect the child in art 19 it does not explicitly advocate for the socialising and development of the child consistent with local values and culture like the CRC; art 11(1)(c) of ACRWC however states that every child shall have the right to education directed at the preservation of African culture and tradition.

¹⁶⁷Art 5 & 14(2) of CRC: T Khaime (n 143 above) 227.

¹⁶⁸Art 18(2) of ACHPR.

¹⁶⁹Art 5 of CRC.

¹⁷⁰W Ncube 'The African cultural fingerprint? The changing concept of childhood' in W Ncube (ed) *Law, culture, tradition and children's rights in east and southern Africa* (1998) 14.

Under international law there is a dynamic relationship between the rights of the child, culture and the family with the intention of achieving the growth and development of the child.¹⁷¹ This relationship is endangered when the practices that are culturally correct conflict with the standards set out in the international human rights norms.¹⁷² It is therefore, the duty of the state to ensure that the family does not engage in cultural practices that are detrimental to the development of the child or that cause the child to be sexually abused and exploited. The rights of the child have to be primary over cultural practices, with the CRC and ACRWC being supreme over any culture and tradition. International law is in favour of cultural practices that advance the protection and promotion of children's rights and overrides practices that are deleterious to the protection of children's rights.¹⁷³

Cultural practices must not sexually abuse and exploit the girl child hence affecting the survival and healthy growth of the child as stated in ACRWC and CRC.¹⁷⁴ Any decision made by the family must be done to enhance the growth and development of the child.¹⁷⁵ There has to be a balance between cultural values and the best interests of the child with the best interests prevailing.¹⁷⁶ Cultural practices that harm the growth of the child and cause the sexual abuse or exploitation of the child cannot be said to be in the best interests of that child.

Since culture has also been identified to be one of the major obstacles to the enjoyment of rights of children in general,¹⁷⁷ there is a need to ensure that although it is necessary to protect the family in exercising its duty to ensure that the girl child is familiar with cultural practices as guaranteed in several international law instruments,¹⁷⁸ the child will not in the long run, be sexually abused or exploited.

3.6 Conclusion

The family has a duty to bring up the child in a manner that is consistent with the local customs and values. Customs and practices that result in the sexual abuse and exploitation of the girl child

¹⁷¹T Khaime (n 143 above) 227.

¹⁷² *ibid*

¹⁷³T Khaime (n 143 above) 229.

¹⁷⁴Art 6(2) of CRC; art 5 (2) of ACRWC.

¹⁷⁵T Khaime (n 143 above).

¹⁷⁶Art 3 of CRC; art 4 of ARWC.

¹⁷⁷C Himonga (n 48 above) 90.

¹⁷⁸ Art 12(1) of the ACRWC states that the child has a right to participate in culture.

conflicting with other rights of the child must not be condoned. There is a need for the state to closely monitor activities of the family to ensure that sexual abuse and exploitation of the child is minimized.

CHAPTER FOUR

CULTURE AND THE RIGHT OF THE GIRL CHILD NOT TO BE SEXUALLY ABUSED AND EXPLOITED

4.0 Introduction

It commence by setting out the position of the Constitution of Uganda on culture and children's rights, a general description of every cultural practice that results in sexual abuse and exploitation of the girl child ensued. This was followed by the Ugandan experience of the practice. The legal framework and any other policy frameworks that have been introduced to curtail sexual abuse and exploitation of the girl and their shortcomings highlighted.

4.1 The experience of the girl child soldiers

Uganda has suffered a tumultuous and violent past. The country is comprised of various tribes who have diverse linguistic and cultural traditions.¹⁷⁹ During British colonial rule, the colonial government often gave top civil service positions to the Buganda tribe of the central and southern sections of the country, and whose kingdom was centered in Kampala, the official capital of the country.¹⁸⁰ Other tribes tended to be marginalized including the Acholi and Lang people of the north, who found their only means of gaining power was through the military.¹⁸¹ In 1962, Uganda gained its independence from British rule and Milton Obote, the leader of the Uganda People's Congress Party became the first Prime Minister of the country.¹⁸² The King of the Buganda tribe was appointed President. Shortly thereafter, Obote ordered his military forces, commanded by the Army Chief of Staff General Idi Amin, to remove any political opponents, including the King.¹⁸³ While the King went into exile in Britain, Obote appointed himself President and had his attorney general rewrite the constitution to consolidate virtually all of the political power in the office of the President.¹⁸⁴

¹⁷⁹ Government of Uganda, *The History of Uganda*, at <http://www.government.go.ug/static/history.htm>.

¹⁸⁰ Ibid

¹⁸¹ Ibid

¹⁸² Ibid

¹⁸³ Ibid

¹⁸⁴ Enter Uganda, at <http://www.enteruganda.com/about/history.php>.

4.2 Application of Current Legal Standards to Girl

4.2.1 The Convention on the Rights of the Child

In analyzing the effectiveness of the current international conventions and treaties which apply to girl soldiers in Uganda, one must start with the center-piece of children's rights, the Convention on the Rights of the Child.¹⁸⁵ The United Nations adopted the Convention in 1989, and Uganda ratified the Convention on September 16, 1990.¹⁸⁶ Uganda did not enter any reservations.¹⁸⁷ The Convention on the Rights of the Child is the most widely-ratified human rights convention in the history of the United Nations, with all of the countries in the world ratifying the convention except for the United States and Somalia.¹⁸⁸

The Convention on the Rights of the Child covers the general scope of children's human rights. Several articles address specific human rights abuses that girls face all over the world. Article 2 prohibits discrimination based on gender.¹⁸⁹ Article 32 offers children protection from economic exploitation, while Article 34 protects children from sexual exploitation and abuse.¹⁹⁰ Article 35 protects children from abduction and trafficking.

The Convention on the Rights of the Child is also inherently feminist in its linguistic construction. Cynthia Price Cohen has pointed out that the Convention on the Rights of the Child breaks the "linguistic tradition" of using the masculine singular possessive pronoun.¹⁹¹ Throughout the Convention, "the child" is used whenever possible; in situations in which it is necessary to use a singular possessive pronoun both "his" and "hers" appear.¹⁹²

Just as the Convention on the Rights of the Child addresses abuses faced by girls, it also offers specific protection for child soldiers. Article 38 deals with children involved in armed conflict, specifically that (1) states must respect international humanitarian law relevant to the child; (2)

¹⁸⁵ Convention on the Rights of the Child, *supra* note 8.

¹⁸⁶ Office of the United Nations High Commissioner for Human Rights, Status of Ratifications of the Principle Human Rights Treaties 11, available at <http://www.unhchr.ch/pdf/report.pdf> [hereinafter Status of Ratifications].

¹⁸⁷ Office of the United Nations High Commissioner for Human Rights, *United Nations Treaty Collection Declarations and Reservations (as of Oct. 1, 2001)*, at http://www.unhchr.ch/html/menu3/b/treaty15_asp.htm.

¹⁸⁸ Status of Ratifications, *supra* note 70.

¹⁸⁹ Convention on the Rights of the Child, *supra* note 8, at art. 2.

¹⁹⁰ *Id.* at art. 32; art. 34.

¹⁹¹ Cohen, *supra* note 4, at 47

¹⁹² *Ibid*

children under fifteen must not “take a direct part in the hostilities”; (3) states shall not recruit children under fifteen; (4) states must “take all feasible measures” to protect children affected by armed conflict.¹⁹³ Article 39 requires that states must take “all appropriate measures”

Like any other African society, Buganda people of Uganda engage in several cultural practices that are not compatible with rights of children. Some of these cultural practices are defended on the basis of socialisation of the child. One of the most common practices that was fizzling out but has recently been resurrected due to harsh economic conditions prevailing in the country is child marriages. Parents are now resorting to marrying off their girl children who reach puberty as a survival technique. Some of these child marriages are not driven by economic conditions, but are just practiced because of the cultural beliefs of the parents. It has been noted that most reports of sexual abuse occur in families with the lowest socio-economic levels.¹⁹⁴

A culture and children’s right in the Constitution of Uganda is predicated on the doctrine of constitutional supremacy.¹⁹⁵ The 1980 Constitution of Uganda has been amended 17 times since it came into force. Although the Constitution of Uganda is the supreme law of the land it is silent on children’s rights. It does not have provisions protecting the child in any manner let alone sexual abuse and exploitation. The bill of rights is deficient in its protection of fundamental rights in this regard.

Uganda has ratified a number of conventions that protect children against child sexual abuse and exploitation such as the CRC and ACRWC. International treaties or conventions ratified by Uganda under the authority of the President are not self executing unless passed into law by parliament.¹⁹⁶ This is known as incorporation of international instruments into domestic law. The Ugandan Constitution has a provision for this.¹⁹⁷ The declaration of rights in the Constitution focuses on a relationship between the state and the individual (primarily a masculine relationship).¹⁹⁸ The Constitution of Uganda does not have any explicit provision on cultural

¹⁹³ Ibid

¹⁹⁴ G Melton et al *Protecting children from abuse and neglect: Foundation for a new national strategy* (1994) 132.

¹⁹⁵ Sec 3 of the Constitution of Uganda states that the Constitution is the supreme law of the land.

¹⁹⁶ Sec 111b of the Constitution of Uganda.

¹⁹⁷ Ibid

¹⁹⁸ Ibid

rights but it condones discrimination in cases where customary law applies.¹⁹⁹ The Constitution of Uganda does not explicitly guarantee the right to culture although application of customary law is recognized in several statutes.²⁰⁰

¹⁹⁹ The Republic of Uganda constitution 1995

²⁰⁰ Ibid

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

Protection of children against sexual abuse falls within the public and private debate. One school of thought regards the family as a private sphere beyond the control of the state. The other school perceives the family as a social institution that can preserve power structures under which certain members like men are able to exert control over the weaker subordinate members such as children and women.²⁰¹

A central dilemma that faces the state in its protective mandate is the potential conflict with family privacy or parental autonomy in child rearing. Parents cannot however have the absolute right to determine the upbringing of the children.²⁰² This century has seen a considerable increase in the power of the state to intervene in the lives of children within their families.²⁰³

It is trite that there should always exist a formal separation between childhood and sexuality as intersection can have a boomerang effect on the overall enjoyment of the rights of the girl child. Child sexual abuse and exploitation is wrong. The lack of a viable solution in Uganda to the problem is also wrong. Child sexual abuse can be regarded as a moral disaster. The Ugandan government has acknowledged in its reports to the Committee on the Rights of the Child that there are cultural practices by some ethnic groups in Uganda that conflict with fundamental rights of the child and has identified some of them to be child marriages, pledging of girls for economic gain, and appeasement of the spirit of a murdered person (ngozi).²⁰⁴ However sexual abuse through these practices still persists.

Poverty affects young children more and they are the most vulnerable. It affects their rights to survival, growth and development.²⁰⁵ Poverty defines every aspect of a child's existence and it is

²⁰¹ A Bainham *Children, parents and the state* (1988) 85.

²⁰² Ibid

²⁰³ R Dingwall et al 'Rethinking child protection' in (ed) MD Freeman *The state, law and the family* 1984) 94.

²⁰⁴ Ibid

²⁰⁵ Ibid

one of the underlying causes of the abuse and exploitation of children.²⁰⁶ Poverty has to be addressed in order to minimize cases of child sexual exploitation that are inherently abusive. Uganda has shown political will in protecting children who have become victims of sexual abuse by implementing programmes like the multi-sectoral approach for management of child sexual abuse.²⁰⁷ The purpose of the protocol is to create a coherent, multi-sectoral plan to assist victims of sexual abuse. It involves a number of departments such as the judiciary, the Law Society of Uganda (LSA), ministry of health and child welfare, department of social welfare and NGOs that work and support victims of sexual abuse.²⁰⁸ Uganda needs to work more towards prevention of sexual abuse and exploitation than merely making efforts to assist the victims as some of the effects will not be reversible at all. There is a need for Uganda to turn more towards empowering the child and the community to reduce incidence of sexual abuse by adopting a holistic approach that will include the measures outlined below.

5.2 Recommendations

There is a need to have a supporting legal framework to regulate family relations and curb cultures that result in sexual abuse and exploitation of the girl child. Experiences from other countries like Uganda show that stiff penalties for sexual abuse of children known as defilement do not deter offenders at all. The Penal Code Act makes a person liable to capital punishment for defiling a child.²⁰⁹ Child sexual abuse still remains high in the country. In implementing measures to stop child sexual abuse and exploitation the state must realise the interrelatedness, indivisibility and interdependence of rights.²¹⁰

Section 83(1) *Any person who incites any other person to do an act of violence Against any person by reason of his or her race, place of origin, political opinions, colour, creed or sex or*

²⁰⁶ UNICEF *The state of the world's children 2001: early childhood* (2001) 32.

²⁰⁷ UNICEF/ FIDA *Uganda Baseline survey on girl child sexual abuse* (1997) 2.

²⁰⁸ As above; Uganda has also been applauded for setting up victim friendly courts that are benefiting victims of sexual abuse as they can now give evidence through an intermediary and not face the accused person as this had the effect of intimidating them. There has also been the development of a family support unit that provides medical and psychosocial support to the victim, medical services are for free to those who cannot afford see ANPPCAN 'Here is something we can copy from Uganda' *Child link Uganda* (2002) 6 & 7.

²⁰⁹ Sec 83(1) of the Penal Code of Uganda

²¹⁰ NB Pityana 'The challenge of culture for human rights in Africa: the African Charter in a comparative context' in (eds) M Evans and R Murray *The African Charter on Human and Peoples' Rights: the system in practice* (2004) 226.

office commits an offence and is liable on conviction to imprisonment for a term not exceeding fourteen years.

There is therefore, a need for a holistic approach with the government adopting several measures that include economic, social, educational and legal measures in order to stop sexual abuse and exploitation of children. Measures should be aimed more at preventing rather than treatment of sexual abuse as effects caused by sexual abuse on the health of the child cannot be reversed.

There is a need to plan preventive programmes with an understanding of the complex requirements inherent in such programmes. There has to be a conceptual framework that views child sexual abuse as a complex multi factorial phenomenon and not a simplistic cause and event.²¹¹ For the measures to be effective there have to be culture sensitive.²¹² In Uganda such measures especially if educational should be directed at all members of society like traditional leaders that include the chiefs, herdsmen or kraal herds and traditional healers who interact with the general public. The programmes should not be started in isolation there should be part and parcel of an umbrella policy of child protection.

5.2.1 Socio- economic measures

There must be increased support for families. There should be a general right to social welfare support to children whose parents are poor. Food aid and eradication of poverty are important. Child protection strategies cannot be divorced from macro-economic development strategies²¹³. Currie states that several factors contribute to the abuse of children such as poverty, unemployment and illiteracy.²¹⁴ They should therefore be high level strategies to combat unemployment, poverty and crime.²¹⁵ Economic pressures and poverty have led to an increase in the cases of child sexual abuse and exploitation. Girls are encouraged or persuaded to go into marriage for pecuniary benefits.²¹⁶ Bride wealth is one of the forces that encouraging child marriages resulting in the sexual abuse and exploitation of the girl child. Early marriages largely

²¹¹ P Lachman 'Child protection in Africa: the road ahead' 20 *Child abuse and neglect* (1996) 245.

²¹² *ibid*

²¹³ R L September 'The progress of child protection in Uganda' 15 (Supplement) *International journal of social welfare* (2006) s65.

²¹⁴ I Currie et al *The Bill of rights handbook* (2005) 614.

²¹⁵ RL September s72.

²¹⁶ D Kyalondo (*Ibid*)

motivated by economic gain have led to the increase in the vulnerability of the girl child in many countries.²¹⁷

There must be a general right to family and parental care as in the Uganda Constitution,²¹⁸ placing a duty on the family to provide care for the children and by implication on the state to provide support on the institution of the family.²¹⁹ This can include a minimum grant to needy families.

Uganda as a state has a positive role to play that is supportive in relation to families that is reflected in the provision of social welfare, health and housing benefits directed specifically to families with children.²²⁰ Other support that can be offered to families can be moral support which can include home visitation, Uganda had a pilot project in Kampala town,²²¹ this project was concerned with education and awareness of parents on methods of preventing exposure of children to dangerous situation that result in burning of a child within the home.²²² This project can be adopted with a different focus. The focus will be on training Child Care Advocates (CCAs) who must be respectable members of society trained to educate their communities on rights of children.

Government ministries like justice and education in conjunction with the Law Society of Uganda (LS7) can provide training. NGOs can be involved in this project. This approach has been adopted in Uganda by FIDA Children's Right Education Support Services (CRESS) that is sponsored by Save the Children Uganda.²²³ In Uganda such an approach can be adopted by training community leaders that have been trained on the negative effects and illegality of sexual abuse and exploitation and entrusting them with a duty to ensure that their communities are

²¹⁷ UNICEF/ FIDA Uganda (n 289 above) 2.

²¹⁸ The 1995 constitution of Uganda

²¹⁹ I Currie et al 605.

²²⁰ This role has been greatly undermined by some programmes that Uganda undertook in 2005 that include the operation code named *Murambatsvina* aimed at cleaning up the street or driving out the filth that resulted in destruction of homes that were deemed to be illegal and not built in accordance with the city council regulations. This operation resulted in many people being left homeless and without an income as all informal trading places were either shut down or destroyed.

There was an increase in rural migration by the urban population. During that period cases of child sexual abuse increased as some families were forced to stay with relatives who did not have enough room to accommodate them see D Potts 'Restoring order?': operation *Murambatsvina* and the urban crisis in Uganda 32 *Journal of Southern Africa studies* (2006) 273 & 276; at least 700000 people are believed to have lost their source of income because of the operation.

²²¹ Ibid P Lachman

²²² MRC SA and UNISA 'Crime, violence and injury lead programme: Annual report 2005' (2006) 8&9 available

at <<http://www.unisa.ac.za/contents/faculties/humanities/shs/docs/2005%20CVI%20ANNUAL/20%REPORT.pdf>> (accessed 22 October 2006).

²²³ FIDA (U) *Role of Child Care Advocates (CCAs) in our communities* (2001).

aware. This can also be used as a way to regulate family activities especially in cases of suspected family violence leading to abuse of children as CCAs will be in regular contact with communities and they can closely monitor activities in the family.

Sexual violence lies in the construction of dominant masculinities found in all patriarchal social systems.²²⁴ Such patriarchal beliefs should be shattered. Child protection legislation alone will not work. There should be establishment of spaces to facilitate broader debate and inclusion of families and communities to influence the imperative shift of mindsets pertaining to the children's worth in society.²²⁵ Sexual violence is an effective tool of social control. It combines the unpleasantness of physical violence and deep shame and self blame on the part of the victim. This leads to self-punitive and self monitoring behavior changes by the victim who is unlikely to report her attack or seek legal advice particularly if the perpetrator is in the immediate circle. Effective regulation of families by trained CCAs can help reduce incidence of sexual abuse of children.

Other forces contributing to increased sexual abuse are the HIV/AIDS pandemic and its related myth of sex with a virgin.²²⁶ There is a need to provide anti retroviral treatment to those infected and extensively educating them and shattering myths like sex with a virgin curing HIV. Patients must be aware that there is currently no cure for HIV. Families, especially parents have to be educated so that they are not lured into marrying off their children to HIV positive men who offer large amounts of bride wealth thereby placing the health and life of the child at risk.

5.2.3 Mandatory reporting of all cases of sexual abuse

There has to an obligation on anyone working with children to report sexual abuse as in Uganda were the Child Care Act places an obligation on nurses, teachers, health professionals, social workers or even priests and day care centers to report any child abuse that they come across.²²⁷ Accordingly children specific rights involve the setting up of enforcement agencies to supervise the care that is provided by families as children lack the capacity to enforce rights on their own.²²⁸ There is a need to intrude on the family autonomy constantly, this is despite the basic right to family integrity that children should enjoy that requires the privacy of the family life

²²⁴ Ibid S Chirawu

²²⁵ Ibid

²²⁶ Ibid

²²⁷ Ibid

²²⁸ Ibid

under parents who are autonomous. An uninterrupted parent child relationship can damage the child.²²⁹ There should be compulsory reporting of all cases of sexual abuse in Kampala that extends to teachers, traditional healers, priests and other professions that are regularly in contact with young children.

5.2.4 Mandatory registration of all marriages

In order to curb child sexual abuse there is a need to ensure that all marriages are registered in a central registry book. Registration of marriages can be done and monitored by the community leaders especially when it comes to the most common customary unions. Although the private sphere should not be eliminated completely by international law, states should interfere more within the private sphere, the public private distinction cannot be allowed to stand, as that is where most of the interfamilial violence occurs.²³⁰

In countries like Namibia there have been recent moves to introduce a law that requires registration of all customary marriages.²³¹ The government of Namibia involved the traditional leaders in the drafting of the new law on customary marriages and consulted them on implementation.²³² This is necessary as traditional leaders administer customary law in many countries. This is also the position in Kampala. Another provision that was included in the Namibian draft bill is the role of traditional leaders administering the law on compulsory registration of all customary marriages with the relevant support from the Minister of Local government and Housing.²³³ The Minister of Home Affairs has to keep a centralized register of all marriages.²³⁴ A grace period of two years is given to all couples to register their marriages.²³⁵ Kampala can follow the same reform process and seek to involve traditional leaders in the registration of all customary marriages after harmonizing the minimum age under all marriage regime to be 18 years in accordance with international standards.

²²⁹ *ibid*

²³⁰ G van Bueren 'The international protection of family members rights as the 21st century approaches' 17 *Human rights quarterly* (1995).

²³¹ Government of Namibia 'Law reform and development Commission Report on Customary law Marriages' (2004) 1 available at <<http://www.moj.gov.na/pdf/customary/pdf>> (accessed on 3 October 2006).

²³² Customary law Marriages Bill (n 323 above).

²³³ *Ibid*

²³⁴ *ibid*

²³⁵ *Ibid*

There should be provision of a penalty for traditional leaders who fail to conduct their duties diligently. There should also be intensive awareness programmes in rural communities by the ministries of education and justice, legal and parliamentary affairs on the desirability of registering all marriages and the illegality of child marriages such as pledging or simply forced marriages. The Constitution as the supreme law, should have a provision that sets out the minimum age of marriage to be 18.²³⁶ Communities have to be educated on the minimum age of marriage with the police and local councils and traditional leaders working together. An office of the Ombudsperson dealing with children's rights should be set up with the mandate of following up on all reported cases of sexual abuse and exploitation thereby ensuring that these cases are not unduly withdrawn.

5.2.5 Educational measures

Reducing poverty should be one of the priorities for the government of Kampala. One way of doing this will be by making sure that all children get basic education.²³⁷ This can be done by involving NGOs that are willing to sponsor education for poor children.²³⁸ Recommending that Kampala makes education free for all will be impossible given the current economic situation facing the country.

Making it a priority that all children are in school will go a long way in ensuring that children receive the basic education on human rights in general and rights not to be sexually exploited or abused in particular. The participation and empowerment of children and young persons is central to a holistic child protection strategy.²³⁹ Children who engage in educational activities to enhance their empowerment may gain great insights but not the skills to protect themselves in the homes.²⁴⁰ Children should be taught from an early age what amounts to sexual abuse as some children are ignorant and cannot distinguish between bad or good touching.

²³⁶ This is the position with the Constitution of Malawi sec 22(6) although those below 18 are allowed to marry with the consent of the parents sec 22(7); art 31 of the Constitution of Uganda stipulates 18 as the minimum age of marriage.

²³⁷ The right to education is recognised in art 11 of ACRWC; art 28 & 29 of CRC; art 13& 14 of ICESCR

²³⁸ There is a need for the Ministry of education to exempt children who are unable to pay their school fees it will not be feasible to demand immediate realisation of the right to education as it is subject to progressive realisation as a socio-economic right.

²³⁹ RI September (n 305 above) s71.

²⁴⁰ *ibid*

Human Rights education must be included in all school curricula at all levels from primary to tertiary. There will also be a need to train teachers on preventive education on sexual abuse. These educational measures should involve NGOs that are involved in cases of child sexual abuse such as the Girl Child network that has formed clubs around the schools to sensitise children on preventive measures on sexual abuse.²⁴¹ This will ensure that children have the appropriate knowledge, attitudes and skills on child sexual abuse. Extensive media campaigns should be carried out to ensure outreach to all children even those who are not attending schools.

Educating all children is the key, efforts should be made to ensure that all children are in educated. The campaign that has been launched in the schools in Kampala is a noble cause but it will not benefit all children. A human rights based approach demands that every effort must be made to reach all children without exception.

5.2.6 Legal measures

When the family fails to protect children for any reason the state has a an obligation to protect the child.²⁴² Children must be protected by the supreme law of the land. Section 28(1) of the Constitution of South Africa protects children against all forms of abuse.

Kampala does not have any municipal reinforcement of CRC provisions relating to child sexual abuse and exploitation in the Constitution unlike its South African counterpart that seeks to protect children against sexual abuse.²⁴³

Virginity testing should be a criminal offence that is liable to a penalty. In South Africa a bill is before parliament that criminalises virginity testing. Practices such as chiramumu should be interpreted to fall under the provisions of the Criminal Law (Codification and Reform) Act that seek to prevent indecent touching of young people until specific laws to address this problem are enacted.

²⁴¹ Girl Child Network available at <http://www.idex.org/partner.php?partner_id=13>(accessed on 23 October 2006).

²⁴² Art 20& 22 of CRC.

²⁴³ Sec 28(1) of the Constitution of South Africa; In some cases the judiciary sites and refers to the obligations of Zimbabwe regarding sexual abuse and exploitation see S V NyemudzaiChikunguruse HH125/2004.

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