

Evoking the Principle of Subsidiarity: Merit for a SADC Protocol for Children

MUSA VENGANA WINSTON THEODORE CHIBWANA

Senior Child Protection Officer, African Committee of Experts on the Rights and Welfare of the Child, Ethiopia, Addis Ababa

musa.chibwana@gmail.com

Abstract

Children's rights civil society in the Southern African Development Community (SADC) is pushing for a protocol for children to be developed. The effort that these organisations are exerting raises obvious questions: Is there a need for such a protocol and what will be the value of it? Are not the country ratifications at international and regional levels enough? Are we not burdening the member states by asking them to have another instrument when they seem to be struggling with the existing ones? How will accountability be ensured? The paper provides a rationale for the children's protocol and prospective content that will be encapsulated therein. One of the main reasons is that the emerging children's rights issues are not adequately covered in existing children's rights normative frameworks such as the African Charter on the Rights and Welfare of the Child (ACRWC) and the United Nations Convention on the Rights of the Child (UNCRC). Consequently, there is no jurisprudence of how member states can deal with these emerging issues. Further, SADC has 27 protocols dealing with a plethora of issues. The available protocols do not systematically address children's rights in line with the four cardinal principles. It is a realisation of these issues that has prompted children's rights civil society to lobby SADC to come up with a SADC protocol for children.

Keywords: African Charter on the Rights and Welfare of the Child (ACRWC), children, child rights, civil society, protocol, Southern African Development Community (SADC)



Introduction

Children's rights civil society in southern Africa is engaged in a campaign to have a SADC¹ protocol for children. Organisations such as the Child Rights Network for Southern Africa (CRNSA) have identified this initiative as a galvanising point for regional children's rights advocacy and thus have made it the mainstay of their regional work.² The effort that these organisations are exerting raises obvious questions: Is there a need for such a protocol and what will be the value of it? Are not the country ratifications at international and regional levels not enough? Are we not burdening the member states by asking them to have another instrument when they seem to be struggling to implement existing instruments? How will accountability be ensured? Indeed all these questions are legitimate, and will need to be answered for the idea of the protocol for children to see the light of day. This paper seeks to engage these questions on the basis of the work that the child rights sector in southern Africa has been engaged in. The paper is structured in three sections. The first section provides a contextual sociolegal analysis of the southern Africa region as a basis of interrogating whether there is a need for a protocol for children or not. The second section provides a rationale for the protocol using a multi-disciplinary approach. The third section provides an exploration of some of the possible areas that the protocol can cover should the idea see the light of day.

SADC region: A children's rights lens

The SADC region has a young population, with 76% below the age of 35 years (Corcoran, 2017). Children below the age of 18 years comprise nearly half of the region's population. Understanding the demography of SADC is a key factor to the attaining its long-term goals. A study commissioned by the World Bank in Botswana, Lesotho, Namibia, Eswatini and South Africa confirms that southern Africa is at a different demographic moment than the rest of sub-Saharan Africa (Bruni *et al*, 2016). The World Bank Report suggests that in 2050, southern Africa will have a working-age population that is larger than its number of young dependents (Ibid). That demographic window of opportunity will reach its peak around 2050, when a full 68% of the five countries' people will be of working age. This opportunity can be a double-edged sword. If the Member States do not deliberately invest in human capital, which is a conduit for transforming the demographic bulge into a dividend, then the productive potential will be lost. This will have serious security repercussions on the region as a whole.

On the children's rights legislative framework front, all countries in the SADC region, with the exception of the Democratic Republic of Congo, have ratified both the UNCRC and the ACRWC. Some of the countries have even gone a step further by domesticating some of the provisions of these two child mainstay instruments, as can be deciphered from Table 1. At SADC level, there are 27 protocols³ that are in force. Of these protocols, there are none that deal with the issue of children in a systematic manner, as shall be shown in Section three of this paper. It is against this backdrop that children's rights civil society in southern Africa has been lobbying SADC to develop a protocol for children.



Table 1: Children’s Rights Laws in SADC Member States Domesticating Global and Regional Instruments

Country	Year	Law
Angola	2012	Children’s Act No. 25/12
Botswana	2009	Children’s Act No. 8
Comoros	-	-
Democratic Republic of Congo	2009	Child Protection Code 09/001
Lesotho	2011	Children’s Protection and Welfare Act No. 7
Madagascar	-	-
Malawi	2010	Child Care, Protection and Justice Act No. 22
Mauritius	2003 amended in 2008	Child Protection Act No. 40
Mozambique	2008	Children’s Act No. 6
Namibia	2015	Child Care and Protection Act No. 3
Seychelles	2016	Children’s Act No. 14
South Africa	2005	Children’s Act No. 38
Eswatini	2012	Children’s Protection and Welfare Act No. 6
Tanzania	2009 & 2011 respectively	Child Act No. 21 in Tanzania & Children’s Act No. 6 in Zanzibar
Zambia	2005	Child Care and Protection Act No. 38
Zimbabwe	2002	Children’s Act Chapter 5:06

Source: Compiled by author

Despite the promulgation of progressive policy and legislative frameworks by SADC member states, not all children have full enjoyment of their rights. Some of the children live precariously as a result of many issues. Firstly, SADC has high levels of poverty and unemployment exacerbated by little industrial growth (SADC, 2015). Secondly, the region has been characterised by a high incidence of disease, primarily HIV, AIDS, tuberculosis and malaria. According to SADC Statistics (2015), the region is home to nearly 19 million orphans. The numbers of vulnerable children who are not orphaned and the magnitude of their problems are not very clear because of the weak systems for generating and managing information (SADC, 2015). Thirdly, children in the SADC region face serious abuses, such as, *inter alia*, economic and sexual exploitation, risk to sale and trafficking, and gender discrimination in education, especially for the girl child, and limited access to quality basic social services. Other factors affecting children in the region include irregular and undocumented migration, child marriage, huge disparity in quality of life between urban and rural areas, and the phenomenon of children living and working on the streets of many SADC cities.



On the economic front, of the sixteen SADC member states, nine of them have been ranked by the World Bank as middle-income countries.⁴ This means that less than 60% of the region is considered to be in the middle income bracket. In these countries, however, inequality is rife because in some instances, there is no judicious utilisation of resources equitably. In the 2018 report by Africa Child Policy Forum on child friendliness on the continent, five SADC countries featured in the top 10 friendliest countries. These countries are Mauritius, South Africa, Namibia, Seychelles and Swaziland (ACPF, 2018). The relatively high scores of ‘most child-friendly’ governments reflect their consistent efforts to realise the rights and wellbeing of children (Ibid). While this is an achievement worth celebrating for SADC, some of these best performers have been characterised by inequality, which finds expression in inconsistencies on quality of service provision for children in different contexts such as rural and urban. This inequality can be exemplified by the biggest economy of the region, South Africa. As has been noted, the country ranks much better than most in the region on child friendliness but it has been deemed to be one of the most unequal countries in the world (World Bank, 2019). The 2012 World Bank Report on SA (2012) noted that:

An equitable society would not allow circumstances over which the individual has no control to influence her or his basic opportunities after birth. Whether a person is born a boy or a girl, black or white, in a township or leafy suburb, to an educated and well-off parent or otherwise should not be relevant to reaching his or her full potential: ideally, only the person’s effort, innate talent, choices in life, and, to an extent, sheer luck, would be the influencing forces. This is at the core of the equality of opportunity principle, which provides a powerful platform for the formulation of social and economic policy – one of the rare policy goals on which a political consensus is easier to achieve.

The citation above shows that there are significant disparities in life opportunities for children in South Africa. These differences are configured along race, gender, location and household income. Such huge differences, like in any unequal society, are unbecoming for a country that has almost all the indicators in the positive for children’s rights. Though poverty has reportedly declined, a report provided data proving that the rich are getting richer while the poor are getting poorer.⁵ In her research, Orthoses (2016) found that 10% of the population own 90-95% of all the wealth in South Africa. The country has a Gini-coefficient of about 0.95 (compared to 0.7 for incomes, the highest in the world). The South African wealth distribution is as unequal as that of the world as a whole (Ibid). It means that the quality of basic social services available to children in South Africa are not the same; they are dichotomised according to the economic and social strata from where the child comes.

Rationale for the SADC protocol for children

The rationale for a SADC Protocol for Children lays in the abovementioned uneven progress in SADC countries in meeting targets set under the already existing child rights instruments. As such, it is



reckoned that in order to have children's issues on the political agenda perennially, it is imperative to develop a regional, obligatory and action-oriented child rights framework. Such a framework would need the backing of a plethora of instruments in existence already. A detailed account of these existing international and regional child rights instruments falls beyond the objectives of this contribution. The scope and number of these global and regional instruments' content would need to be consolidated into one, comprehensive document addressing contemporary children's rights issues. Building on the existing global and regional children's rights frameworks will not only ensure clarity of normative expectation, it also will permit the inclusion of and focus on region-specific children's rights issues. Further, the protocol will consolidate the gains that have been made by the SADC Minimum Package of Services for Orphans and Vulnerable Children and Youth. This is primarily because a protocol is more binding and durable to be used as a premise to promote general measures of implementation for children's rights, instead of the current SADC Minimum Package of Services for Orphans and Vulnerable Children and Youth, which is a programmatic document with no binding effect.

There is an argument against having a SADC Protocol for Children premised on the fact that all member states in SADC, except the Democratic Republic of Congo, have ratified the UNCRC and the ACRWC. The major concern submitted in this line of argument is that it is pointless to have so many regional mechanisms or tools before there is full implementation of the already existing ones in SADC member states. The argument further posits that the efforts have to be made in ensuring that state parties fully comply with obligations that they have signed up to before introducing a new children's rights instrument to add to the list of the mechanisms that a member state has to comply with. The argument further posits that having an instrument does not translate to the realisation of children's rights, rendering the effort of developing a SADC Protocol for Children futile. This conservative argument, therefore, suggests that instead of having a campaign for a new protocol, these efforts should be directed towards ensuring that the already existing mechanisms are used fully to have all children enjoy their rights.

There are three arguments that can be used to address the concerns raised by the conservative school above. The first is the principle of subsidiarity argument. This is a structural human rights principle that governs the relationships of communities, as well as relations of individuals to any form of human community (Gosepath, 2001). Smaller social or political entities or institutions are supposed to be accorded primacy. As such, it is sacrosanct that bigger institutions facilitate smaller ones to perform their tasks and to provide them with any necessary support (*subsidium*) (Ibid). Milano (1990) buttresses the foregoing by noting that the principle refers:

to the need to ensure that political decisions are not taken at any higher level than they need to be, or, more precisely, that there should be a decentralised organisation of responsibilities, with the aim of never entrusting to a larger unit what can better be realised by a smaller one.



Spicker (1991) concurred with the foregoing when he noted that the role of others who are more remote is correspondingly reduced; they are 'subsidiary' to the primary responsibilities. The role of public services, in particular, is subsidiary to that of family, the local community and the private sector (Spicker, 1991). As such, the idea of a SADC Protocol for Children is anchored on this principle. As provided for in the SADC Treaty of 1992, what the SADC member states have committed at international level has to be reflected upon, unpacked and contextualised at the regional and national levels for understanding and ease of operationalisation. The protocol will explore available opportunities and derive relevant content from the uniqueness of the region, in particular, its demographic transition and sociocultural, economic and political development trajectory.

The second argument tied to the principle of subsidiarity pertains to the weaknesses of both the UNCRC and the ACRWC. Several scholars have attended to this subject.⁶ Further, the duration lapse since promulgation of these two instruments has been more than 30 years at the writing of this article. There have been a lot of emerging issues that both instruments did not envisage would be topical in future. Some of these issues include children and climate change, children and digital technology, sexual minority rights of children, radicalisation of children and terrorism, to mention but a few. As a result, member states are confronted with such issues and there is no jurisprudence they can rely on in dealing with them. The development of a region-specific protocol will, therefore, provide an opportunity to fill the gaps left by both the UNCRC and the ACRWC. The protocol is not meant to produce new obligations for the states' parties. It is, however, meant to build on the normative framework provided by the existing children's rights instruments by providing clarity on some of these complex and emerging issues that have come up in the course of time.

Linked to the emerging children's rights issues not adequately covered in the existing children's rights instruments is the incipient trend of integration that has been taking place in the region. The borders are more open, as such movement of people from one country to the other has increased. The African Continental Free Trade Agreement (AfCFTA), signed by 44 African countries in Kigali, Rwanda in March 2018, is one instrument that is facilitating this ease of movement of people on the continent. The instrument has an aspiration of creating a tariff-free continent that can grow local businesses, boost intra-African trade, rev up industrialisation and create jobs.⁷ The AfCFTA is intended to bring together all 55 member states of the African Union, covering a market of more than 1.2 billion people, including a growing middle class, and a combined gross domestic product (GDP) of more than US\$3.4 trillion (Zoogah, 2019). In terms of numbers of participating countries, the AfCFTA will be the world's largest free trade area since the formation of the World Trade Organization. Estimates from the Economic Commission for Africa (UNECA) suggest that the AfCFTA has the potential both to boost intra-African trade by 52.3% by eliminating import duties, and to double this trade if non-tariff barriers are also reduced (Ibid). This brilliant opportunity on the continent will bring with it a new dynamic for children's rights. It means that the risk of child trafficking for sexual exploitation will increase. To combat this, state parties at regional level will need closer collaboration in dealing with such cross-border children's rights violations. Addressing



cross-border children's rights violations would require deliberate, systematic and focused actions. These can be guided by a regional binding instrument that will assist member states to harmonise their interventions.

The third argument is that southern African countries have a shared history. Consequently, there are issues that are common in most SADC member states that will need an organically tailored regional response. The common challenges are mainly rooted in shared borders and natural resources, historical, sociocultural, religious, economic and political ties, as well as geography. Common problems and challenges include, *inter alia*, ensuring mutual socio-economic interdependence amid different levels of development, resolving conflicts, controlling communicable diseases such as tuberculosis, Ebola, malaria and the magnitude of HIV and AIDS and its impact such as orphanhood and the high occurrence of households headed by children. These shared challenges give a deeper sense of common identity and purpose than may exist at continental level. A SADC protocol, therefore, will provide common approaches to common challenges related to children's rights in the region, building on the aspiration for a common future and destiny. The protocol will then articulate, in a more nuanced and peculiarly southern African way, children's rights violations recommending radical and practical means of attending to them.

Are the current SADC protocols not enough?

The SADC mission statement is:

To promote sustainable and equitable economic growth and *socio-economic development* through efficient, productive systems, deeper co-operation and integration, good governance, and *durable peace and security*; so that the region emerges as a competitive and effective player in international relations and the world economy [emphasis added].

The mission of SADC is broad enough to cover issues of children's rights under the socio-economic development ambit. Also, the achievement of durable peace will entail inculcating a culture of peace in children and young people. The achievement of this mission is anchored on the extent of investment that SADC member states will make in their children and young people.

While it is easy to locate children within the SADC mission statement, it is not difficult to see the conspicuous absence of children in the SADC protocols. Article 22 of the SADC Treaty provides for the development of protocols in identified areas of relevance and cooperation. There are three typologies of protocols that SADC has developed since its inception. First, there are procedural and administrative protocols that provide guidance on diplomatic and international relation matters. Secondly, there are technical protocols on specific issues of the region. Lastly, there are thematic protocols that seek to harmonise the work of member states.

Table 2 provides a list of the procedural and technical protocols that SADC has developed.



Table 2: Procedural and Technical Typologies of SADC Protocols

Procedural Protocols	Technical Protocols
SADC Protocol on Immunities and Privileges	SADC Protocol on Energy
SADC Protocol on Shared Watercourse Systems (replaced by Revised Protocol)	SADC Protocol on Transport, Communications and Meteorology
SADC Protocol on Tribunal and Rules of Procedure	SADC Protocol on Combatting Illicit Drugs
SADC Protocol on Wildlife Conservation and Law Enforcement	SADC Protocol on Trade
SADC Protocol on Shared Watercourses	SADC Protocol on Mining
SADC Protocol on Politics, Defence and Security Cooperation	SADC Protocol on Fisheries
SADC Protocol on the Control of Firearms, Ammunition and other Related Materials in SADC	SADC Protocol on Forestry
SADC Protocol on Extradition	SADC Finance and Investment Protocol
SADC Protocol on Mutual Legal Assistance in Criminal Matters	SADC Protocol on Science, Technology and Innovation
SADC Protocol against Corruption	SADC Protocol on Legal Affairs

Source: Compiled by the author

While it can be said that children's issues can be mainstreamed in most of the protocols outlined in Table 2, the available protocols do not directly speak to the issues of children in a deliberate and systematic way. This is because these protocols are oriented towards putting in place regional systems and standard operating procedures necessary for integration. Of course, such a protocol as one on Mining could be instrumental in addressing issues of child labour in the mining sector. However, the scope of the protocol is purely administrative, not providing guidance on the practices provided for by member states. Thematic protocols have content that can help in addressing children's rights issues. There is, therefore, a need for one systematic instrument that specifically and explicitly engages children's rights. The other existing instruments put children's rights as an appendix or footnote.

Table 3 provides a children's rights lens exploring the extent to which child rights issues are encapsulated, to avoid duplication of efforts in providing for children in the region. Analysis of the available protocols shows that there is no systematic engagement with the four children's rights principles, namely: best interest of the child; right to life survival and development;; non-discrimination; and respect of children's views. In some of the protocols, indeed children's rights issues are raised, albeit in a piece-meal approach. It can be said that the current protocols all have an Achilles heel of assuming that the people of the region are a monolithic group, as set out in the Treaty establishing SADC itself. There is, therefore, a need to unpack 'the peoples of the region' phrase, which will enumerate children as an important demographic of the region.



Table 3: A Children's Rights Analysis of SADC Thematic Protocols

Legal Instrument	Date of Entry into Force	Total Number of Countries that have:				Children's Rights Analysis of the Protocols
		Ratified - R	Ceded - C	Signed - S	Adopted - A	
Treaty of SADC	30/09/1993	10	3	-	-	The Treaty understandably covers 'all peoples of the region' (SADC Treaty, 1992) without necessarily identifying specific groups. In the general undertakings section, however, the Treaty places a premium on non-discrimination on various grounds, although age is not one of them. Non-discrimination is one of the pillars of children's rights work, as outlined in the ACRWC Article 3, which outlines that Every child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status (ACRWC, 1999). The SADC Treaty does not, however, provide such a nuanced articulation of the grounds for discrimination.
SADC Protocol of Education and Training	31/09/2000	11	-	1	-	The Protocol on Education and Training Development in SADC identifies the areas of cooperation as follows: basic education; intermediate education and training; higher education and training; research and development; life-long education; and publishing and library resources. The Protocol further gives guidance on institutional arrangements for its implementation as well as resources and scholarship fund assists. Article 5 of the Protocol attends to key aspects necessary for basic education such as relevant curricular that is organic to the community; the idea of providing universal basic education and affirmative action for disadvantaged groups. This article is in consonance with Article 11 of the ACRWC.8 The provisions of the Protocol under Article 5, however, are policy and administrative process oriented. There is no reference to the children who are the rights holders, the quality of the education aspect is missing and emphasis is on availability primarily. From the time the Protocol was put in place, a lot of progress has been made in the region to address accessibility. What is missing from the protocol is attending to the issues of acceptability and adaptability of the education. The protocol also does not answer the 'how to' question. It gives an impression that financing will be guaranteed and yet this may not be so.

Legal Instrument	Date of Entry into Force	Total Number of Countries that have:				Children's Rights Analysis of the Protocols
		Ratified - R	Ceded - C	Signed - S	Adopted - A	
SADC Protocol on the development of Tourism	26/11/2002	9	-	2	-	The Protocol sets out SADC's objective to build upon the region's potential as a tourist destination. SADC intends to ensure even distribution of tourism development throughout the region and to create a favourable environment for tourism, thereby using tourism as a vehicle for socioeconomic development. ⁹ To facilitate these plans, Member States agree to encourage private sector involvement in the industry through incentives, infrastructure, and a regulatory framework that encourages their participation. Also, the Protocol establishes systems for facilitating travel to southern Africa, training for industry workers, and marketing the region as a tourist destination. It also includes an institutional framework for implementing the Protocol, specifying committees, units, duties, and procedures relevant to improving tourism in the region. The protocol does not cover involvement of children in the tourism sector through sexual exploitation. This is a growing phenomenon in southern Africa that would need a systematic regional response. Articles 32 and 34 of the UNCRC covers this aspect comprehensively. Unfortunately, the protocol did not consider the nuances that exist since research has been showing that children are prone to sexual exploitation in some tourism hotspots.
SADC Protocol on Health	14/08/2004	9	-	4	-	SADC Member States signed the Protocol on Health on the 18th of August 1999 to coordinate regional efforts on epidemic preparedness, mapping prevention, control and, where possible, the eradication of communicable and non-communicable diseases. Education and training, efficient laboratory services and common strategies to address the health needs of women, children and vulnerable groups are discussed within the Protocol. The Protocol covers all the essentials pertaining to health, however, the challenge is that the protocol does not capture the spirit of Article 24 of the UNCRC and Article 14 of the ACRWC on guaranteeing the enjoyment of the highest attainable standards of health for all children. There seems to be an assumption that quality is guaranteed as well as child-sensitive services are available.



Legal Instrument	Date of Entry into Force	Total Number of Countries that have:				Children's Rights Analysis of the Protocols
		Ratified - R	Ceded - C	Signed - S	Adopted - A	
SADC Protocol on Culture Information and Sport	07/01/2006	9	-	4	-	To re-enforce the central role played by culture and sport in the integration and co-operation of the Member States of SADC, the Protocol on Culture, Information and Sport was developed in 2001. The Protocol is guided by the following general principles: striving to develop policies and programmes in the areas of culture information and sport; pooling of resources (expertise, infrastructure facilities) by Members States; commitment to enhancing a regional identity in diversity and the right of access to information and participation in the areas of culture, information and sport by all citizens. The scope of culture covered in the protocol does not address some harmful cultural practices that violate children's rights, as captured in Article 21 of the ACRWC, which provides for state parties to 'take appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child' Articles 13 and 17 of the UNCRC address the issue of access to information for children.
SADC Protocol on the Facilitation of Movement of Persons	Pending	1	-	6	-	This protocol has not yet been enforced. It, however, addresses a pertinent issue of child migration and statelessness. If it receives enough signatures, it can help in realising children's rights through synchronised Member States' responses to children on the move. The protocol itself did not recognise children as a special group whose movement needs extra care and attention, it, however, provides wholesome guidelines for Member States to follow in dealing with the movement of persons.
SADC Charter of Fundamental Social Rights	Pending			11		The overall objective of this Charter is to facilitate, through close and active consultations among social partners, a spirit conducive to harmonious labour relations within the region. The Charter promotes the formulation and harmonisation of legal, economic and social policies and programmes that contribute to the creation of productive employment and opportunities and generation of incomes in Member States. While the Charter was a unique opportunity in addressing social rights, as its name suggests, it unfortunately focused primarily on labour rights, which is not enough to take care of the plethora of children's rights issues that are in the region.

Legal Instrument	Date of Entry into Force	Total Number of Countries that have:				Children's Rights Analysis of the Protocols
		Ratified - R	Ceded - C	Signed - S	Adopted - A	
SADC Protocol on Gender and development ¹⁰	08/09/2008					The Protocol aims to provide for the empowerment of women, to eliminate discrimination and achieve gender equality by encouraging and harmonising the development and implementation of gender-responsive legislation, policies and programmes and projects. The Protocol consolidates and creates synergies among various commitments on gender equality and women's empowerment into one comprehensive regional instrument that enhances the capacity to plan, implement and monitor the SADC Gender agenda effectively. It is also a tool used to set realistic, measurable targets, timeframes and indicators for achieving gender equality and equity and monitor and evaluate the progress made by Member States. In this regard, the Protocol clearly speaks to issues of constitutional and legal rights, governance, and education and training, productive resources and employment, gender-based violence, HIV/AIDS and conflict resolution. There is a focus also on the girl child, which enhances the realisation of children's rights. This protocol can, therefore, be used to buttress children's rights work in the SADC region since there is a deliberate effort to focus on the girl child.

Source: Compiled by author



Some of the envisaged provisions of the protocol

The substantive content of the protocol will not be new. However, it introduces a new approach to the implementation of children's rights and will articulate areas of child protection not previously conceptualised and enunciated. The hope is that this fresh approach will result in a breakthrough in the tardiness that seems to characterise attempts in SADC to move beyond lip service and the many commitments made on paper into reality for children. The revised approach specifically means that SADC states will now be legally bound to speed up efforts towards the fulfilment of children's rights.

Through this prospective protocol, state parties are not only expected to commit themselves to making far-reaching changes, but they are also to achieve them with the urgency that warrants children's rights. The protocol would need to address the conventional norm for economic and social rights that stipulates for 'progressive realisation' of rights. The protocol will be guided by the appreciation that allowing progressive realisation of immunisation or basic education will lead the country into an abyss. There will, therefore be a need to set a jurisprudence of ensuring that such rights are given utmost prioritisation so that all children's potential is actualised. It is further anticipated that the protocol will be a one-stop-shop for all children's rights issues. It will seek to harmonise all children's issues scattered in more than 10 SADC protocols, which makes it programmatically complex to work with.

There are pertinent, region-specific children's rights issues that are conspicuously missing from the current protocol provisions. These issues include, *inter alia*:

1. How the countries are domesticating the provisions of international and regional children's rights instruments that they have ratified, such as the UNCRC and the ACRWC;
2. A need for an agreed approach in dealing with cross-border child rights violations in the region as integration is proceeding at an accelerated pace;
3. An integrated approach to providing quality education, health and social protection to children;
4. A need for a harmonised strategy on resourcing of child welfare services and institutions with the aspiration that no child will be left behind while the issue of resourcing is covered, albeit in a limited way in some of the protocols;
5. Several emerging issues that are not covered in the current protocols as well as other child rights instruments (statelessness; sale, trafficking and abduction of children; impact of climate change on children; child rights and the business sector; cyber-crimes against children and safety on internet) in the dynamic world where rights are not static;
6. A need for a regional mechanism for knowledge management, including synchronised data collection, monitoring, evaluation and reporting on children's rights;
7. A need for a harmonised approach in adolescent sexual and reproductive health issues as well as improved shared learning.



Ensuring State party accountability

The Protocol will not be an end in itself; it will spur Member States to fulfil their obligations as primary duty bearers for children's rights. The Protocol will also provide a premise for children as rights claimers and those in solidarity with them to demand the fulfilment of their rights. At its core, the protocol is intended to result in increased accountability on the part of Member States on children's rights, both domestically and regionally. As such, the protocol will create common normative standards, which will subsequently arm the policymakers, service delivery institutions, children's rights activists, and children with the legal tools to demand for the protection, respect and fulfilment of their rights. The Protocol should conjure regional action planning that will set specific targets and timeframes for realising the rights of children, including establishing monitoring and evaluation mechanisms for gauging progress. The implementation of the regional action plan is anticipated to result in measurable, comprehensive, germane and sustainable change across SADC. Thus, the protocol is expected to contain some clear enforcement mechanisms. These mechanisms also need to exist at both the domestic and regional levels.

To ensure that there is effective accountability, the Protocol will provide for member states to institute a requisite legislative framework articulating appropriate remedies for the realisation of children's rights, including arbitration by relevant institutions in each Member State's jurisdiction. Secondly, public spending would need to prioritise allocation of adequate human, technical and financial resources for the implementation of the provisions encapsulated in the protocol. One of the possible advantages of the Protocol will be ensuring delivery-oriented provisions with targets that will inform regional action plans. To ensure coherence between the protocol and national legislation, state parties would need to facilitate the alignment of domestic legal systems so that there may be clear recourse mechanisms at regional level for children's rights violations. The protocol will also need to have a monitoring and evaluation mechanism for state parties.

Concluding remarks

Children's rights civil society in southern Africa is in the process of lobbying SADC to develop a protocol for children. This article has attended to some of the pertinent questions that the Member States have been raising on this issue. The article showed that SADC member states' commitment to children's rights is unequivocal. All the countries have ratified the UNCRC and the ACRWC. Most of the countries have gone further in domesticating provisions of these instruments into their national legislations. Despite this progress, there are glaring children's rights violations in the region, begging the question, can more be done? It is this aspiration of wanting to do more for the realisation of children's rights that has prompted civil society to come up with a SADC Protocol for Children.



The existing SADC frameworks do not address issues of children in a systematic and deliberate manner. Since SADC as an institution does not have an embedded office dedicated to children, coming up with a protocol for children can prompt a realisation that children's issues need particular attention since human capital development is a centrepiece for the realization of the SADC Industrialization Strategy and Road Map 2015-2063. Attaining the targets for these will require strategic and policy commitments geared towards transforming the children demographic bulge into a demographic dividend that inevitably will prompt national development and global competitiveness of states parties in SADC.

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End notes

- 1 SADC comprises 16 Member States, namely Angola, Botswana, Union of the Comoros, Democratic Republic of the Congo (DRC), Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Eswatini, Tanzania, Zambia and Zimbabwe.
- 2 Other organisations that are working with CRNSA include, *inter alia*, REPSSI, RIATT ESA, Save the Children International, Terre Des Hommes Germany, World Vision, UNFPA, Southern Africa AIDS Trust, to mention but a few.
- 3 At the time of writing this article, SADC had promulgated 27 protocols in the areas of (1) Finance and Investment, (2) Employment and Labour, (3) Trade, (4), Science Technology and Innovation, (5) Gender and Development, (6) Extradition, (7) Mutual and Legal Assistance in Criminal Matters, (8) Forestry, (9) Politics Defence and Security Cooperation, (10) Fisheries, (11) Culture Information and Sport, (12) Firearms, Ammunition and other Materials, (13) Tribunal and Rules Thereof, (14) Legal Affairs, (15) Shared Water Courses (as revised), (16) Health, (17) Wildlife Conservation and Law Enforcement, (18) Mining, (19) Education and Training, (20) Transport Communications and Meteorology, (21) Combatting Illicit Drug Trafficking, (22) Development of Tourism; (23) Treaty Establishing SADC on Privileges and Immunities; (24) Against Corruption; (25) Energy; (26) Facilitation and Movement of Persons; (27) Trade in Services.
- 4 First are **mature Middle Income Countries (MIC)**, which include Botswana, Cape Verde, South Africa, Mauritius, Namibia, Seychelles, and Eswatini, with some 60 million people. These are Africa's better-off economies, located in southern Africa or small island states and come most naturally to mind when thinking about Africa's middle-income countries. But their growth rates are actually lower, especially in South Africa, Africa's largest economy. Second are **commodity MICs**. These are Angola, Congo (Brazzaville), Equatorial Guinea, Gabon, Ghana, Nigeria, Zambia and Sudan. These countries, which are home to about 260 million people, are rich in natural resources, mainly oil. By most social standards, these countries remain very poor but they would have sufficient resources to fight poverty successfully. Third are **new MICs**, which include Cameroon, Cote d'Ivoire, Djibouti, Lesotho, Mauritania, Sao Tome & Principe, and Senegal. These countries represent a broad mix of economies representing 60 million people. While continuing to face major development challenges, most of the new MICs benefitted from improved economic policies and Africa's broader growth momentum. Forth are Africa's **next MICs**. The following countries – home to 110 million people today – should reach middle-income status by 2025 if past trends continue or political interruptions subside: Chad, Kenya, Mozambique, Rwanda, Sierra Leone and Zimbabwe. With this group of new MICs, more than half of Africans would live in middle-income economies and many other countries are just behind, especially in Eastern Africa (see map which also includes 'potential MICs' by 2025) found at <http://blogs.worldbank.org/africacan/africas-mics>. Accessed 1 August 2019.
- 5 Economic Inequality in SA 'Exploded after End of Apartheid', *The South African Newspaper*, (18 January 2016), <https://www.thesouthafrican.com/economic-inequality-in-sa-exploded-after-end-of-apartheid/>. Accessed 5 July 2019.



- 6 See Chirwa, Danwood Mzikenge. (2002). The Merits and Demerits of the African Charter on the Rights and Welfare of the Child. *The International Journal of Children's Rights*, Vol. 10, No. 2, pp.157-177; Memzur, Benyam D. (2008). The African Children's Charter versus the UN Convention on the Rights of the Child: A Zero-sum Game?. *SA Publiekreg= SA Public Law*, Vol. 23, No. 1, pp 1-29.; Mbise, Amana Talala. (2017); The Diffusion of the United Nations Convention on the Rights of the Child (UNCRC) more than the African Charter on the Rights and Welfare of the Child (ACRWC) in Africa: The Influence of Coercion and Emulation. *International Social Work*, Vol. 60, No. 5, pp.1233-1243.; Alen, André, Johan Vande Lanotte, Eugene Verhellen, Fiona Ang, Eva Berghmans, and Mieke Verheyde. (2007). Chapter Two. Comparison with Related International Human Rights Provisions. In *A Commentary on the United Nations Convention on the Rights of the Child, Article 7: The Right to Birth Registration, Name and Nationality, and the Right to Know and Be Cared for by Parents*, pp 3-20. Brill Nijhof; Achilihu, Stephen Nmeregini. (2010) *Do African Children Have Rights? A Comparative and Legal Analysis of the United Nations Convention on the Rights of the Child*. Universal-Publishers.
- 7 The 22-country threshold for the protocol to be enforced was reached on 29 April 2019 when Sierra Leone and the Saharawi Republic deposited their instruments of ratification with the depository.
- 8 Article 11 of the ACRWC outlines that 1. Every child shall have the right to an education. 2. The education of the child shall be directed to: (a) the promotion and development of the child's personality, talents and mental and physical abilities to their fullest potential; (b) fostering respect for human rights and fundamental freedoms with particular reference to those set out in the provisions of various African instruments on human and peoples' rights and international human rights declarations and conventions; (c) the preservation and strengthening of positive African morals, traditional values and cultures; (d) the preparation of the child for responsible life in a free society, in the spirit of understanding tolerance, dialogue, mutual respect and friendship among all peoples ethnic, tribal and religious groups; (e) the preservation of national independence and territorial integrity; (f) the promotion and achievements of African Unity and Solidarity; (g) the development of respect for the environment and natural resources; (h) the promotion of the child's understanding of primary healthcare. 3. State parties to the present Charter shall take all appropriate measures with a view to achieving the full realisation of this right and shall in particular: (a) provide free and compulsory basic education; (b) encourage the development of secondary education in its different forms and to progressively make it free and accessible to all; (c) make the higher education accessible to all on the basis of capacity and ability by every appropriate means; (d) take measures to encourage regular attendance at schools and the reduction of drop-out rates; (e) take special measures in respect of female, gifted and disadvantaged children, to ensure equal access to education for all sections of the community. 4. State parties to the present Charter shall respect the rights and duties of parents, and where applicable, of legal guardians to choose for their children's schools, other than those established by public authorities, which conform to such minimum standards as may be approved by the State, to ensure the religious and moral education of the child in a manner with the evolving capacities of the child. 5. State parties to the present Charter shall take all appropriate measures to ensure that a child who is subjected to schools or parental discipline shall be treated with humanity and with respect for the inherent dignity of the child and in conformity with the present Charter. 6. State parties to the present Charter shall have all appropriate measures to ensure that children who become pregnant before completing their education shall have an opportunity to continue with their education on the basis of their individual ability. 7. No part of this Article shall be construed as to interfere with the liberty of individuals and bodies to establish and direct educational institutions subject to the observance of the principles set out in paragraph 1 of this Article and the requirement of education given in such institutions shall conform to such minimum standards as may be laid down by the States.
- 9 SADC Protocol on the development of Tourism. (2002).
- 10 SADC Heads of State and Government signed and adopted the SADC Protocol on Gender and Development in August 2008 with the exception of Botswana and Mauritius. Out of the 13 Member States

that have signed, 11 have already ratified the Protocol. The Objectives of the Protocol are, among others, to provide for the empowerment of women, to eliminate discrimination and to achieve gender equality and equity through the development and implementation of gender-responsive legislation, policies, programmes and projects. It also seeks to harmonise the various international, continental and regional gender equality instruments that SADC Member States have subscribed to such as the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) and the Beijing Declaration and its Platform of Action. The protocol was updated in 2016 and Botswana has signed the updated one.

