

Save the Children
Child Survival Campaign

Legislative Frameworks
for
Child Survival

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1. INTRODUCTION

1.1 Every year, 8.8 million children die before their fifth birthday. That means that one child dies every three seconds.

1.2 In September 2000, the General Assembly of the United Nations adopted the UN Millennium Declaration¹, setting a series of “Millennium Development Goals” to be achieved by 2015. Millennium Development Goal 4 (*MDG 4*) commits States to “*reduce by two thirds the mortality rate among children under five*”.²

1.3 The Child Survival Campaign has been launched by Save the Children with the aim of reaching this target, by focusing on deaths of children under five resulting from preventable conditions.

1.4 The following countries are the Child Survival Campaign’s priority targets and are designated as “Premier Countries”: China, Ethiopia, India, Nigeria, Pakistan and Sierra Leone.

1.5 Additionally, the Child Survival Campaign targets fourteen other countries, designated as “Champion Countries”: Afghanistan, Angola, Bangladesh, Brazil, the Democratic Republic of the Congo, Egypt, Kenya, Liberia, Mozambique, Niger, South Africa, Tanzania, Vietnam and Zimbabwe.

1.6 These countries have been selected principally because, in absolute terms, they have the highest levels of child mortality in the world.

1.7 Save the Children’s vision is that within five years no child under five will die from preventable causes. Moreover, Save the Children aims to transform public attitudes such that we will not tolerate a return to high levels of child mortality.

1.8 We have been asked by Save the Children to consider the role of legal frameworks in addressing the issue of child survival. In particular, we have been asked to identify:

- (a) Laws relevant to equitable child survival, including:
 - (i) Existing international frameworks relating to child survival; and
 - (ii) Existing national frameworks of the Premier and Champion countries, including implementation of international legal commitments and national enforcement mechanisms;
- (b) Whether there is an optimal legal framework for ensuring child survival that can be discerned from State practice in any of the Premier and Champion countries such that the other Premier and Champion countries could realistically be expected to adopt similar measures.

¹ A/Res/55/2, 18 September 2000.

² See: <http://www.un.org/millenniumgoals/childhealth.shtml>

1.9 We have been asked to pay particular attention to what Save the Children has identified as “intermediate causes” of child mortality.³ These are:

- (a) Inadequate health systems;
- (b) Poor nutrition;
- (c) Lack of clean water and sanitation;
- (d) Maternal illiteracy; and
- (e) Limited access to contraception.

1.10 Following the Executive Summary in Chapter 2, our report is structured as follows:

- (a) In Chapter 3 we provide an overview of the international treaties and other legal instruments of most relevance to the issue of child survival. The key provisions of those instruments are appended to this report in **Appendices 4B, 4C and 4D**.
- (b) Chapter 4 focuses on certain Premier and Champion countries, drawing on local law advice where possible to examine what legal frameworks, if any, exist to address issues that impact on child survival. The local law advice itself can be found in **Appendix 5**.
- (c) In Chapter 5, we consider whether there are any particular legal factors that may help to explain the significant improvement in child mortality rates that have been observed in two Champion countries – Brazil and Egypt – since 1990.
- (d) Chapter 6 contains a summary of best practice and recommendations based on the review of the Premier and Champion countries.
- (e) We suggest further possible avenues of work in Chapter 7, and in particular engagement with multinational corporations, to see if progress can be made through the increasing awareness of and commitment to corporate social responsibility.

1.11 In our research, we have been greatly assisted by lawyers in many different jurisdictions, without whose commitment and analysis we would not have been able to produce this report. Our appreciation of the efforts of those individuals is recorded in Chapter 8.

³ Save the Children *Newborn and Child Survival Policy Brief 2009*, page 1.

2. EXECUTIVE SUMMARY

International framework for child survival

2.1 As a matter of international law, there is a clear consensus regarding legal rights and obligations that impact on child survival. The relevant international treaty framework is the most highly subscribed and most rapidly ratified in history. If all of the 194 State parties to the Convention on the Rights of the Child had fulfilled even half of their international law commitments, then Millennium Development Goal 4 would probably have been unnecessary.

Transposition of international obligations into national laws

2.2 The picture at a national level is markedly different, with disparate approaches being adopted across the Premier and Champion countries (and, in some countries, seemingly little or no approach at all). The mere fact that it has taken five months to conduct the national research that has gone in to this report demonstrates that it is not easy to identify what relevant law (if any) exists in some of the countries under examination, let alone achieving an understanding of how any such laws may be implemented as a matter of practical reality, and what effects they may have in addressing child mortality rates. This alone demonstrates the need for this project.

Common themes and gaps

2.3 The review of the Premier⁴ and Champion⁵ countries indicates certain endemic issues and problems that seem to arise across many of the jurisdictions. These include:

- (a) Weak, incomplete legislation dealing with, or relevant to, some of the intermediate causes of child mortality;
- (b) The existence of aspirational constitutional rights that are not supported by well-defined, enforceable legal obligations;
- (c) Legislation granting theoretical access to healthcare and/or education, but not requiring such access to be free of charge;
- (d) Lack of school places (particularly for girls) such that a legal rights to access education have little meaning in reality;
- (e) Very limited enforceable rights addressing access to food (including school meals);
- (f) Limited notions of social security, usually linked to employment status, war veterans or the elderly, and not necessarily to the poorest people;

⁴ China, Ethiopia, India, Nigeria, Pakistan and Sierra Leone.

⁵ Afghanistan, Angola, Bangladesh, Brazil, the Democratic Republic of the Congo, Egypt, Kenya, Liberia, Mozambique, Niger, South Africa, Tanzania, Vietnam and Zimbabwe.

- (g) No legislated, enforceable right to water in any of the Premier and Champion countries (indeed, no clear concept of the right to water/sanitation);
- (h) The existence of particularly vulnerable groups e.g. street children, orphans, indigenous groups, which are often overlooked by legislation;
- (i) A chasm between urban and rural populations in terms of access to services that impact on child survival;
- (j) A reluctance to embrace equality of women, or special needs of women such as maternal education, with consequent impact on children;
- (k) A particular reluctance to permit access to contraception and to promote exclusive breastfeeding;
- (l) A lack of systematic data gathering at national level to see if measures are making sufficient impact on the issue of child survival; and
- (m) Lack of access to courts (including inability to bring public interest litigation) for children or those representing them to enforce their rights.

Example of best practice and recommendations

2.4 Despite the serious socio-economic problems affecting many of the Premier and Champion countries, there have been successful attempts at addressing the issue of child survival - and it is possible to find examples of legislative intervention that may provide useful insights into approaches that may prove successful elsewhere. In particular, the following measures have proven manageable – and successful – in some of the Premier and Champion countries that we have examined:

- (a) developing a unified child law, drawing together all aspects of child welfare law (such as Brazil, Egypt, Kenya, Mozambique, Nigeria, Sierra Leone, South Africa, Tanzania and Vietnam);
- (b) alternatively, if it is too difficult to develop a *universal* framework applicable to child rights at a national level, developing specific legal frameworks for specific intermediate causes of particular importance to that country e.g. school meals legislation in Angola and Kenya, breast-feeding legislation in Brazil/Egypt, clean water/sanitation legislation and programs in China, malaria prevention legislation in Tanzania;
- (c) incentive-based legislation e.g. the Brazil Family Grant Scheme, which gives families a monthly social security grant on condition that children are immunised and schooled;
- (d) an awareness of inherent biases in legislation in favour of urban dwellers, to redress the “urban versus rural” divide in child survival e.g. China’s gradual relaxation of its historic, enforced system of societal division (“hukuo”), which favoured urban residents and its recent pursuit of successful water/sanitation policies aimed at over 100 million rural dwellers;

- (e) the establishment of a National Human Rights Institution (*NHRI*) or other monitoring body to oversee the implementation of rights and effectiveness of national programs tackling the issue of child mortality e.g. Brazil, Egypt, Kenya and Mozambique. The government of South Africa has gone one step further and in 2009 formed a Ministry of Women, Children and People with Disabilities to oversee work in those fields; and
- (f) in the context of creating a framework for *equitable* child survival (i.e. trying to ensure equitable outcomes across the population), a legislative focus on particularly vulnerable groups e.g. indigenous peoples, disabled children, street children, orphans e.g. the Mozambique National Plan for Orphans and Vulnerable Children, Indian legislation prioritising educational access to Scheduled Castes and Scheduled Tribes.

2.5 The above themes and suggestions are, of course, not intended to be prescriptive in any given case. Clearly, each country has its own unique circumstances. The effectiveness of legislative frameworks may only reflect underlying political will in terms of addressing structural and intermediate causes of child mortality. Such will may also turn on the state of economic development within a country (although those indicators may correlate). In that regard, law may be regarded as a necessary, but not sufficient, tool to address the problem of child mortality.

2.6 However, our review clearly indicates that law can provide a framework within which flexible approaches can be pursued to address the prevalent causes of child mortality within each country. In that case, the themes and concepts outlined above may provide a useful starting point for the Premier and Champion countries in advancing their own legislative frameworks. This is particularly so in light of the fact that such measures have provided a successful platform in other Premier and Champion countries such as Brazil and Egypt, which have deployed legislative measures as part of a wider armoury in order to put themselves on track to meet their Millennium Development Goal 4 targets.

Further work

2.7 By way of possible further work, we suggest engaging with multinationals and other investors operating in Premier and Champion countries to examine whether, as part of their own corporate social responsibility (*CSR*) commitments, they can take active steps either independently or in collaboration with governments and NGOs, to assist in tackling some of the intermediate (and even some structural) causes of child mortality.

2.8 Alternatively, having identified certain patterns and legislative/enforcement gaps, or in addition, Save the Children may wish to consider the use of strategic litigation in some countries to catalyse action on the part of States that are failing to meet their international law commitments.

3. THE INTERNATIONAL LEGAL FRAMEWORK

Introduction

3.1 The aim of this chapter is to determine the international legal basis of the Child Survival Campaign and to identify the international treaties and other legal instruments that impact on child survival. A full understanding of this will then inform the analysis in Chapter 4 of the national frameworks that exist in Premier and Champion countries – it is only when one sees what the States have signed up to on an international level that one can examine the degree to which they have followed through their international commitments domestically.

3.2 Save the Children has identified several “intermediate” and “structural” causes of child deaths.⁶

3.3 The intermediate causes affecting child survival are:

- (a) Inadequate health systems;
- (b) Poor nutrition;
- (c) Lack of clean water and sanitation;
- (d) Maternal illiteracy; and
- (e) Limited access to contraception.

3.4 The structural causes affecting child survival are:

- (a) Poverty;
- (b) Inequality and exclusion;
- (c) Governance and fragile states;
- (d) Violent conflict;
- (e) Climate Change and natural disasters; and
- (f) Global political economy.

3.5 International law affecting the above intermediate causes can broadly be divided into those laws establishing rights to healthcare and contraception; rights to nutrition, water and sanitation; and rights to education including in particular education targeting maternal illiteracy and learning about contraception. These are explored below.

3.6 We have also been asked to consider certain of the structural causes in this report, namely poverty, and inequality/exclusion. International law affecting these

⁶ Save the Children *Newborn and Child Survival Policy Brief 2009*, page 1.

causes is generally found in those laws establishing socio-economic and peoples' rights. These are also explored below.

3.7 Of equal importance to the substance of international law provisions are the enforcement and monitoring mechanisms that accompany them. The details of such mechanisms under the different international legal instruments are set out in **Appendix 4C** and an analysis is set out below.

International law - outline

3.8 Any analysis of the effect of international law on child survival should begin with what are regarded as the key international legal instruments, particularly those signed under the auspices of the UN, and above all the UN Convention on the Rights of the Child 1989 (*the CRC*).

3.9 A list of the key international legal instruments identified for their potential to impact on child mortality rates is at **Appendix 4A**.

Origin of children's rights in international law

3.10 The international legal basis for supporting the physical, social and spiritual health of children can be traced to the Geneva Declaration on the Rights of the Child (*GDRC*), adopted by the League of Nations on 26 September 1924. This declaration was a direct result of the drafting and campaigning efforts of Save the Children's founder, Eglantyne Jebb.

3.11 The *GDRC* recognised certain fundamental responsibilities owed to all children regardless of race, nationality or creed. It stated, amongst other things, that children must be given:

- (a) the means requisite for normal development;
- (b) food, nursing, help for the disabled, assistance for the delinquent and shelter and succour for orphans; and
- (c) relief first in times of distress.

International legal framework for children's rights today

3.12 Today, many of the provisions which serve to protect children from the intermediate and structural causes of mortality can be found in UN treaties, principally the *CRC*, adopted by the General Assembly on 20 November 1989 and in force from 2 September 1990. It is the most rapidly ratified treaty in history and only two States (the USA and Somalia) out of 196 in the world have not ratified it.

3.13 The *CRC* resonates with the language of the Universal Declaration of Human Rights (*UDHR*)⁷ and recognises the special care and assistance that States should

⁷ The Preamble to the *CRC* acknowledges the inherent dignity and equal and inalienable rights of all members of the human family deriving from the *UDHR*.

afford all children. Many of the CRC's articles go beyond the scope of the Save the Children Child Survival Campaign. Those most pertinent to the Child Survival Campaign are explored thematically below.

3.14 All of Save the Children's Premier and Champion Countries are parties to the CRC. However, as will be seen in Chapter 4, the extent of treaty implementation is variable.

3.15 Notably, China entered a reservation against the CRC such that it will fulfil its obligations under Art. 6 (right to life, survival and development) only in so far as the CRC accords with provisions of Art. 25 (concerning family planning) of the Constitution of the People's Republic of China and is in conformity with the provisions of Art. 2 of the Law of Minor Children of the People's Republic of China. While this reservation has the potential to have a positive effect on maternal access to contraception,⁸ its impact on the structural causes of child mortality, especially discrimination against the female child, is likely to be much less desirable.

3.16 A list of the key international treaties and other legal instruments that we have considered (and their ratification status among the Premier and Champion countries) is set out in **Table A** below.

⁸ "Research suggests that a child who is born less than two years after the next oldest sibling is more than twice as likely to die, compared with when the next child arrives after three years", per Save the Children US, *State of the World's Mothers 2006*, quoted in Save the Children *Newborn and Child Survival Policy Brief 2009*, page 1.

TABLE A: STATUS OF TREATY RATIFICATION BY PREMIER AND CHAMPION COUNTRIES VERSUS CHILD MORTALITY

| | CRC | ICCPR | ICCPR- OP1 | CESCR | CEDAW | Convention relating to the Status of Refugees | African Charter on Human and Peoples' Rights | Under five mortality rate – Reduction since 1990 (%) |
|---------------------------|------------|--------------|-----------------------|--------------|--------------|--|---|---|
| Premier Countries | | | | | | | | |
| China | Ratified | Signatory | - | Ratified | Ratified | Ratified | - | 47 |
| Ethiopia | Ratified | Ratified | - | Ratified | Ratified | Ratified | Ratified | 40 |
| India | Ratified | Ratified | - | Ratified | Ratified | - | - | 34 |
| Nigeria | Ratified | Ratified | - | Ratified | Ratified | Ratified | Ratified | 17 |
| Sierra Leone | Ratified | Ratified | Ratified | Ratified | Ratified | Ratified | Ratified | 7 |
| Champion Countries | | | | | | | | |
| Afghanistan | Ratified | Ratified | - | Ratified | Ratified | Ratified | - | 1 |
| Angola | Ratified | Ratified | Ratified | Ratified | Ratified | Ratified | Ratified | 0 |
| Bangladesh | Ratified | Ratified | - | Ratified | Ratified | - | - | 54 |
| Brazil | Ratified | Ratified | - | Ratified | Ratified | Ratified | - | 65 |
| DRC | Ratified | Ratified | Ratified | Ratified | Ratified | Ratified | Ratified | 0 |
| Egypt | Ratified | Ratified | - | Ratified | Ratified | Ratified | Ratified | 62 |
| Kenya | Ratified | Ratified | - | Ratified | Ratified | Ratified | Ratified | - 25 |
| Liberia | Ratified | Signatory | - | Ratified | Ratified | Ratified | Ratified | 0 |
| Mozambique | Ratified | Ratified | - | - | Ratified | Ratified | Ratified | 41 |
| Niger | Ratified | Ratified | Ratified | Ratified | Ratified | Ratified | Ratified | 21 |
| Pakistan | Ratified | - | - | - | Ratified | - | - | 25 |
| South Africa | Ratified | Ratified | Ratified | Signatory | Ratified | Ratified | Ratified | - 15 |
| Tanzania | Ratified | Ratified | - | Ratified | Ratified | Ratified | Ratified | 27 |
| Vietnam | Ratified | Ratified | - | Ratified | Ratified | - | - | 68 |

ICCPR **International Covenant on Civil and Political Rights**
ICCPR-OP1 **Optional Protocol to the International Covenant on Civil and Political Rights**
CESCR **International Covenant on Economic, Social and Cultural Rights**
CEDAW **Convention on the Elimination of All Forms of Discrimination against Women**
CRC **Convention on the Rights of the Child**
IACHR **Inter-American Convention on Human Rights**

Key

Data Source for under five Child mortality reduction since 1990 (%): UNICEF paper, *The State of the World's Children 2008: Child Survival*, published December 2008, Table 10: The Rate of Progress.

Implementation and enforcement

3.17 One significant problem with the implementation of the CRC and other international treaties by States is that, depending on countries' legal systems, provisions contained in such treaties usually need to be incorporated into domestic legislation (by, for example, ratifying the treaty or passing legislation to implement such laws locally) in order for a child or its representatives to rely on such provisions in a domestic court. This is considered in relation to Premier and Champion countries in Chapter 4.

3.18 Additionally, and in contrast to other UN treaty bodies,⁹ the Committee of the CRC is not empowered to receive complaints from individuals or NGOs. Another enforceability related problem is that of non-submission of reports to committees by State parties. Although some committees have developed strategies to review compliance without a country report,¹⁰ in the absence of comprehensive reporting systems, such reviews will necessarily lack the necessary feedback on which to make meaningful findings. In this regard, while it is helpful that the Committee of the CRC permits the submission of reports and observations from NGOs, this requires a diversion of resources by the NGOs and is not a substitute for the individual States accounting for their own acts (or omissions).

3.19 Another notable source of international law designed to have a direct impact on child mortality rates is the African Charter on the Rights and Welfare of the Child 1990 (*the ACRWC*), to which all of the African States targeted by the Child Survival Campaign are party, with the notable exception only of the Democratic Republic of the Congo.

3.20 The Charter has potential to reduce child mortality and makes provision for enforcement. Its enforcement mechanism includes a process whereby States Parties submit reports within two years of ratification or entry into force of the Charter and every three years thereafter to a Committee of Experts comprised of nationals of States Parties to the Charter of competence in matters of the rights and welfare of the child.

3.21 Additionally, and perhaps more importantly, Civil Society Organisations (*CSOs*) (including NGOs) can also submit second or "alternative" reports. In situations where a State fails to submit a report, such alternative reports become the *de facto* State report. Having been considered by the Committee of Experts, reports are then submitted to a session of the African Union for recommendations, a session at which contributors to the alternative reports may attend and participate on an informal basis.

⁹ For example, the [Human Rights Committee \(UNHRC\)](#) may consider individual communications relating to States parties to the [First Optional Protocol to the International Covenant on Civil and Political Rights](#); the [CEDAW](#) may consider individual communications relating to States parties to the [Optional Protocol to the Convention on the Elimination of Discrimination Against Women](#); the [CAT](#) may consider individual communications relating to States parties who have made the necessary declaration under [article 22 of the Convention Against Torture](#); the [CERD](#) may consider individual communications relating to States Parties who have made the necessary declaration under [article 14 of the Convention on the Elimination of Racial Discrimination](#); and the [CRPD](#) may consider individual communications relating to States Parties to the [Optional Protocol to the Convention on the Rights of Persons with Disabilities](#). See **Appendix 4D**.

¹⁰ For example, the UNHRC decided in 2001 that a State's record could be examined at the Committee's discretion in the absence of a report, and if necessary in the absence of a delegation from a State Party, which would be advised in advance of the proposed date of such an examination. The major factor in deciding which States are examined in this fashion is the delay in reporting or the non-submission of reports.

3.22 To supplement the reporting obligations, communications regarding violations of child rights may be submitted to the Committee by individuals, groups, associations and NGOs.

3.23 However, several substantive and monitoring/enforcement issues remain in respect of the ACRWC. On the substantive side, unlike the CRC, there are no rights explicitly afforded to minorities. On the monitoring/enforcement side, cases take an average of two and a half years to be decided by the Committee of Experts and many States fail to submit reports to the Committee. Moreover, the lack of legal counsel present at sessions of the Committee to give legal guidance on decisions being taken by the Committee is symptomatic of the low level of scrutiny of the Committee.

3.24 Effective mechanisms of implementation and enforcement are clearly critical in the development of an international legal framework sufficiently robust so as to significantly improve child survival rates.

3.25 **Appendix 4C** sets out in detail the mechanisms of enforcement of rights afforded by the main international treaties examined in this paper and the main problems with such mechanisms. Some of Appendix 4C's most important observations include:

- (a) the inadequacy of reporting requirements alone to bring about change;
- (b) the failure of treaty bodies to involve all relevant actors in enforcement mechanisms;
- (c) the "pick and mix" attitude of States both to reporting requirements and reactions to committee observations;
- (d) the work of several committees is gridlocked as a result of large caseloads and a lack of legally trained staff; and
- (e) many international tribunals and treaty monitoring bodies accept applications only from States Parties.

International Law – intermediate causes of child mortality

3.26 The field of international human rights law has expanded enormously both in its scope and recognition over the past fifty years. These laws aspire to provide legal protection and redress for victims of human rights violations. Save the Children's categorisation of the intermediate causes of child deaths demonstrates that such conditions may constitute human rights violations.

3.27 This Chapter aims to outline the ways in which international law affords children protection from such violations, and to evaluate the extent to which it succeeds in its aspirations.

3.28 International law and particularly human rights law can be sub-categorised in any number of ways. As indicated at paragraph 3.3 above, most instructive when trying to evaluate how these rights impact on child mortality rates is to identify such international instruments that endorse:

- (a) adequate healthcare systems and access to contraception;
- (b) access to good nutrition, clean water and sanitation; and
- (c) education, particularly targeting maternal illiteracy and teaching about contraception.¹¹

3.29 Set out below is a thematic analysis of the international legal framework affecting the intermediate causes of child mortality.

Right to healthcare and contraception

3.30 Underpinning all healthcare-specific rights is the most fundamental legal right of all: the right to life.¹² Additionally, Art. 24 CRC states that States Parties recognise the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such healthcare services.

3.31 Art. 24 CRC explicitly and comprehensively states that, amongst other things, States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures to:

- (a) diminish infant and child mortality; and
- (b) ensure the provision of necessary medical assistance and healthcare to all children with emphasis on the development of primary healthcare.

3.32 Other international legal instruments also acknowledge the right to healthcare. One example is of Art. 12 CESC. Art. 12(2)(a) provides for the reduction of infant mortality and the healthy development of the child, along with broader, non-child specific provisions for the prevention of treatment and control of epidemic, endemic, occupational and other diseases, and the creation of conditions which would assure to all medical service and attention in the event of sickness. Since many adult diseases also threaten children's health,¹³ healthcare for all people is a clinical imperative for child survival.

3.33 The African (Banjul) Charter of Human and Peoples Rights 1986 (the *ACHR*) and ILO Convention C169 – Indigenous and Tribal Peoples Convention (*ILO ITPC*) also contain express rights to healthcare.¹⁴ Although child rights are not specifically prioritised, the visibility given to the right of all people to healthcare and community-based healthcare services undoubtedly has the potential to directly impact on child survival. Further, Art. 18(2) ACHR reiterates African States' commitment to their international legal obligations in respect of mothers and children:

¹¹ For a detailed breakdown of rights under international law affecting these factors, see **Appendix 4B**.

¹² Arts. 6 CRC and CCPR.

¹³ Indeed of the five illnesses and medical conditions that are responsible for more than 90% of all child deaths in the under five age range, four of them affect adults too: pneumonia; measles, diarrhoea and malaria.

¹⁴ See Arts 4, 16 and 18 ACHR and Arts 7 and 25 ILO ITPC.

“[t]he State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and child as stipulated in international declarations and conventions.”

3.34 The legal right to contraception might sound a strange subject in a paper on child survival. Nevertheless, research suggests that a child who is born less than two years after the next oldest sibling is more than twice more likely to die than where the next child arrives after three years.¹⁵ Lack of access to contraception is therefore legitimately to be acknowledged as an intermediate cause of child mortality.

3.35 The term “contraception” is not used in any of the key treaties identified at **Appendix 4A**. Nevertheless, the term “family planning” (a notable substitution) is prioritised in international treaties, both in healthcare and educational contexts. Clearly, effective contraception requires the engagement of both spheres. In the interest of clarity however, the twofold aspects of access to contraception will be predominantly dealt with in this section in healthcare.

3.36 Art 24(f) CRC places a positive obligation on States to develop family planning education and services.

3.37 Similarly, Art. 12 CEDAW¹⁶ states that:

“States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.”

3.38 Additionally, in eliminating discrimination against women in rural areas, Art. 14 CEDAW provides that:

“States Parties... shall ensure to such women the right... [t]o have access to adequate health care facilities, including information, counselling and services in family planning.”

Right to nutrition, sanitation and water

3.39 Art. 24(c) CRC states that “to combat disease and malnutrition”, States Parties shall pursue full implementation of the right to the enjoyment of the highest attainable standards of health including through, amongst other things, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water. This legal right is especially important since an estimated 3.5 million child deaths each year are attributable to under-nutrition.¹⁷

¹⁵ Per Save the Children US, *State of the World’s Mothers 2006*, quoted in *Save the Children Newborn and Child Survival Policy Brief 2009*, page 1.

¹⁶ 185 States have signed CEDAW, including all of Save the Children’s Premier and Champion Countries.

¹⁷ *Save the Children Newborn and Child Survival Policy Brief 2009*, page 3.

3.40 Other international instruments also acknowledge the right to food. Since, unlike the CRC, they aim to have a transformative effect on socio-economies and sustainable development, thus targeting the structural causes of child mortality, they go beyond the granting of the basic right to consider the broader responsibilities of States, thereby creating more substantive rights with the potential for promoting greater change.

3.41 For example, Art. 11 CESCR grants the right to adequate food, freedom from hunger, including, importantly, undertakings by States Parties to take measures to improve methods of production, conservation and distribution of food by making full use of technical knowledge and disseminating knowledge of the principles of nutrition and reforming agriculture.¹⁸

3.42 The fact that the CRC and the CESCR are the only “hard law” legal instruments amongst those analysed¹⁹ which afford a specific right to food, demonstrates that the concept of the right to food is quite undeveloped in international law. The same observation applies in respect of rights to water and sanitation granted under international law.

3.43 However, following the Interactive Thematic Dialogue of the UN General Assembly on the Global Food Crisis and the Right to Food on 6 April 2009, the proposal is gaining ground that the right to food, as an enforceable human right, should be at the centre of efforts to reform the global food system. This would directly affect child mortality rates.

3.44 At the High-Level Conference on World Food Security held in Rome on 3-5 June 2008, the Secretary General pleaded for the inclusion of the right to food in the work of the High-Level Task Force on the global food crisis “as a basis for analysis, action and accountability.” At its core, this reference to the right to food means that in order to effectively combat hunger and malnutrition, producing more or increasing aid will not suffice.

3.45 An awareness of the UN’s historic failure to prioritise food security prompts an analysis of so-called “soft law” international instruments which acknowledge the right to food and water.²⁰ The Johannesburg Declaration on Sustainable Development is a prime example of such an instrument. Paragraph 18 provides as follows:

“We welcome the Johannesburg Summit focus on the indivisibility of human dignity and are resolved through decisions on targets, timetables and partnerships to speedily increase access to basic requirements such as clean water, sanitation, adequate shelter, energy, health care, food security and the protection of bio-diversity. At the

¹⁸ Significantly, the CESCR has been ratified by 160 States, compared with 194 States Parties to the CRC. All of Save the Children’s Premier and Champion Countries are party to the CESCR with the notable exception of Mozambique.

¹⁹ See **Appendix 4A** for a list of instruments analysed.

²⁰ Soft law instruments are quasi-legal instruments which do not have any legally binding force, or whose binding force is somewhat weaker than the binding force of traditional law, often contrasted with soft law by being referred to as “hard law”. They are usually considered as non-binding agreements which nevertheless hold much potential for morphing into “hard law” in the future. Examples include resolutions and declarations of the [UN General Assembly](#); elements such as statements, principles, codes of conduct, codes of practice often found as part of framework treaties; action plans (such as Agenda 21 of the Rio Declaration); and other non-treaty obligations

same time, we will work together to assist one another to have access to financial resources, benefit from the opening of markets, ensure capacity building, use modern technology to bring about development, and make sure that there is technology transfer, human resource development, education and training to banish forever underdevelopment.”

3.46 The Johannesburg Declaration is notable for achieving wide-ranging participation from all other States, development banks and NGOs.²¹ In this respect it reflects a broader will than some of the hard law international legal provisions discussed herein, to which only States are party. Such multilateralism should not be underestimated.²² Multi-stakeholder²³ engagement offers a new paradigm for international governance and presents new opportunities for the sphere of child rights and child survival more particularly.

3.47 The rights to food, water and sanitation should not only guide strategies at national level which empower, improve accountability, and ensure adequate targeting of public policies, including agricultural policies. It also should help establish an international framework which enables such national efforts to realise these rights.²⁴ Such a framework should be based on a substantive right to food and water, such as that provided under CESCRR and should be bolstered by monitoring mechanisms to ensure enforceability and accountability.

3.48 The UN Food and Agriculture Organisation (*FAO*) therefore recommends that States pursue a rights-based monitoring approach to food security. This means monitoring not just outcomes but also structures and processes of food production and distribution. Structural indicators measure the adequacy of legal, regulatory and institutional structures, registering for instance the legal status of the right to food, and the mandates of relevant institutions. They should also include information regarding land ownership and tenure rights, food safety laws and consumer protection agencies.²⁵

3.49 Significantly, the FAO fails to interweave its food rights narrative with the rights to sanitation and water. In the context of child survival especially, a more joined-up methodology would contribute towards a more holistic approach to child rights and yield more effective results.

3.50 Moreover, the right to food and water, like the right to healthcare, demonstrates the importance of legislative frameworks and enforcement mechanisms to encourage socio-economic development and sustainability. These themes are explored in more detail below at paragraphs 3.60 and 3.79.

Right to education including maternal literacy and learning on contraception

²¹ See pages 76-79 of the *UN Report of the World Summit on Sustainable Development*.

²² See further: the Stakeholder Forum’s paper, *Towards Global Food Security: Fighting against hunger*, and additionally: <http://www.stakeholderforum.org/>.

²³ For these purposes, stakeholders are such parties who benefit from or bear some responsibility for child survival in the international sphere: children, parents, communities, NGOs and corporates as well as States.

²⁴ Statement by Mr. Oliver De Schutter, Special Rapporteur on the right to food, Interactive Thematic Dialogue of the UN General Assembly on the Global Food Crisis and the Right to Food on 6 April 2009.

²⁵ See further: http://www.fao.org/righttofood/inaction/ajustice_en.htm.

3.51 Maternal literacy is underpinned by the right of all people, namely children of both sexes, to education. Child access to education is also important in its own right, because of the value it may add in terms of access to and understanding of healthcare, contraception, nutrition and sanitation.

3.52 Art. 28 CRC states that States Parties recognise the right of the child to education. With a view to achieving this right progressively and on the basis of equal opportunity, State Parties shall, in particular, amongst other things and pursuant to Art. 28(1), make primary education compulsory and available free to all.

3.53 Additionally, several other international legal instruments recognise children's rights to education. They include Art. 13(2)(a) CESCRC which states that primary education shall be compulsory and available free to all; Art. 14 CESCRC states that:

“[e]ach State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.”

The extent of domestic implementation of this undertaking by Premier and Champion countries is explored further in Chapter 4.

3.54 The importance of the right to (primary) education should therefore not be overlooked in a campaign targeting child survival, because it forms a basis on which children can learn about health, diet and contraception and moreover may be entitled under domestic law to basic nourishment whilst at school.²⁶

3.55 In this way a right to education can promote the survival rates of young children.

3.56 The children of illiterate mothers are more than twice as likely to die or to be malnourished than children of mothers who have secondary or higher education.²⁷ The first step in overcoming this divide is to improve maternal literacy rates. Clearly, if Art. 28 CRC and Arts 13 and 14 CESCRC are properly implemented, literacy rates amongst female children should improve, thus impacting on maternal literacy rates in the long term.

²⁶ A national example of the transformative power of education is that of the Indian Constitution (86th Amendment) Act 2002. The amendment makes it a requirement under Art. 45 of the Indian Constitution to provide a state education for children:

“Provision for early childhood care and education to children below the age of six years.—The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years.”

This, combined with governmental efforts to increase girls' enrolment in school and the introduction of the Midday Meal Scheme affects children's access to nutrition and education, two vital components for eradicating poverty and most notably malnutrition, which is estimated to be an underlying cause of more than one third of all deaths in children under five. This is considered further in Chapter 4.

²⁷ Save the Children *Newborn and Child Survival Policy Brief 2009*, page 1.

3.57 The legal right of women to education is specifically enshrined in Art. 10 CEDAW, which prescribes that:

“States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education.”

3.58 In particular, Art 10(e) places an obligation on States to ensure that women have the same opportunities for access to programmes for continuing education, including adult and functional literacy programmes. However, significant though this article is, it is necessarily limited by its failure to prioritise maternal literacy and is therefore vulnerable to the problems of wider educational frameworks.

3.59 In terms of education about contraception, Art. 10(h) CEDAW is of particular note, because it requires States Parties to take all appropriate measures to ensure access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning. Such a duty on States has enormous potential if properly implemented to reduce child mortality rates by educating future parents on child care, basic healthcare, first aid and nutrition.

International law – structural causes of child mortality

Socio-economic rights – overcoming poverty

3.60 Socio-economic development is the very axle on which the issue of child survival turns. Consistently, it is the poorest children in the poorest communities in the poorest countries who are at the greatest risk of dying.²⁸

3.61 This is demonstrated by the fact that a child born in a developing country is over 13 times more likely to die within the first five years of life than a child born in an industrialised country. Sub-Saharan Africa accounts for about half the deaths of children under five in the developing world.²⁹

3.62 Sources of international law important in promulgating socio-economic development, which in turn should raise child survival rates, are various.³⁰

3.63 Examples of important socio-economic rights in those international instruments explored include the duty on States Parties in Art. 4 CRC to:

“undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.”

²⁸ Save the Children *Newborn and Child Survival Policy Brief 2009*, page 2.

²⁹ See *Millennium Development Goals Goal 4 Fact Sheet*, page 1 from the High-Level Event on the Millennium Development Goals held at the UN Headquarters in New York, 25 September 2008.

³⁰ For example, see various chapters in the UN Charter dated 1945; CSR; CESC; CESC-OP1; Durban Declaration; and CEDAW.

3.64 This provision demonstrates the importance of domestic legislation in order to affect socio-economic transformation. Indeed, in *The Constitutional Protection of Socio-Economic Rights in Selected African Countries: A Comparative Evaluation*, John Cantius Mubangizi,³¹ having surveyed South Africa, Namibia, Uganda and Ghana,³² concludes that South Africa has not only made the most advanced constitutional provision for socio-economic rights, it has also taken the lead in the judicial enforcement of such rights.³³ Again, this is considered in more detail in Chapter 4.

3.65 Another important limitation of Art. 4 CRC is that it is subject to States' "available resources". It promotes an international, multilateral response to socio-economic development by advocating a "framework of international co-operation". This spirit of collective multi-State enterprise is also overt in Art. 26 IACHR and Art. 22 ACHR. This demonstrates the imperative for commitments from developed States, NGOs and corporates in order to effect an integrated holistic response to eradicating poverty.

3.66 The CRC also aims to confer on State Parties a duty to recognise the right of every child to:

- (a) benefit from social security (Art. 26);³⁴ and
- (b) an adequate standard of living (Art. 27).

3.67 Other legal instruments aim to overcome poverty by addressing peoples' working conditions. For example, Art. 8 CCPR grants all people freedom from slavery, and Art. 7(a)(ii) affords a decent living for them *and their families*. Women's rights to family benefits, bank loans and other credit are enshrined in Art. 13 CEDAW.

3.68 Surprisingly, the Refugee Convention and the Johannesburg Declaration are the only instruments examined that acknowledge the human right to property/shelter.³⁵

3.69 There is space therefore in the current international legal framework of child and human rights to flesh out socio-economic rights. Moreover, socio-economic development is reliant on more than just international legal provisions, namely domestic legislation and mechanisms of enforcement. Only an integrated framework that promotes local accountability and multilateral engagement can effect such a change.

Peoples' rights

³¹ John Cantius Mubangizi is Professor and Deputy Dean, Faculty of Law, University of KwaZulu-Natal, Durban, South Africa.

³² These countries enacted their present constitutions around the same time (1990 to 1996) in an attempt to transform themselves into democratic societies and also enabled the author to comment on a geographical spread of States.

³³ *The Constitutional Protection of Socio-Economic Rights in Selected African Countries: A Comparative Evaluation*, John Cantius Mubangizi, published in the African Journal of Legal Studies 2006, pp 1-19.

³⁴ Also see Art. 24 CSR.

³⁵ Art. 21 CSR and para. 18, Johannesburg Declaration.

3.70 The preeminent assertion of peoples' rights is the UDHR, which in 1948 recognised "*the inherent dignity and... the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.*"

3.71 Since 1948, the sphere of peoples' rights has constantly expanded, both in terms of its breath and scope and in terms of the depth of the obligations and rights engendered in sources of international law. For example, there are two significant conventions that proclaim the rights of all peoples and impose obligations on States Parties to eliminate racial discrimination - the Convention on the Elimination of Racial Discrimination³⁶, and the ILO ITPC. Further, the ACHR explicitly recognises people's rights in Arts. 19 to 24.

3.72 Moreover, there is a growing corpus of custom in relation to peoples' rights spinning out of various "soft law" instruments such as the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities 1993 and the Draft Declaration on the Rights of Indigenous Peoples. Most notably in recent times, the Durban Declaration Against Racism, Racial Discrimination, Xenophobia and Related Intolerance explicitly included numerous reference to the rights of indigenous peoples, albeit with a qualification regarding "ongoing international negotiations on texts that specifically deal with this issue".³⁷

3.73 The Durban Declaration, like those at Rio and Johannesburg, is particularly notable for its active involvement of non-State actors and thus represent a shift in the international legal landscape towards integrated multilateral engagement in peoples' rights issues.

3.74 The contribution of the above treaties to provisions which may impact on child survival is set out in detail in **Appendix 4B**. However, it is instructive to consider briefly what kind of peoples' rights are most applicable in the context of child survival. In categorising the causes of child mortality, Save the Children has prioritised poverty, inequality and exclusion in its analysis of the structural causes of child deaths from preventable illnesses.

3.75 One of the most fundamental strands of peoples' rights with clear application to child survival is the right to life. This applies irrespective of creed, colour, age or gender. This right is enshrined in the CRC, CCPR, CESC, IACHR, ACHR, and additionally under the Rio Declaration and ILO ITPC. Additionally, the following peoples' rights are notable for their capacity to transform socio-economies and narratives of equality, so as to create a space in which peoples are empowered to nurture and protect children:

- (a) right to freedom from discrimination on any grounds including of race, colour, sex, language, religion;³⁸
- (b) right to freedom from discrimination against women in all its forms;³⁹

³⁶ 173 State Parties, including all Champion and Premier countries (save for Angola). CERD does not explicitly refer to indigenous peoples.

³⁷ Art. 24.

³⁸ Art. 2 CCPR. Also see Art. 26 CCPR

³⁹ Art. 2 CEDAW. See also Art. 5 CEDAW, Art. 3 CCPR and Art. 3 CESC.

- (c) protection of indigenous rights,⁴⁰ and the rights of indigenous children in particular;⁴¹ and
- (d) rights of refugees to housing, employment, social security and healthcare.⁴²

3.76 When speaking of child survival, it is perhaps in the milieu of peoples' rights that the limits of a rights based approach are most clearly demonstrated, not least because of the way in which the CRC seeks to impose obligations on States Parties and parents to recognise common responsibilities for the upbringing and development of the child.⁴³ Similarly, Art. 29(1) ACHR attempts to impose on individuals a duty to preserve the "harmonious development of the family."

3.77 Such provisions have great potential to improve child survival rates. However, in instruments signed only by States, attempts to impose duties on individuals by means of international instrument are necessarily dependent on local implementation by such means as legislation and policy changes affecting education and socio-economic development.

3.78 In terms of peoples' rights under international custom as outlined in paragraph 3.71, soft international legal provisions have the potential to influence child survival by means of their commitment to:

- (a) sustainable development and a higher quality of life for all people, including the obligation on States to reduce and eliminate unsustainable patterns of production and consumption;⁴⁴
- (b) women's and indigenous peoples' roles in environmental management and development;⁴⁵
- (c) build a humane, equitable and caring global society cognizant on the need for human dignity for all;⁴⁶ and
- (d) protect and preserve the property, institutions and environments of indigenous peoples.⁴⁷

3.79 An exploration of international legal instruments beyond UN conventions into broader declarations embracing various issues and targeting wider audiences suggests therefore that an effective legal framework for child survival may be one that:

⁴⁰ See KO ITPC, especially Arts 4 and 12 KO ITPC and paragraph 23 of the Durban Declaration.

⁴¹ Art. 30 CRC.

⁴² Arts. 21 and 24 CSR. 144 States are party to the CSR, including the majority of the Premier and Champion Countries. Those which have not ratified the CSR are India, Pakistan, Bangladesh and Vietnam.

⁴³ Art. 18 CRC.

⁴⁴ Principle 8 Rio Declaration.

⁴⁵ Principles 20 and 22 Rio Declaration.

⁴⁶ Paragraph 2 Johannesburg Declaration.

⁴⁷ Arts 4 and 7 ILO ITPC.

- (a) targets a broad range of issues aimed at having a transformative but sustainable effect on socio-economic conditions;
- (b) inculcates a spirit of obligation as well as rights combined with effective local mechanisms of enforcement; and
- (c) engages non-State actors, such as NGOs and corporations, in its implementation and monitoring regimes.

Non-discrimination and equitable outcomes

3.80 Discussion of structural causes of child mortality cannot take place in a vacuum. We cannot assume that the mere provision of substantive rights and obligations in relation to children will properly address the issue of child survival. This is because the rights themselves may be defined in such a way that they are discriminatory in application or effect (even if not by design). This requires an analysis of the concept of equality.

3.81 Art. 2 of The Universal Declaration of Human Rights starts from the basis that the key grounds of discrimination are “*race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*”. This seems to have survived more or less intact for some 60 years as the benchmark of discrimination. The African Charter refers to “*race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status*”.⁴⁸ The CRC itself prohibits discrimination on the basis of “*the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status*”.⁴⁹

3.82 Putting aside the issue of people’s rights (discussed above), there is a question as to whether concepts of discrimination dating back 60 years are fully applicable to the modern era. For example, old fashioned-definitions are unlikely to target discrimination on the basis of age, disability, illness/disease (e.g. HIV/AIDS) or on the basis of other vulnerabilities or characteristics, such as orphans, rural and homeless children. These types of discrimination have a profound adverse impact on the issue of child survival.

3.83 Further, one needs to look at the issue of inequity from the perspective of access to services and rights. It is not enough to grant a theoretical right to healthcare to all children if the reality is that street children or orphans are unable to access healthcare services. Therefore, an effective framework needs to provide positively for *access* to services by marginalised people and communities. That may even require “positive discrimination” to redress inequities.

3.84 In that regard, we see gradual acknowledgement of the notion of *equality of access* with a view to achieving *equitable outcomes* creeping in to international law.

⁴⁸ Art. 2.

⁴⁹ Art. 2(1).

3.85 In the Johannesburg Declaration, States, having committed themselves to an “equitable and global society cognisant of the need for human dignity for all”⁵⁰, went on to note “the indivisibility of human dignity and [resolve] through decisions on targets, timetables and partnerships to speedily increase access to basic requirements such as clean water, sanitation, energy, health care, food security and the protection of bio-diversity”.⁵¹

3.86 Albeit in the context of racial discrimination, xenophobia and related intolerance, the Durban Declaration went further, with its participants urging States to:

“110...

(b) To take steps to ensure equal access to comprehensive, quality health care affordable for all, including primary health care for medically underserved people, facilitate the training of a health workforce that is both diverse and motivated to work in underserved communities, and work to increase diversity in the health-care profession by recruiting on merit and potential women and men from all groups, representing the diversity of their societies, for health-care careers and by retaining them in the health professions;

(c) To work with health-care professionals, community-based health providers, non-governmental organizations, scientific researchers and private industry as a means of improving the health status of marginalized communities, in particular victims of racism, racial discrimination, xenophobia and related intolerance...

121. Urges States to commit themselves to ensuring access to education, including access to free primary education for all children, both girls and boys, and access for adults to lifelong learning and education, based on respect for human rights, diversity and tolerance, without discrimination of any kind;”

3.87 It therefore seems increasingly accepted as a matter of international law that the modern concept of non-discrimination not only includes the notion that laws must be *applied* in a non-discriminatory manner, but also that States can only comply with substantive legal obligations by ensuring that the laws are equitable in their *effect*. In other words, both the means and the end must be informed by the principles of non-discrimination and equity of outcome.

Conclusion

3.88 The United Nations has been instrumental in the development of a credible and widely accepted international legal framework for child survival – most notably in the form of the CRC.

3.89 There are several common strands running through the various UN conventions. The first and most important is the inalienable right to life. Children are specifically afforded rights to food, healthcare, social security, education and an adequate standard of living. These rights (at least in part) create a framework designed to ensure child survival worldwide.

⁵⁰ Paragraph 2.

⁵¹ Paragraph 17.

3.90 However, despite the existence of this framework, child mortality rates remain unacceptably high at 9.2 million in 2007. This suggests that on some levels the framework is failing. Reasons for this failure include the facts that:

- (a) not all countries ratify UN conventions or implement them under domestic legislation, by transposing them into national law. Without a robust domestic law framework to implement and enforce international obligations, such conventions may be rendered ineffective;
- (b) States may derogate from and/or register reservations against certain UN conventions or provisions in them;
- (c) UN General Assembly resolutions are viewed as “soft law” by States and principles underlying such conventions are not prioritised;
- (d) UN resolutions and conventions do not always do enough to oblige and empower non-State Parties, such as NGOs and corporates, to engage in efforts to lower child mortality rates;
- (e) the systems of enforcement and accountability of international law obligations remain imperfect, and are vulnerable to the shortcomings of domestic legal frameworks; and
- (f) international commitments are sometimes implemented in an inequitable manner, such that measures may impact disproportionately across different sections of the population.

3.91 Not only is it essential that children’s rights, principles and standards are incorporated into domestic law and policy, but also, the intermediate causes of child mortality must be addressed. Equitable legislative systems and mechanisms of accountability are needed to confront the issues of inadequate healthcare, poor nutrition, lack of clean water and sanitation, maternal illiteracy and limited access to contraception.

3.92 Legislation tackling the structural causes of child deaths from preventable illnesses such as poverty and inequality is also needed to address to the socio-economic root causes of child mortality.

4. NATIONAL FRAMEWORKS

Using this Chapter

4.1 This chapter is designed for use by practitioners working in the field of child rights, whether in the Premier and Champion Countries or elsewhere. It is therefore structured so as to enable ease of reference either by means of country analysis or by theme. The structure of this chapter is as follows:

- (a) Rationale For Selection Of Premier And Champion Countries;
- (b) Gap Analysis;
- (c) Issue Analysis – focused on the intermediate causes;
- (d) Country-By-Country Observations/Gaps/Recommendations; and
- (e) Recommendations and Examples Of Best Practice.

Rationale for selection of Premier and Champion Countries

4.2 The following countries have been identified by Save the Children because they have the worst child mortality statistics in terms of absolute numbers of children dying prior to their fifth birthday:

- (a) Premier Countries: China, Ethiopia, India, Nigeria and Sierra Leone;
- (b) Champion Countries: Afghanistan, Angola, Bangladesh, Brazil, Democratic Republic of Congo, Egypt, Kenya, Liberia, Mozambique, Niger, Pakistan, South Africa, Tanzania, Vietnam and Zimbabwe.

4.3 Questionnaires were designed in consultation with Save the Children and were sent to local counsel in each country. The questionnaire can be found in **Appendix 2**. Follow-up questions, focused on intermediate causes, were sent to local counsel. These can be found in **Appendix 3**. The responses to the questionnaire and follow-up questions can be found in **Appendix 5**.

4.4 We were unable to obtain questionnaire responses from Ethiopia, Bangladesh, DRC, Liberia and Pakistan.

4.5 It should be stressed that reading this chapter, and particularly the (relatively high level) country-by-country observations, is not a substitute for reading the detailed responses received from the local lawyers that are contained in **Appendix 5**.

Gap analysis

4.6 This section aims to identify those legal issues affecting child survival in the majority of the Premier and Champion Countries. This introduces the national analyses, after which are discussed the recommendations for legal reform proposed by local counsel in their questionnaire responses, the CRC Committee on the Rights of

the Child (*the CRC Committee*) in its Reports, Concluding Observations and General Comments, and other relevant sources such as UNICEF reports.

4.7 It is useful to identify the legal impediments to child survival encountered in our review. This “gap analysis” has enabled us to recognise legislative provisions that support child survival, and also to identify “pressure points” where Save the Children and other NGOs might consider lobbying, working with governments or even litigating as appropriate, in order to strengthen States’ legal frameworks for child survival.

4.8 One of the most common observations by local counsel has been the chasm between the rights and obligations on States’ statute books, and those which are:

- (a) justiciable and thus enforceable in local law courts; and
- (b) implemented by policies on the ground.

4.9 This gap is clearly affected by non-legal factors beyond the scope of this review, but is still worthy of note. Moreover, it is hoped that some of the legal recommendations suggested will hope to close this gap between paper and practice.

4.10 The failure to align national child rights legislation with international child rights legislation, and most importantly the CRC, is a near global failure amongst the Premier and Champion Countries.⁵² This is an observation that runs beyond the implementation of child rights statutes, to include the ways in which laws (including constitutions) affecting any of the structural and intermediate causes of child survival are drafted, applied, implemented and interpreted and the primacy of international child rights obligations. In particular, where international laws, once ratified, have less force than domestic constitutional provisions, constitutions should be amended to provide absolute guarantees for children’s right to survival.

4.11 A lack of cohesion in terms of child rights provisions and principles was another common issue identified by local counsel.⁵³ It is on this basis that we have formulated the view that the optimum legal framework would include a single statute incorporating all child rights law.

4.12 Many legal systems fail not only to outlaw discrimination, but provide a framework that arguably perpetuates such discrimination, whether it is against women or children *per se*, women or children belonging to particular social or indigenous or religious groups, or against the girl child in matters such as child marriage. Such legislation is clearly incompatible with the CRC, to which all of the Premier and Champion Countries are a party.

4.13 Many jurisdictions reviewed have legislation applicable to healthcare and education. However, such legislation could in most instances be improved to better tackle the intermediate causes of child mortality. Save the Children has identified

⁵² Although the extent of this failure varies between countries.

⁵³ See, for example, the questionnaire responses from local counsel in Vietnam and China.

particularly pertinent intermediate and structural causes of child mortality, which local counsel have provided legal analysis on. These are:

- (a) inadequate health systems: whilst many countries afford their citizens rights to healthcare under their constitutions, or under healthcare legislation, only rarely was child and infant healthcare prioritised, and rarer still were legislative attempts to increase equity of access to that healthcare;
- (b) poor nutrition: very few countries had: food safety laws; laws regulating the manufacturing, selling and marketing of breast milk substitutes and other foodstuffs aimed at children; laws obligating public schools to provide meals; and/or constitutions or child rights statutes acknowledging the right of children to food and sustenance;
- (c) lack of clean water and sanitation: the legal right of children and citizens generally to water and sanitation was almost universally overlooked amongst the jurisdictions reviewed;
- (d) maternal illiteracy: whilst some education acts made special provision for the education of girl children, female adults, and more specifically mothers, were not prioritised in any of the legislation reviewed;
- (e) access to contraception: this was also overlooked, except in some of the African jurisdictions more acutely affected by the HIV AIDS crisis, such as Sierra Leone and South Africa; and
- (f) discrimination and exclusion/inequality of outcome: it is the poorest mothers, newborns and children in the poorest communities and countries who are at greatest risk of dying. Addressing this problem necessitates tackling inequalities of power and opportunity, and countering discrimination against ethnic, indigenous, caste or religious groups, and particularly against women and children.⁵⁴ Whilst certain jurisdictions such as South Africa, Brazil, India and Mozambique have made legislative efforts in this regard, many still have much further to go. In particular, one of the most notable gaps that almost none of the countries considered have tackled from a legislative perspective has been the gap between urban and rural populations.

⁵⁴ Save the Children *Newborn and Child Survival Policy Brief 2009*, p. 3.

ISSUE ANALYSIS

Comprehensive Children's Rights/Welfare Law

4.14 All countries with constitutions had some constitutional provision relating to child welfare. However, that is no guarantee of any substantive rights. Some countries, such as Afghanistan and Niger, have almost no national legislation (at least none that could be found by local lawyers) that specifically addresses the intermediate causes of child mortality.

4.15 However, many of the Premier and Champion countries have, particularly in the past ten years, developed specific child welfare laws. Indeed, at the time of writing this report, the Parliament of Tanzania has approved the Law of the Child Act and it is awaiting Presidential Assent. Other Premier and Champion countries with similar child welfare laws include Brazil, China, Egypt, Kenya, Mozambique, Nigeria, Sierra Leone, South Africa and Vietnam.

4.16 Whilst the existence of such laws is encouraging, largely reflecting the view upon which there is universal agreement at international level that children have rights and need a framework for development, the content of those rights is less clear. It is only when specific intermediate causes are considered, as is the case below, that one can see if the constitutions and national legislation are mere words and aspirations, or if they provide an effective platform for national programs that address the intermediate causes of child mortality.

Health Systems

4.17 Several issues surrounding the legislative provision of healthcare systems have been raised by local counsel.

4.18 A number of jurisdictions have a public health statute of some kind, such as Angola, Mozambique, Brazil, Vietnam and China. Additionally or alternatively, some jurisdictions contain constitutional guarantees of healthcare and/ or duties on the State to improve that healthcare. This is the case in the Indian, Brazilian, Niger, Mozambique and South African constitutions.

4.19 However, both these types of legal provision often fail to prioritise child health in particular. In contrast, China has a Law on Maternal and Infant Care which specifically targets the health of mothers and young children. Such a law offers a paradigm to the other Premier and Champion Countries.

4.20 Some of the child rights statutes analysed also contained rights for children to access health systems. This is true of child rights statutes of South Africa, Kenya, China and Vietnam.

4.21 Whilst acknowledging that legislative attempts have been made in respect of healthcare, and particularly by means of healthcare statutes, it is important to recognise that many of these statutes fail to holistically construct a concept of health. In so doing, they ignore the inextricably linked legal rights of children to water and sanitation.

4.22 Another key issue to highlight is that, although some constitutions and laws reviewed by local counsel provide that States should assist maternal and infant healthcare, there is often no requirement for such services to be provided by the State free of charge.

4.23 Where costs remain prohibitive, such laws cannot have a transformative effect since they cannot redress the equity imbalance that so significantly contributes to child mortality rates.⁵⁵ Notably, Vietnam's Law on Child Protection, Care and Education provides free healthcare for children under 6 years of age. Whilst implementation of this law is not yet nationwide, it has great potential to transform child mortality rates in the country.

4.24 Elsewhere, resource-strapped countries have taken a more pragmatic approach, targeting key health issues facing that country and developing programs to tackle those issues. For example, Tanzania has specific programs targeting HIV/AIDS and malaria.

Nutrition/Right to Food

4.25 Malnutrition underlies and contributes to approximately 53 per cent. of all child deaths.⁵⁶ The right to adequate nutrition, therefore, is a fundamental, foundational right for children.

4.26 General Comment No. 12 to the International Covenant on Economic, Social and Cultural Rights (*ICESCR*) clarifies that every State is obligated to ensure for everyone under its jurisdiction access to the minimum essential food which is sufficient, nutritionally adequate and safe to ensure freedom from hunger.

4.27 Question 2 of the questionnaire sent to local counsel asked counsel to provide details of national laws passed affecting child survival issues. In addition, recognising the importance of the nutrition piece, we sent follow-up questions to local counsel asking them whether there was any national legislation affecting access to nutrition.

4.28 The results were varied, but several key legislative deficiencies were identified.

4.29 First, in respect of constitutional rights to nutrition and obligations on States to raise the standard of nutrition, it was not uncommon for such rights and obligations to be non-justiciable, either by virtue of non-implementation, or by virtue of their being drafted in such a way as to be morally binding only. The former was particularly identified as an issue in the South African and Zimbabwean Constitutions and the latter was a very live issue in the Indian Constitution.

4.30 Secondly, very few of the Premier and Champion Countries have specific legislation dealing with nutrition and child nutrition in particular. Examples of

⁵⁵ United Nations Children's Fund, *The State of the World's Children 2008: Child Survival*, p. 23.

⁵⁶ J Bryce et al, Child Health Epidemiology Reference Group "WHO estimates of the causes of death in children" *Lancet* vol. 365 (2005); p. 1147-52, quotes in United Nations Children's Fund, *Handbook on Legislative Reform*, p. 221.

jurisdictions which had passed such laws include Vietnam (by Decree 21 and the Food Safety Law), China (through the Food Safety Law 2002, which provides for a state-level food safety commission to be set up by the State Council to oversee the entire food monitoring system and determines the responsibilities of the departments of health, agriculture, quality supervision, industry and commerce administrative assume different responsibilities in relation to monitoring) and Mozambique (by the Regulations on Food Allowance and Support to Vulnerable Citizens).

4.31 Some countries have developed (non-legal) policies to deal with the issue of child malnutrition. Examples include school feeding programmes and food safety and security policies. Angola, India and South Africa have specific programs providing free school meals to children in compulsory state education.

4.32 Some local counsel cited political will as being a particular impediment to implementation. The most extreme example is clearly Zimbabwe, where, despite various constitutional aspirations to children's rights and development, the current government's policies appear to be achieving entirely the opposite result. The Premier and Champion Countries are therefore ripe for legislative development in this area, since laws are by their nature more compelling than policies and thereby more likely to be transformative.⁵⁷

4.33 Finally, many countries failed to view legislative reform for nutrition holistically, in terms of incorporating the wide variety of areas pertinent to good child nutrition identified in Chapter 5 ("Realising Children's Rights to Adequate Nutrition Through National Legislative Reform") of the United Nations Children's Fund Handbook on Legislative Reform. These include not only addressing micronutrient malnutrition, protecting, promoting and supporting breastfeeding and promoting healthy diets, but also structuring such efforts against a backdrop of healthcare more broadly, access to clean water and sanitation and education thereon. Only such a holistic approach can result in the joined-up transformative approach required.

4.34 All of the above observations combine to demonstrate the importance of the child rights statute. Such legislation is an important way in which the issues highlighted in this section can be pulled together in a holistic way and moreover ensures their focus through the lens of child survival.

Clean Water And Sanitation

4.35 In developing countries, 1 in 5 people do not use safe water, and roughly half are without adequate sanitation. The repercussions are often deadly. The number of children under five worldwide dying from diarrhoea is estimated at almost 2 million per year; in many countries the proportion of child deaths due primarily to diarrhoea is around 20 per cent.⁵⁸ An estimated 88 per cent of diarrhoeal deaths are attributed to

⁵⁷ Clearly, however, political will is often a prerequisite to legislative reform.

⁵⁸ World Health Organisation, "Health Status: Mortality", World Health Statistics 2006, WHO, Geneva, 2007, pp.29-31, cited in United Nations Children's Fund, *The State of the World's Children 2008: Child Survival*, p. 15.

poor hygiene practices, unsafe drinking-water supplies and inadequate access to sanitation.⁵⁹

4.36 Just as the UN Food and Agriculture Organisation fails to interweave its food rights narrative with the right to water, so too have many of the Premier and Champion Countries failed to incorporate not only a rights-based approach to water and sanitation provision but also the framework for provision of such necessities.⁶⁰ In the context of child survival especially, a more joined-up methodology would contribute towards a more holistic approach to child rights and yield more effective results.

4.37 This objective of holism is not theoretical. Measures to improve feeding practices – through, for example, greater attention to food hygiene – are often undermined by poor and contaminated water supplies and inadequate sanitation facilities.⁶¹ There is therefore a very practical rationale for needing to develop a more comprehensive and consolidated legal framework addressing access to clean water, sanitation, food, healthcare, education and equity.

4.38 Having said that, there is clearly a legislative reluctance across Premier and Champion countries to actually tackle the definition of a right to water (and then to create a right/obligation in that regard).

4.39 The only constitution reviewed that grants citizens the express right to water and sanitation is that of South Africa. In fact, the South African Constitution was raised by counsel in several African countries as an example of a superlative paper constitution in terms of the way it addresses the key issues affecting child survival.⁶² This is in stark contrast to the inadequate provisions particularly identified by local counsel in respect of the Sierra Leone and Nigerian constitutions.

4.40 Additionally, the Brazilian and Egyptian children's statutes both address the issue of fair access to water and sanitation. That other jurisdictions' children's statutes fail to flesh out this right is a notable shortcoming on their part.

4.41 Perhaps unsurprisingly in terms of the issues they face, the African nations considered were best in terms of establishing programmes, funds and ministries (sometimes with legislative support) for implementation of such rights. Examples include Nigeria, Mozambique, Kenya, South Africa.

⁵⁹ United Nations Children's Fund, *Progress for Children: A report card on water and sanitation*, Number 5, UNICEF, New York, September 2006, p. 3, cited in United Nations Children's Fund, *The State of the World's Children 2008: Child Survival*, p. 15.

⁶⁰ See further: http://www.fao.org/righttofood/inaction/ajustice_en.htm.

⁶¹ Henry Perry, David Shanklin and Dirk Schroeder, "Impact of a Community-based Comprehensive Primary Healthcare Programme on Infant and Child Mortality in Bolivia", *Journal of Health, Population and Nutrition*, vol. 21, no. 4, Dec. 2003, p. 386, cited in United Nations Children's Fund, *The State of the World's Children 2008: Child Survival*, p. 57.

⁶² Please note, however, that, particularly in terms of its equity record, the conditions affecting child survival on the ground in South Africa continue to be affected by narratives of inequality and discrimination.

4.42 China has also achieved considerable success in the past five years in ensuring and improving clean water supply to over 100 million people in rural areas.

4.43 Nevertheless, the issues faced in respect of the failure by most countries to consistently or holistically address the provision of clean water and sanitation on an equitable basis by legislative means remain. The agenda for this debate is also developing. As the water table drops and countries such as India find water resources under increasing strain from industrial use, there will be a growing tension between the water needs of the population and the short-term economic development of the Premier and Champion countries.

Maternal Illiteracy

4.44 Children of illiterate mothers are more than twice as likely to die or to be malnourished than children of mothers who have secondary or higher education.⁶³

4.45 Whilst some education statutes identified by local counsel made some provision for the education of girl children, female adults, and more specifically mothers, this need was not prioritised in any of the legislation reviewed.

4.46 This is perhaps the most striking of all the legislative gaps identified by local counsel, insofar as it relates to all the jurisdictions surveyed. Whilst the issue is perhaps not as tightly bound up with dramatic improvements in child survival rates and is distinguishable from some of the other issues insofar as it relates to adults rather than children, it nevertheless is important both because:

- (a) it has the potential to impact on child survival statistics;
- (b) it speaks to the framework of equity which legislative change to improve child survival seeks to develop, promulgate and entrench; and
- (c) in many Premier and Champion countries it is acceptable to discriminate against women; the detrimental impact upon children is an inevitable side-effect.

4.47 Some notable programs exist that target the issue of maternal literacy. For example, the National Literacy Mission in India specifically targets female literacy as a means of delivering female empowerment; and the ABET program in South Africa is helping to tackle adult literacy in that country.

Access To Contraception

4.48 Research suggests that a child who is born less than two years after the next oldest sibling is more than twice as likely to die, compared with when a child arrives after three years.⁶⁴

⁶³ Save the Children *Newborn and Child Survival Policy Brief 2009*, page 1.

4.49 As contraception is often a taboo subject, many of the Premier and Champion Countries have failed to take positive, and especially legislative, steps to encourage access to and education about contraception. This failure was particularly noted by local counsel working in Nigeria, Afghanistan and Sierra Leone.

4.50 One of the problems is that contraception is often associated with pre-marital sexual intercourse, which many states consider undesirable and actively discourage, often through legislation or national programs e.g. in China and Vietnam. As a result, single women have very little information about contraception and family planning. Vietnam's family planning legislation also fails to include sex education in school syllabi.

4.51 Some of the Premier and Champion Countries have made legislative efforts to increase access to and education about contraception. This is particularly true of those countries badly affected hit by the HIV/AIDS crisis such as Niger, Mozambique, Kenya and Vietnam.

4.52 In some ways, South Africa's approach is a model example. Faced with the grim reality of HIV/AIDS, South Africa has taken the pragmatic step of legislating a right of access to contraception for children over 12, as well as developing a comprehensive strategy for dealing with wider HIV/AIDS issues, including caring for children suffering from the disease.

4.53 The lifting of the "gag rule"⁶⁵ by the United States administration was noted as a potential catalyst for improved education and availability by the Kenyan local counsel. It will hopefully lead to an increase of funding from the US to organisations that provide family planning information and contraceptives in Kenya and other developing countries.

Equality

4.54 Because they are poor and disenfranchised, millions of women and children have been excluded from progress in recent decades. The disparities in child survival prospects between poor and better-off children are stark, not only among countries but within them.⁶⁶ For example, children living in the poorest 20 per cent of households are far more likely to die before their fifth birthday than children living in the richest quintile of the population; in some countries the risk is up to five times higher.⁶⁷

4.55 The questionnaire responses of local counsel demonstrate that children are excluded from health services by poverty, discrimination, geographic isolation, low levels of parental education, AIDS at epidemic levels and complex emergencies, such

⁶⁴ Save the Children US, State of the World's Mothers 2006, *Saving the Lives of Mothers and Newborns*, Save the Children 2006, cited in Save the Children *Newborn and Child Survival Policy Brief 2009*, p. 1.

⁶⁵ The "gag rule" prohibited US funding to organizations that talk about abortion or offer related services.

⁶⁶ United Nations Children's Fund, *The State of the World's Children 2008: Child Survival*, p. 23.

⁶⁷ Ibid.

as armed conflict and natural disasters. Many children are affected by these circumstances simultaneously, which further decreases the likelihood that life-saving interventions will reach them. The UDHR sets out the various grounds for discrimination by citing the following categories under Article 2:

- (a) Race;
- (b) Sex;
- (c) Language;
- (d) Religion;
- (e) Political or other opinion;
- (f) National or social origin;
- (g) Birth; and
- (h) Other status.

4.56 Two additional structural issues should be noted, which may not be apparent from the above list, dating from the 1948 convention. The first is the apparent “urban versus rural” divide that numerous local counsel have pointed out e.g. China, Vietnam, Nigeria, Tanzania. While legislative frameworks do not set out to widen that gap, equally they also rarely set out to bridge it. In some ways related to this is the gap that exists between Federal and State laws. In some countries, comprehensive Federal laws may exist but that may not be reflected by individual state laws e.g. in Nigeria, where Lagos State (predominantly urban) practice seems to be far more developed than other Nigerian states.

4.57 It is apparent from the above that the focus historically has been on non-discriminatory laws and measures. Increasingly, however, there has been an appreciation that this does not necessarily result in *equity of outcome*.

4.58 Of the countries reviewed, several jurisdictions have constitutional guarantees of equality. These include: Angola, China, India, Kenya, Mozambique, Sierra Leone, South Africa and Zimbabwe. In addition to a lack of implementation, one problem with such guarantees is that they do not always extend to prohibit all forms of discrimination. Equally, some fail to go far enough in terms of affirmative action where needed. In that regard, Save the Children may wish to study the Indian and South African models and contexts of positive discrimination to consider their effectiveness.

4.59 A common issue identified in terms of constitutional guarantees is that, usually, such guarantees only apply to citizens of that country. This is true of the constitutions of Sierra Leone, India, China, Mozambique and Angola. It is particularly problematic in countries with large numbers of migrants and refugees such as those in East Africa and the Indian Subcontinent. Article 9 of the South African constitution, on the other hand, extends the principle of equality to everyone.

It is supported by a raft of legislation aimed at ensuring that measures of equality create equitable outcomes.

4.60 In addition to constitutional guarantees, certain of the countries reviewed have laws specifically outlawing discrimination aimed at redressing the equity imbalance. These are further detailed in the questionnaire responses at **Appendix 5**.

4.61 However, certain jurisdictions fail not only to outlaw discrimination, but provide a framework that seemingly perpetuates such discrimination. One example is of Article 27(4) of the Sierra Leone Constitution which allows for discrimination against women and children. It states that the principle of non-discrimination shall not apply with respect to adoption, marriage, divorce, burial, devolution of property on death or other interests of personal law. This entrenched discrimination against women also flows from customary law and this relationship between national and customary (often discriminatory) laws was identified as being problematic in Vietnam, Zimbabwe and Nigeria.

4.62 Other countries which local counsel and the CRC Committee in its Concluding Observations identified as having particular poor levels of equality are:

- (a) China – local counsel noted that further legislative and other efforts are needed in respect of discrimination against the girl child, children affected by HIV/AIDS, Tibetan, Uighur and Hui children and children belonging to other ethnic and religious minorities, internal migrant children. Additionally, the hukou system residency registration creates a two class society - urban versus rural and has become a source of social injustice, although it seems that this is increasingly accepted by China, which is now actively taking steps to improve living conditions in rural areas;⁶⁸
- (b) Nigeria – local counsel noted in particular the North/South, rural/urban narrative of inequality. This framework is compounded by the fragmented sources of law – the federal, the state, the customary and the religious. This inequality needs to be better addressed through federal legislation;⁶⁹
- (c) Zimbabwe – local counsel noted that children and women’s rights are affected by section 23(3) of the Zimbabwe Constitution which accords primacy to customary law. Although section 23(1) of the Constitution prohibits discrimination, section 23(3) sets out certain exceptions to this general prohibition. These exceptions include issues relating to matters of personal law and the application of African customary law. Accordingly, the exceptions allow for decisions that would otherwise be regarded as discriminatory to be taken. The competing agenda of customary law, protected under the Constitution, continues to adversely affect the rights of women and children, especially in terms of inheritance and ownership of land, further putting them at risk of marginalization. In *Magaya v Magaya*, the

⁶⁸ Please refer to local counsel’s response to Question 4 of the Questionnaire in **Appendix 5**.

⁶⁹ Please refer to local counsel’s response to Question 6 of the Email questions in **Appendix 5**.

Supreme Court of Zimbabwe upheld the appellate magistrate's decision to prohibit a woman being heir to her father's estate;⁷⁰

- (d) Vietnam – local counsel noted that the disparity between people of differing means, geographical location and ethnic background are significant impediments to realisation of what is quite an extensive, if inefficient (by virtue of the plethora of legislation), legal framework for child survival;⁷¹

4.63 For further information on the issues raised by local counsel and the CRC Committee, please see the questionnaire responses at **Appendix 5**.

⁷⁰ Please refer to local counsel's response to Question 3 of the Questionnaire in **Appendix 5**.

⁷¹ Please refer to local counsel's response to Question 4(b) of the Email questions in **Appendix 5**.

COUNTRY-BY-COUNTRY OBSERVATIONS/GAPS/RECOMMENDATIONS

PREMIER COUNTRIES

CHINA

Rights to adequate standard of living (including access to food)

4.64 Article 45 of the PRC Constitution provides that citizens of the PRC have the right to receive material assistance from the state and society when they are old, ill or disabled. The state develops social insurance, social relief and medical and health services that are required for citizens to enjoy this right.

4.65 However, there is no Constitutional provision that provides for social security for mothers and children.

4.66 Article 43 of the PRC Law on the Protection of Minors provides that the state shall take care of minors that live a vagrant life. Child welfare organisations established by the civil affairs departments are required to take care of orphans and the minors whose parents or other guardians cannot be identified, and other minors having no assured living resources.

4.67 Since 1993, the State has promulgated numerous programs and strategies, including⁷²:

- (a) the Guidelines on Reform and Development of the Food Structure of China;
- (b) Guidelines on Development of the Food and Nutrition of China (2001 – 2010);
- (c) Strategies for Improvement of Nutrition of China;
- (d) Planning Guidelines for Elimination of Iodine Deficiency Disorders;
- (e) National Plan on the Control of Respiratory Tract Infection of Children; and
- (f) National Plan on Control of Diarrhoea.

4.68 According to the Report on the Right and Interest Status of Chinese Minors published by the China Youth Research Centre, the above programs and strategies have significantly improved the nutrition and health of minors. For example, among the children under five years old, the rate of severe malnutrition dropped from 3.09% in 2000 to 2.34% in 2005.

4.69 One area in which China has legislated actively in recent times has been child food safety. Use of certain chemicals and other additives have been banned in infant food under the PRC Food Safety Law, introduced after a series of food scares.

⁷² See response of local counsel in **Appendix 5**.

Right to adequate standard of health care

4.70 Article 44 of the PRC Law on the Protection of Minors requires state departments of public health and schools to provide sanitary, health-care and nutrition guidance to minors, provide them with necessary sanitary and health-care conditions, and take measures to prevent diseases. This expressly includes preventive inoculation (free of charge) of children under a state immunization programme. Particular priority is given to:

- (a) preventing frequently-occurring diseases among children;
- (b) strengthening supervision and management over the prevention and treatment of infectious diseases; and
- (c) strengthening the professional guidance, supervision and inspection of sanitation and health care work in nurseries and kindergartens.

4.71 China has formulated the PRC Law on Maternal and Infant Health and Administrative Measures on Maternal and Child Health Institutions. Pursuant to these laws, a three-tiered maternal and child health policy and the monitoring system, focusing on⁷³:

- (a) Under five child mortality;
- (b) the death of pregnant women; and
- (c) birth defects.

4.72 In 2002, China announced that it would gradually establish a new rural cooperative medical-care system. The Ministry of Health, Ministry of Finance and Ministry of Agriculture circulated the Notice on the Establishment of the New Rural Cooperative Medical-care System in 2003.

4.73 According to the Report on the Right and Interest Status of Chinese Minors published by the China Youth Research Centre, up until 2005, the health-care coverage rates of minors are 82.3% in cities and 69.7% in rural areas respectively.

Right to clean water and sanitation

4.74 The PRC Central Government has prioritised action in relation to clean water and sanitation in recent times. The National Development and Reform Commission, the Ministry of Water Resources and the Ministry of Health promulgated the Notice with Respect to Doing a Good Job in Safe Drinking Water Construction Projects in Rural Schools in 2005, and the Ministry of Water Resources and the Ministry of Finance promulgated the Administrative Measures on Construction Funds for the Rural Safe Drinking Water Projects in 2007. This is said to have solved drinking water shortages for 109 million rural residents during the period of 2006 to 2008.

⁷³ See response of local counsel in **Appendix 5**.

Right to social security

4.75 The PRC has adopted some measures in an attempt to establish a social insurance system. For example, it has passed the Resolution for the Establishment of a Unified System for a Basic Pension Insurance Scheme for Company Employees (1997) and Resolution on the Establishment of a Basic Medical Insurance Scheme for City and Township Employees (1998).

4.76 Article 62 of the PRC Labour Law provides that female staff and workers shall be entitled to no less than 90 days of maternity leave for bearing children.

4.77 In 2009, the Ministry of Finance and the Ministry of Health promulgated a series of Notices and Regulations to establish the Subsidiary Programme for Hospitalized Delivery of Rural Pregnant Women, allocating funds of the central finance to provide subsidies to rural women who deliver their babies in hospitals.

Right to education, especially for mothers

4.78 Article 2 of the PRC Compulsory Education Law codifies the right for school-age children to receive 9 years of compulsory education. The law lays down the principle that the State shall establish a funding system to guarantee implementation of compulsory education. Children must be sent to school at the age of six and no fees shall be charged for compulsory education (Article 11).

4.79 The PRC Education Law stipulates that the government must, in order to improve the conditions of schooling and guarantee that children can fully enjoy their rights to receive an education, provide a variety of priority and preferential measures.

4.80 Article 17 of the PRC Implementing Measures of the Law on Maternal and Infant Health provides that medical and health care institutions shall provide consultation and medical health care services on contraception, birth control, childbearing, infertility and reproductive health to women in their childbearing age. However, there is no proactive teaching in this regard.

Right to equal access/non-discrimination legislation

4.81 Article 33 of the PRC Constitution provides that:

- (a) all citizens of the People's Republic of China shall be equal before the law;
- (b) the State shall respect and protects human rights; and
- (c) every citizen is entitled to the rights and at the same time must perform the duties stipulated by the Constitution and laws.

4.82 Article 3 of the PRC Law on the Protection of Minors provides that minors shall enjoy rights to survival, development, protection and participation and the right to education. These rights are to be enjoyed by minors equally, regardless of gender, ethnic status, race, religion etc. The State is to provide special and preferential protection according to minors' physical and mental development

4.83 Article 4 of the PRC Law on Compulsory Education provides that all children and adolescents who hold the nationality of the PRC and have reached schooling age shall have the equal right and assume the obligation to receive compulsory education according to law, regardless of their gender, ethnic status, race, family property status and religious belief.

4.84 Article 9 of the PRC Education Law provides that citizens of the PRC have the right and obligation to receive an education. All citizens, regardless of their ethnic status, race, gender, occupation, property status and religious belief, shall enjoy equal opportunities for education according to law.

4.85 Finally, Article 25 of the PRC Marriage Law provides for equal treatment of children, regardless of parentage and means of conception.

4.86 The PRC has legislated quite widely to prioritise particularly vulnerable groups, such as orphans and disabled children (for example through the PRC Law on the Protection of the Disabled).

4.87 Further details on the specific legal provisions discussed here are set out in **Appendix 5**.

Gaps

4.88 Nevertheless, the following gaps and issues have been observed⁷⁴:

- (a) the State has not defined “the child” uniformly within its legal framework;
- (b) although the Law on Maternal and Infant Health sets out duties on healthcare institutions to provide appropriate healthcare, those services are not always provided free of charge;
- (c) the State has registered an exception to Article 6 CRC (right to life) stating that it shall fulfil its obligation provided by this Article under the prerequisite of planned birth provided by Article 25 of the Chinese Constitution. Art. 25 provides that “the State implements family planning so that population growth can match the plans for economic and social development”, the discriminatory effect on girl children of the PRC’s family planning policy is well documented;⁷⁵
- (d) national legislation sets out only general principles. These principles are implemented through regulations and legislation issued by ministries under state councils and provinces, therefore may vary considerably between provinces. The enforcement of such regulations and legislation also varies greatly from one province to another;

⁷⁴ Please refer to the responses from local counsel at **Appendix 5**.

⁷⁵ Ambassador Moushira Khattab, Vice-Chair of the CRC, “*The Elimination of all forms of discrimination and violence against the girl child*”, UN Division for Advancement of Women Expert Group meeting, 25-28 September 2006.

- (e) although steps have been taken in terms of combating discrimination against women and suggesting an equity paradigm in the constitution, there have been few legislative efforts to address the discriminatory frameworks beyond that of gender;
- (f) one of the major problems in relation to child mortality is the outdated hukou system of residency registration in China. This effectively divides society into fairly rigid divisions of “rural” and “urban”. Children take on the registration / classification of their parents. The system engenders systemic discrimination and inequality, with more resources dedicated to urban citizens, resulting in significant differences between rural and urban populations in relation to child mortality and other problems. The Chinese government has realised the hukou system has become a source of social injustice and reform has been initiated to correct the situation. However, more measures should be taken to eliminate the discrimination and injustice brought by the hukou system;
- (g) despite its non-discrimination legislation, large communities within China such as the Uighur and Hui are subject to inferior treatment and have significantly poorer child survival rates;
- (h) the Civil Procedure Law only gives standing to citizens, legal persons or other organisations that have a direct interest in a case. Therefore public interest litigation/representative actions are not possible.

Recommendations

4.89 Local counsel and/or the CRC Committee in its Concluding Observations dated 24 November 2005 make the following recommendations in relation to China’s legal framework in respect of child survival:

- (a) the State should take all necessary measures to eliminate any negative consequences arising from family planning policies, including abandonment and non-registration of children and unbalanced sex ratios at birth;
- (b) the State should strengthen efforts to eliminate discrimination against girls, children affected by HIV/AIDS, Tibetan, Uighur and Hui children and children belonging to other ethnic and religious minorities, internal migrant children and other vulnerable groups by ensuring that they have equal access to basic services, including health, education and other social services, and that such services are allocated sufficient financial and human resources;
- (c) the State should review legislation affecting children to ensure that children and children’s organisations are given the opportunity to be heard in any judicial and administrative proceeding, policies or programmes affecting them, such as educational reform;
- (d) legislative amendments should be made to define “the child” uniformly within its legal framework in such a way as to be compatible with the CRC; and

- (e) the State should take all necessary measures to provide universal access to health services for all children in its jurisdiction, including non-registered children. It should also adopt policies and programmes to address the problems of malnutrition in children and promote breastfeeding through strengthening the implementation of the International Code of Marketing of Breast milk Substitutes in all parts of the State.

INDIA

Right to adequate standard of living (including right to food)

4.90 The Constitution of India contains several aspirational “Directive Principles of State Policy”. These are non-enforceable sections of the Constitution that are intended to inform federal and state legislation and policy.

4.91 One such Directive Principle is Article 47, which provides that the duty of the State is to raise the level of nutrition and the standard of living of its people as a primary responsibility. In the absence of an express, enforceable provision in the Constitution in this regard, the judiciary in India has innovated. In a series of cases, the Indian Supreme Court has held that the Article 21 of the Indian Constitution, which states: “no person shall be deprived of his life or personal liberty except according to procedure established by law”, can be read as implying a *quality* of life. The Supreme Court has therefore stated that “the right to life guaranteed in any civilized society implies the right to food, water, decent environment, education, medical care and shelter”.

The right to food litigation⁷⁶

4.92 Over the past few decades, India has established various food security programmes. They include:

- (a) “Entitlement feeding programmes” e.g. Integrated Child Development Services (*ICDS*), Mid-Day Meal Scheme (*MDMS*);
- (b) Food subsidy programmes e.g. Public Distribution System (*PDS*);
- (c) Employment programmes e.g. National Rural Employment Guarantee Act (*NREGA*), National Food for Work Programme;
- (d) Social security programmes e.g. National Maternity Benefit Scheme, National Old Age Pension Scheme and National Family Benefit Scheme.

4.93 These are comprehensive programmes that address the nutritional needs of a person from the time of birth through to old age. The ICDS seeks to take care of the nutritional challenges faced by infants and young children (0-6 years), pregnant women, nursing mothers and adolescent girls; the MDMS provides meals to all primary school children; the targeted PDS provides subsidised grain to families below the poverty line; the NREGA provides 100 days of employment in 200 districts (to

⁷⁶ See response of local counsel in **Appendix 5**.

begin with); the social assistance programmes cover the aged who are left out of the social security net.

4.94 The above programmes have prevented large scale food crises and famine of the type that plagued India prior to Independence. However, in recent years, there have been increasing concerns and food shortages caused by a variety of reasons such as crop failures, urbanization, large industrial/dam projects and an ever-increasing population.

4.95 This resulted in numerous court cases concerning the right to food. It is vast litigation, still ongoing, which has resulted in over 47 interim orders by the Supreme Court of India alone.

4.96 Most notably, in an interim order on November 28, 2001, the Supreme Court converted most food and employment-related schemes into “legal entitlements”. This means that the Government of India and state governments cannot change these schemes without the permission of the Supreme Court until the final judgment is passed in this case. The campaign hopes that this case will culminate in the right to food becoming a fundamental right that can be made justiciable in any court of law in the country.

4.97 The interim orders of the SC reflect the growing complexity of the case and the diverse issues being covered. The orders on universalising access to food, especially for children related to mid-day meals and the ICDS are major legal landmarks – in and out of India.

4.98 Specifically, the Supreme Court’s interim order of 28 November 2001 directed state and central governments to universalise the mid-day meal scheme and provide hot, cooked meals to all primary school children in India. The interim order also universalised the ICDS programme, making it mandatory for government to provide supplementary nutrition and the other five services under the ICDS to all children below the age of six, all pregnant women and nursing mothers and adolescent girls.

4.99 The interim order of the Supreme Court relating to the ICDS explicitly states:

“We direct the State Governments/Union territories to implement the Integrated Child Development Scheme (ICDS) in full and to ensure that every ICDS disbursing centre in the country shall provide as under:

1. Each child up to 6 years of age to get 300 calories and 8-10 grams of protein.
2. Each adolescent girl to get 500 calories and 20-25 grams of protein
3. Each pregnant woman and each nursing mother to get 500 calories and 20-25 grams of protein
4. Each malnourished child to get 600 calories and 16-20 grams of protein

5. Have a disbursement centre in every settlement.”

4.100 After central and state governments failed to comply with the interim orders, the Supreme Court put in place numerous comprehensive mechanisms to enforce compliance by the state and its agencies. This has resulted in 188,000 ICDS centres being established. However, much more action is still required.

Right to adequate standard of healthcare

4.101 As seen above, judicial activism has breathed life into the meaning of Article 21 of the Constitution, by reference to Directive Principles. In the case of healthcare, those principles being found in Articles 39 and 47 of the Constitution which provide, *inter alia*, that children should be given the opportunity to develop in a free and healthy manner.

4.102 Several government initiatives are worth highlighting in this regard⁷⁷:

- (a) National Charter for Children 2003: this provides, *inter alia*, that the State shall take measures to:
- (i) ensure that all children enjoy the highest attainable standards of health, and provide for preventive and curative facilities at all levels especially immunisation and prevention of micronutrient deficiencies for all children;
 - (ii) cover, under primary health facilities and specialised care and treatment, all children of families below the poverty line;
 - (iii) provide adequate pre-natal and post-natal care for mothers along with immunization against preventable diseases;
 - (iv) provide for a national plan that will ensure that the mental health of all children is protected; and
 - (v) ensure protection of children from all practices that are likely to harm the child's physical to provide all children from families below the poverty line with adequate supplementary nutrition and undertake adequate measures for ensuring access to safe drinking water and environmental sanitation and hygiene.
- (b) National Rural Health Mission: this programme is specifically aimed at reducing infant mortality and maternal mortality in rural India.
- (c) Reproductive and Child Health Programme: this programme aims focuses on immunisation, ante-natal care, and skilled attendance during delivery. It stresses improving neonatal care in at all levels, hospital, homes and the community in order to target infant mortality. The programme aims at eradicating polio. It also includes plans to expand family planning services.

⁷⁷ See response of local counsel in **Appendix 5**.

Right to clean water and sanitation

4.103 Article 15(2) of the Constitution provides for equal access to “wells, tanks and bathing ghats”. Again, this has been supplemented by judicial activism in interpreting the right to life under Article 21.

4.104 Numerous Supreme Court and High Court cases in India have addressed the issue of the right to water. The Supreme Court recently reiterated again that “*the right to access to clean drinking water is fundamental to life and there is a duty on the state under Article 21 to provide clean drinking water to its citizens*”. The State is duty bound not only to provide adequate drinking water but also to protect water sources from pollution and encroachment. Any act of the State that allows pollution of a water body “*must be treated as arbitrary and contrary to public interest and in violation of the right to clean water under Article 21*”.

4.105 However, the exact scope of the right to water remains unclear. There does not appear to be any comprehensive, legislated plan of action addressing clean water and sanitation. Additionally, there is increasing concern in India regarding substantial use of surface and ground water by corporates and industry.

Right to Social Security

4.106 In India, social security is increasingly viewed as an integral part of the development process. Article 43 of the Constitution sets out that the State has primary responsibility to provide social security to the citizens of India.

4.107 Various statutory regimes provide social security coverage for people employed in the “organized” State and private sectors. However, 92% of workers are employed in the “unorganized” sector of the economy e.g. agricultural and other manual labourers. Those people have no formal social security provision.

4.108 In addition, there are “protective” social security programmes aimed at old age, survival benefits, medical insurance, widows, orphans and maternity benefits. Many of these programmes have specific legislative frameworks e.g. Workmen’s Compensation Act 1923, Payment of Gratuity Act 1972 and the Maternity Benefits Act 1961.

4.109 In theory, maternity coverage is quite comprehensive, with female employees being entitled to a minimum maternity leave of 12 weeks (paid), or 6 weeks for miscarriage/termination. Women employed in the State sector enjoy significantly better maternity provisions.

Right to Education (including maternal literacy)

4.110 Article 21A of the Constitution provides that the state shall provide free and compulsory education to all children of the age of 6 to 14. Many states have enacted their own legislation to supplement this provision.

4.111 Central government has produced several National Policies on Education, most recently in 2002. While being comprehensive in nature, the 2002 National Policy specifically targets education of:

- (a) Women, with the aim of women's equality and empowerment;
- (b) Scheduled (i.e. lowest) castes;
- (c) Scheduled tribes;
- (d) Minorities;
- (e) Adults.

4.112 Detailed plans are set out for targeting the above groups. For example, a National Literacy Mission is actively involved in supporting efforts to improve female literacy.

Right to Equality

4.113 Numerous Articles of the Constitution reinforce the right to equality: Article 14 (equality before the law and equal protection), Article 15 (social equality), Article 16 (equal opportunity in public employment), Article 17 (abolition of untouchability), Article 18 (abolition of Titles) and Articles 25 to 28 (freedom of religion).

Public Interest Litigation

4.114 Of the Premier and Champion Countries, India has one of the most developed legal systems in terms of the ability of its courts to hear public interest litigation (PIL) brought by NGOs. Strategic litigation on the issue of children's rights may therefore be an effective way to tackle legal problems affecting child survival India. Indeed, the Supreme Court of India has played a pivotal role in matters relating to child protection and child survival through various PIL – see the discussion above in relation to the right to food litigation. There are many other precedents for the Indian courts' willingness to address issues and enquiries raised by the National Human Rights Commission in human rights violations.

4.115 It is possible for individuals, social action groups, international and/or local NGOs to file PIL for the enforcement of legal rights of some other person provided such other person is unable to approach the Court directly including such person belonging to class or group of persons who have suffered “a personal injury or injury to a disadvantaged section of the population... on account of social and economic impediments.”

Gaps

4.116 The 1949 Constitution and several other Indian statutes legislate for a variety of issues pertinent to child survival, including public health, raising the level of nutrition, maternity relief and the provision of free and compulsory education. These

are further set out in the questionnaire responses at **Appendix 5**. Nevertheless, the following legislative gaps can be identified:

- (a) most of the constitutional provisions relating to protection of women and children are contained in Part IV and IV A relating to the Directive Principles of State Policy and Fundamental Duties respectively. These provisions are not as easily legally enforceable in a court of law as “hard” legislation and other non-Directive constitutional provisions;⁷⁸
- (b) the constitutional guarantee of free and compulsory education does not cover children aged 0 to 6 years. While the Constitution makes it a ‘fundamental duty’ of every parent to provide education for those aged 6 to 14 years, this is a non-binding obligation which is not enforceable in a court of law; and
- (c) there is no legislation encouraging of adult literacy and maternal literacy more specifically. The National Literacy Mission (*NLM*) has a key role in the promotion of adult literacy and has working partnerships with many NGOs.

Recommendations

4.117 Local counsel and/or the CRC Committee in its Concluding Observations dated 26 February 2004 have made the following recommendations in respect of improvements that could be made to India’s legislative framework to improve child survival rates:

- (a) the State should make greater efforts to ensure that all domestic legislation, and particularly personal laws which govern family matters, are in conformity with the provisions and principles of the CRC;
- (b) legislation should be passed to ensure that street children are provided with adequate nutrition, clothing, housing, healthcare and educational opportunities, including vocational and life-skills training, providing official documents when necessary;
- (c) PIL should be seen as offering an avenue through which children from all sections of society can be protected and their rights can be championed;
- (d) a public health act could be passed to give weight to and to substantiate the constitutional guarantees in the 1949 Constitution, extending the State’s understanding of healthcare to incorporate a right to nutrition, water and sanitation as well as healthcare. Local counsel report that:

“improving health in India will largely require the building up of the health system in the next ten to fifteen years based on certain core values. Five concerns emerge when facing the challenge of improving health in India: (i) promoting equity by reducing household expenditure in total health spending and experimenting with alternate models of health financing; (ii) strengthening public health

⁷⁸ Please refer to p.6 of local counsel’s response to Question 3 of the Questionnaire in **Appendix 5**.

infrastructure and restructuring the existing primary health care system to make it more accountable; (iii) reducing disease burden and the level of covariate risk; (iv) establishing institutional frameworks for improved quality of governance of health; and (v) investing in technology and human resources for a more professional and skilled workforce and better monitoring. These concerns need to be resolutely addressed by a combination of policies that will stimulate the process of reform to achieve the goal of good health and wellbeing of all citizens. Such reform, which will take no less than fifteen years, should aim to overhaul the existing system that is dominated by low-quality health care, is costly and unaffordable for the majority of the people, and where the public sector is underfunded, poorly equipped and constrained by bureaucratic procedures.”⁷⁹

- (e) national health policies should be amended to acknowledge the special rights that children should be afforded;
- (f) NGOs should consider any scope there may be for pushing the priority of maternal literacy in their interaction with the NLM and the Directorate of Adult Education; and
- (g) Tackling the gap between the legislative framework that exists and the lack of real action that prevents realisation of the legal objective. For example in relation to the right to water, State policies are not in tune with the Constitutional rights bestowed upon citizens.⁸⁰

NIGERIA

Relevant provisions

4.118 Most of Nigeria’s constitutional provisions (for example, s.16(2), which requires the State to provide “*adequate shelter, suitable and adequate food, reasonable national minimum wage, old age care and pensions...for all citizens*”) are unenforceable by citizens.⁸¹

4.119 In 2003, Nigeria passed the Child Rights Act (**CRA**). This effectively sought to transpose most of the rights and obligations under the CRC into Nigerian domestic law.

4.120 In particular, the CRA provides for:

- (a) Freedom from discrimination on the basis of origin, sex, religion, disability, community or ethnic group;

⁷⁹ Please see local counsel’s full report at **Appendix 5**.

⁸⁰ Local counsel states in its report that “*The State’s priorities may have to be re-ordered in order to ensure that the right to water is not whittled down on the grounds of affordability and lack of resources*”. Please see **Appendix 5** for more information.

⁸¹ For more information, please see the response from local counsel at **Appendix 5**.

- (b) The government to strive to reduce infant mortality, provide medical and health care, adequate nutrition, safe drinking water, hygienic and sanitized environments, combat diseases and malnutrition and develop primary healthcare for children;
- (c) Special measures to protect particularly vulnerable groups such as street children and orphans;
- (d) Healthcare for expectant and nursing mothers;
- (e) Immunisation of children under the age of two, with judicial penalties for parents that fail to ensure this;
- (f) Family Courts to help administer and resolve issues concerning child rights; and
- (g) A Child Rights Implementation Committee to ensure fulfilment of obligations at national and local levels.

4.121 In addition, further work is being done through the auspices of the National Commission for Women in relation to maternal health and education.

4.122 Therefore, the existence of a legal framework is not in issue. The question is whether it is effective. We have little information in this regard. However, it appears that many of the legislative frameworks only apply to Lagos, and does not extend to other urban, or any rural areas e.g. the Free Health Services (Miscellaneous Provisions) Law (2003) and the Vaccination Law (2003).

Gaps

4.123 Those legal provisions relevant to child survival may be seen in the questionnaire responses at **Appendix 5**. The following gaps should be noted:

- (a) there is no legislation or state policy regarding right to water/sanitation, right to social security, right to maternal education and right to contraception;
- (b) strategic litigation is being used in Nigeria and was successful in the *Anima Lawal v State* death penalty (adultery) case. Under the representative rules of the court, it is possible to bring a representative action where delegated by Power of Attorney. However, in this case NGOs were involved in pro bono legal advice, representation and campaigning, and had no standing of their own. The issue of NGO standing to sue and prosecute on the issue of child rights is untested;
- (c) although the CRA defines the child as a person under the age of 18 years old, and section 31 CRA prohibits sexual intercourse with a child, child marriage is still prevalent in many of the Northern states, and the interrelationship between Federal laws, states' laws and customary law is complex. Greater awareness of the CRA is needed to ensure its roll-out throughout the country; and

(d) there is little by way of monitoring and effective enforcement.

4.124 Local counsel noted that the dominant religious organisations in Nigeria oppose any form of non-natural contraception and advise their followers against such methods. This also leads to a lack of available education in this regard.

Recommendations

4.125 Local Counsel and/or the CRC in its Concluding Observations dated 13 April 2005 recommend that:

- (a) there needs to be greater social awareness of the existence of the CRA, the penalties that come with violation and the avenues through which people can enforce such rights. Traditional leaders' awareness and respect for the CRA is essential to enable effective implementation;
- (b) greater education of women, especially in rural communities would ensure: that healthcare opportunities available are explored; contraception (which is now widely available) is used (effectively); sufficient child-spacing and pre/post-natal attention;
- (c) provision of a State funded social security policy along with a clear and coherent family policy in the framework of poverty reduction strategy, as well as effective strategies for using the social safety net benefits to further the rights of children and to combat poverty;
- (d) the CRC Committee calls for the mainstreaming of customary law and regional and local legislation and that this and the CRA conform fully with the principles and provisions of the CRC;
- (e) the CRC Committee also recommends that the State increases its efforts to ensure implementation of existing laws guaranteeing the principle of non-discrimination;
- (f) the State should take all measures to improve the health infrastructure, particularly in rural areas, take measures to introduce awareness-raising programmes for women on the importance of, inter alia, prenatal and postnatal health care, preventive measures and treatment for common illnesses; immunisation and balanced diet for the healthy development of children;
- (g) the State should streamline the management of educational syllabi; and
- (h) ensuring universal access to drinking water and sanitation services should be a priority.

SIERRA LEONE

Relevant provisions

4.126 Sierra Leone has a fairly comprehensive legislative framework in the form of the Child Right Act 2007 (**CRA 2007**), expressly intended to implement obligations under the CRC, which is in theory well set up to support child survival.

4.127 The CRA 2007 provides that:

- (a) Every child has the right to life and to survival and development to the maximum extent possible (Art 23);
- (b) Disabled children have a right to special care, education and training wherever possible to develop his maximum potential (Art 30(2));
- (c) Any health worker, teacher, or social development worker, and all other governmental and non-governmental service providers shall discharge their duties to children and communities with diligence, fairness, without being swayed by personal interest and without discrimination, respecting people's dignity and worth and taking into account the short and long term interests of the children (Art 38(1)).

4.128 The CRA 2007 establishes a complex supporting network around the legislation, consisting of:

- (a) National Commission for Children;
- (b) Village Welfare Committees, to monitor child rights locally and to consider complaints;
- (c) Chiefdom Welfare Committees, to supervise and assist village communities; and
- (d) Child Panels in each district, to mediate in civil and criminal matters concerning children.

4.129 Section 3(2) of The Education Act 2004 provides that every citizen of Sierra Leone shall have:

“the right to basic education [i.e. six years of primary and the first three years of secondary education] which accordingly shall be compulsory and shall be designed to:

(a) provide facilities for all citizens to be literate and numerate and help them to cultivate the knowledge, skills and attitudes that will enable them to earn a good living;

(b) improve the social and health circumstances of the citizen;”

4.130 The Education Act specifically sets out:

- (a) to rapidly enhance literacy in Sierra Leone and improve the educational opportunities for women and girls, rural areas dwellers and those disadvantaged in the acquiring of formal education;
- (b) a prohibition on discrimination in the provision of education services.

4.131 There is no legislation impacting on maternal literacy, right to clean water/sanitation and contraception.

Gaps

4.132 There are no constitutional or legislative rights of citizens to food, water and social security.

4.133 The legal framework for healthcare is particularly weak. There is no express provision in Sierra Leonean legislation concerning provision of healthcare services to children and mothers.

4.134 Abortions remain illegal, and there is no legislation providing Sierra Leoneans with free access to and education about contraception. This impacts on child survival, since family spacing is acknowledged as very important in reducing child mortality.⁸²

4.135 Although Article 27 of the Sierra Leone Constitution provides for a principle of non-discrimination, in fact, Article 27(4) allows for discrimination against women and children. It states that the principle of non-discrimination shall not apply with respect to adoption, marriage, divorce, burial, devolution of property on death or other interests of personal law. Customary law also discriminates against women on these bases. Moreover, although refugees are in theory granted protection by the Refugees Protection Act 2007, Article 27(4) provides that the principle of non-discrimination shall not apply to persons who are not citizens of Sierra Leone or who acquire citizenship by registration or naturalisation. The promise of free education in the Education Act is negated by the drafting of section 3 of this Act, which states that education is only free insofar as it is specified by a Minister.

4.136 Corruption is still endemic and impacts on many aspects of child survival. In particular, food aid intended for children is often diverted to the black market. Additionally, healthcare is often only provided upon payment of (unlawful) fees.

4.137 The Social Security Act 2001 does provide for basic social security system, based on an employer and employee contribution system. However, there is no right to paid maternity leave. As most women are unemployed or employed in informal activities (such as petty trading) they would not benefit from this act. There is a need to review the legislative framework to protect such women.

⁸² Research suggests that a child who is born less than two years after the next oldest sibling is more than twice as likely to die compared with when the next child arrives after three years, per Save the Children *Newborn and Child Survival Policy Brief 2009*, p.1.

4.138 In this way, the Sierra Leonean Constitution and its laws fail to promote a narrative of equity and rather serve to promulgate frameworks of inequality which in turn contribute to child survival.

Recommendations

4.139 Local counsel, and/or the CRC Committee in its *Concluding Observations* dated 20 June 2008, recommend:

- (a) the State to take, as a matter of priority, all appropriate measures to ensure that the CRA has precedence, in juridical terms and in practice, over previous legislation relating to child rights. The CRC Committee also recommends that the State ensure adequate human and financial resources for the full implementation of the CRA's provisions, particularly with regard to the ability of local councils to carry out the necessary planning and implementation of programmes in this regard;
- (b) legislation should be amended to rectify the situation faced by children born to mothers out of wedlock/separated mothers;
- (c) the State should ensure free access to education for all children, since in practice public schools currently charge additional fees; and
- (d) whilst legislation such as the Refugees Protection Act and the Gender Acts go some way to alleviating the effects of Article 27(4) of the Constitution of Sierra Leone, the structural problem of discrimination would be best tackled from a legal perspective by its removal from the Constitution.

CHAMPION COUNTRIES

AFGHANISTAN

4.140 We have only received scant information from Afghanistan. The sheer difficulty in obtaining any information regarding child rights in Afghanistan amply demonstrates the nature and extent of the problems concerning child survival in that country.

Relevant provisions

4.141 The Constitution of Afghanistan and Afghan Civil Code make provision for the safeguarding of the physical wellbeing of children and mothers. The Constitution of Afghanistan also paved the way for the setting up of the Afghanistan Independent Human Rights Commission in 2002, Afghanistan's first NHRI.

Gaps

4.142 However, effective, practical steps for the implementation of the CRC and CEDAW are yet to be developed. Legal rights under international treaties are not enforced by the courts, which are often plagued with corruption and weakened by lack of resources, training and funding.

Recommendations

4.143 The passing of a comprehensive Child Rights Act would go some way to strengthening the rights of children in Afghanistan to basic services such as nutrition, healthcare and education. Afghanistan also requires assistance in complying with its reporting obligations to international treaty organisations such as the HRC and CRC.

ANGOLA

Relevant provisions

4.144 According to the Angolan Constitution 2002 the protection and promotion of the human rights and equality among citizens is one of the fundamental objectives of the Angolan State. Children are entitled to protection and all efforts must be made to guarantee their well being. The State recognizes the right to property, to medical assistance, to education, to work, salary and vacation and, among others, the right to a proper judicial system.

4.145 There is no shortage of laws enacted by the legislature that impact on the issue of child survival. These include⁸³:

- (a) Family Law (1988);
- (b) Family Allowance (1992);
- (c) Child School Regulations (1998) and Education System Law (2001);
- (d) Maternity Protection Law (2005);
- (e) Law on Hosting and Social Assistance Institutions.

4.146 There is also some institutional support to child survival, for example the Child Protection Committee, which was established in 2007.

4.147 The Angolan Government has also been implementing a Food Meals Program for the elementary school students, which started with three hundred and forty thousand children and, at this moment, covers more than one million students, a quarter of all primary students in Angola (Resolution No. 40/2006, dated 24 July 2006).

4.148 In the health sector, the Government of Angola adopted the 2005-2009 National Strategic Plan to Accelerate the Reduction of Mother-Child Mortality, which is considered as the essential package of care and mother-child health services.

4.149 Since 2003 a National Program to Combat Tuberculosis has been implemented and, on October 2008, the Director of this Program announced an extended five-year action plan.

⁸³ See response of local counsel in **Appendix 5**.

Gaps

4.150 As with Mozambique, there are rarely statutory penalties for persons and entities that violate children's rights.

4.151 There are a lack of legal measures and practical conditions to effectively implement the provisions of the existing laws and treaties.

4.152 The CRC Report commented on the "unacceptably high number of unregistered children in the State", which makes compiling accurate data about child mortality very difficult. Therefore, trends that may show how to reduce child mortality in Angola are not easily highlighted.

4.153 Discrimination is a problem, in particular against children with disabilities living in rural areas. The CRC report and local counsel highlighted a trend of child abuse due to alleged witchcraft.

Recommendations

4.154 The CRC Committee recommends that the State establish an independent human rights institution and a single national council with a clear mandate and sufficient human and financial resources to effectively coordinate all activities undertaken by the State for the implementation of children's rights at the national, regional and local levels.

4.155 The CRC Committee strongly recommends that the State ensures that all children are registered at birth by the use of mobile birth registration units.

4.156 Save the Children may wish to assess the impact and effectiveness of the Food Meals Program.

4.157 The court system in Angola is disorganised and court cases are not usually disclosed to the public. This systemic issue must be addressed in order to allow cases to be heard and beneficial developments in the legal framework to happen.

KENYA

Relevant provisions

4.158 The key statutes affecting child survival are the Kenyan Constitution and the Children Act 2001 (the *CA*). In particular, the following provisions are of note:

- (a) the Kenyan Constitution contains constitutional guarantees for the right to life, protection from inhuman treatment; protection from deprivation of property and freedom from discrimination;
- (b) under the *CA*, the government and family are responsible for ensuring:
 - (i) a child's survival and development;

- (ii) the right to be protected from discrimination based on origin, sex, religion, creed, custom, language, opinion, conscience, colour, birth, social, political, economic, or other status, race, disability, tribe, residence, or local connection; and
- (iii) the right to education.

Right to Education

4.159 According to the Constitution, the responsibility to provide education to the child rests jointly on the Government and the parents. Every child is entitled to free basic education in accordance with Article 28 CRC. The Government of Kenya has attempted to ensure the enforcement of this right through introduction of free primary school education in public schools. The Government has also extended this to provision of free tuition for students in public secondary schools; the right to health.

4.160 Additionally, the Government and parents are legally responsible for providing the child with medical care.

4.161 Additionally, the Government, in partnership with the World Food Program and other stakeholders are undertaking a national school feeding programme. The programme targets rural schools in area which have been worst hit by the food crisis. Apart from providing a healthy diet for school going children, the program has been successful in ensuring that children stay in school and has reduced school drop-out rates. Recently, the Government extended the programme to run during school holidays. This initiative has the potential to greatly impact on the nutritional intake of children. Even if only children over five years old benefit directly from this initiative, it may still affect child survival rates indirectly by easing the burden on families with several children and providing a valuable lesson in terms of nutrition education.

4.162 Also, it is anticipated that the recent lifting of the “gag rule” by the United States administration will improve the availability of contraceptives among women in Kenya since this would improve US funding to organizations that provide contraceptives and disseminate family planning information in Kenya.⁸⁴

Right to Social Security

4.163 The right to social security is provided for every employee employed in the formal sector under the National Social Security Fund Act (Chapter 258, Laws of Kenya) (the *NSSF Act*). The amounts payable by NSSF are not enough for one to comfortably retire on and as a result many employers and employees opt for a private scheme alongside the NSSF.

4.164 Previously, NSSF was only accessible to people employed in the formal sector. Currently, the self employed and people in the informal sector can access the NSSF.

⁸⁴ Please refer to p.12 of local counsel’s response of the Email questions in **Appendix 5**.

4.165 The Employment Act provides for three months paid maternity leave for female employees and two weeks paid paternity leave for male employees. Maternity/paternity leave is an absolute. On return to work, the Employment Act requires that female employees be reinstated to their former position.

Other rights

4.166 There are currently no express legal frameworks relating to rights to an adequate standard of living, right to adequate healthcare, right to clean water/sanitation and right to maternal education.

4.167 However, the government seems to be taking steps to improve general standards of living, for example in a large-scale slum upgrading programme, and in proposed legislation increasing the minimum wage.

Enforcement

4.168 The courts have shown a willingness to enforce the rights granted under the CA. For example, in *B v. Attorney General (2004)* a child succeeded in obtaining an injunction against the Government in a case where the Government wanted to deport the child. The court held that deporting a child who was a ward of the court was contrary to the rights of the child.

4.169 Finally, it is significant that, by section 84 Kenyan Constitution and section 22 CA, the Kenyan High Court is empowered to hear and determine matters relating to fundamental rights and freedoms, and more specifically, children's rights and freedoms. Section 22 CA provides that if any person alleges that any of the provisions of sections 4 to 19 (inclusive) (these sections provide for the rights of the child) has been, is being or is likely to be contravened in relation to a child, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress on behalf of the child.

4.170 The High Court is thus empowered to hear and determine an application and make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 4 to 19 (inclusive).⁸⁵ Therefore, by section 22 CA, Save the Children or any local registered NGO can bring a suit before a court in matter relating to the protection or enforcement of children's rights. To have locus standi to bring the action before a court, the NGO must show sufficient interest in the matter. In most

⁸⁵ In *Diana Ndele Wambua v Paul Makau Wambua* (2004) the High Court considered Article 28 CRC: the right to education. Here the High Court made reference to Article 28(c) CRC, finding that an applicant over the age of 18 might still rely on the CRC to compel her father to contribute to her university fees. This precedent might be used to imply a right for mothers to have access to have basic literacy teaching, irrespective of their age.

cases it will be sufficient to show that the NGO is registered (hence a juridical person) whose main focus is on children's rights in order for the NGO to have *locus standi*.⁸⁶

The draft revised Constitution⁸⁷

4.171 Kenya is in the process of reviewing its Constitution and among the rights that have been provided for in the Harmonised Draft of the Constitution of Kenya that was released on 18 November, 2009 are as follows:

- (a) Rights of children – Section 41 of the Harmonised Draft Constitution provides for the rights of children. Children are recognised as having a special place in society and have rights to parental care, free and compulsory basic education, adequate nutrition, shelter, basic health care services and social services.
- (b) Social security – under section 61, every person has the right to social security and the State is responsible for providing appropriate social security to persons who are unable to support themselves or their dependants.
- (c) Health – under section 62, every person has the right to health, which includes the right to healthcare services, including reproductive healthcare. No person may be refused emergency health treatment.
- (d) Education – under section 63, every person has the right to education and the State has the responsibility of providing free and compulsory pre-primary and primary education and to make secondary and post-secondary education progressively available and accessible.
- (e) Housing – under section 64, every person has the right to reasonable and adequate housing and to reasonable standards of sanitation.
- (f) Food – under section 65, every person has the right to be free from hunger and to adequate food of acceptable quality.
- (g) Water – under section 66, every person has the right to clean and safe water in adequate quantities.
- (h) Environment – every person has the right to a clean and safe environment and to have the environment protected for the benefit of present and future generations, through legislative and other measures.

⁸⁶ Child rights NGOs in Kenya have been the major litigants in cases involving the enforcement of children's rights especially since individuals do not have the monetary and intellectual capacity to bring suits in their own right. In *RM & Another v. Attorney General (2006) eKLR* the suit was brought by the mother of the child and CRADLE, a children's rights NGO as the plaintiffs. The interested parties were two other NGOs, Coalition on Violence Against Women (*COVAW*) and the Federation of Women Lawyers Kenya (*FIDA*).

⁸⁷ See response of local counsel in **Appendix 5**.

4.172 The Harmonised Draft Constitution is still in its preliminary stages and still needs to be debated by Parliament and go through a public referendum before it is passed into law.

Gaps

4.173 Although one of the largest problems in relation to Kenya's legal framework for child survival is its implementation as a result of inadequate funding and resourcing and the 2008 post-election violence, the following gaps are also of note:

- (a) education has been neglected for a very long time in Kenya, with a right to free education only being introduced in 2003. A great deal of work needs to be done to make free education a reality for all children in Kenya;
- (b) there is no legislative provision for maternal literacy programs; and
- (c) the lack of regulation in the breast-milk substitutes market and the failure to promote breast-feeding adequately.

Recommendations

4.174 Kenya's legal framework would therefore benefit from:

- (a) amending the constitution to include guarantees for children's rights (as currently proposed – see above);
- (b) a comprehensive legal framework, backed by real action, in the field of primary education;
- (c) the passing of legislation to regulate and control the marketing of breast-milk substitutes; and
- (d) tackling the issue of street children, providing a programme of assistance, including adequate nutrition, clothing, housing, healthcare and educational opportunities.

MOZAMBIQUE

Relevant provisions

4.175 Pursuant to the 2004 Constitution of the Republic of Mozambique, the provisions contained in international conventions duly ratified or approved are in full force and effect following their publication in the Mozambican Official Gazette.

4.176 Moreover, in principle, the provisions of international law in force in Mozambique prevail over domestic statutes.

4.177 The key legislation affecting child survival are The Constitution of Mozambique and the Child Protection Law 2008 (*CPL*).

4.178 Mozambican law now provides a clear definition of childhood and children rights and regulations on non discrimination, survival, development and participation rights including (i) equal protection, (ii) name and nationality, (iii) freedom of expression, thought and assembly, (iv) family, (v) special protection for physical, mental and social development, (vi) health, (vii) education, (viii) special protection for the physically or mentally disable, and (ix) protection from abuse, exploitation and abandonment.

4.179 Following the implementation of the National Birth Registration Plan 2004, birth registration is compulsory. The Ministry of Justice and the National Directorate of Registries, with the collaboration of UNICEF, are responsible for the implementation of the Plan in the communities. Birth registration is highlighted by the CRC as playing a vital role in the reduction of child mortality.

4.180 Moreover, the Mozambican government has launched social projects to enhance the lives of children in the country, such as The National Plan for Children, The National Plan for Orphans and Vulnerable Children, and many more⁸⁸.

Gaps

4.181 It appears that the Mozambican legal framework is relatively comprehensive but there are rarely statutory penalties. For example, the CPL contains an exhaustive list of children's rights but does not set out any consequence for the violation of its provisions. Failure to respect the children's rights does not have a clear consequence in law.

4.182 Whilst the Mozambican Constitution protects the right to inheritance, traditionally, upon the parents' death, all their assets are taken by the father's family, leaving the child potentially unprotected.

4.183 For different reasons, some related to the government's lack of action, others attributable to cultural and socio-economic reasons, such as illiteracy, some of children's fundamental rights are not enforced.

4.184 Illiteracy in the country makes it difficult to educate people about the issues. In fact, the main issues preventing an effective protection of children rights in Mozambique are related to social, educational and economic constraints (the heavy economic and social burden carried by the State as a legacy of the civil war that ended in 1992), and not to lack of legal provisions.

Recommendations

4.185 Greater effort needs to be made to extend measures already in place in urban areas to rural areas.

4.186 The CRC Committee recommends that the State establishes an independent body with responsibility for monitoring implementation of the Convention and that

⁸⁸ Please refer to local counsel's response to Question 1 of the Questionnaire in **Appendix 5**.

the State increases the proportion of resources spent on health, education and other priority areas.

4.187 More school places need to be provided by the State. At present, a shortage of school places is being abused by some school administrators, who demand illegal payment for registration of children in their schools.

4.188 The State should further develop its mechanisms for collecting data, so that it can monitor the progress of implementation of the Convention.

NIGER

4.189 We have had only limited input from local counsel in Niger.

Relevant provisions

4.190 Niger has not implemented any of the principles under any of the international treaties relevant to child survival to which it is a party. It appears that effective enforcement in the national courts of legal rights and obligations relating to child survival are hampered by, amongst other things, a lack of understanding of the relevant rights/obligations by the judiciary, lawyers and public forces, and lack of visibility of national (and international) texts relating to child survival. Additionally, representative action to enforce child rights is not possible.

4.191 Nevertheless, there are legal provisions supportive of child survival in Niger, such as the constitutional obligation on the State and public bodies to look after the physical health of the family, and in particular, mother and child. Government Order 88-19 legalises the use of contraceptives and 2006-16 Law on Health and Sexual Reproduction provides for the teaching and access to contraception and family planning advice.

4.192 The Constitution promises equality between men and women. However, there is a pervading reluctance to send young girls to school in light of the fact that girls who were educated in the past remain unemployed.

Gaps

4.193 The following gaps pertinent to child survival have been identified by local counsel:

- (a) social security laws do not specifically address the protection of childhood;
- (b) national budget laws do not specifically deal with issues of child survival;
- (c) other than the Constitution of Niger and some provisions referred to in the questionnaire responses at **Appendix 5**, there are no other laws in Niger addressing the rights of children to good nutrition, clean water, sanitation, healthcare and adequate standards of living. Although the President of Niger declared that any child under the age of five shall have free access to

healthcare in any healthcare centre or public hospital, such declaration was not enacted by a law;

- (d) no Niger legislation provides for the improvement of methods of production, preservation and supply of food; and
- (e) there is a discrepancy between the minimum legal age for marriage of boys (18 years) and girls (15 years), which is gender discriminatory. The CRC Committee expresses concern that the Civil Code is rarely applied in this regard and that girls can marry at a much earlier age according to customary law, which leads to a widespread practice of early marriage and early pregnancy.

4.194 Local counsel stated that, in general, even though a statutory framework exists in Niger to some extent, laws are not well-known or widely-disseminated. It requires a raising of public awareness and by local NGOs, national and international organisations.

Recommendations

4.195 The CRC Committee in its *Concluding Observations* dated 13 June 2002, makes the following recommendations:

- (a) the State should take all necessary measures to provide the National CRC Committee for the Survival, Protection and Development of Children with adequate human, financial and other resources. This National CRC Committee should also be provided with a clear mandate;
- (b) the State should strengthen the implementation of the Niger Constitution as far as children's rights are concerned and undertake to take all necessary steps to harmonise existing legislation and customary law with the CRC;
- (c) the State should seek technical assistance from, inter alia, the Office of the High Commissioner for Human Rights and UNICEF to develop monitoring structures for factors affecting child survival;
- (d) the State should legislate for the same minimum age for marriage for girls and boys by increasing the minimum age for girls, and develop sensitisation programmes involving traditional and religious leaders, and society at large, including children themselves, to curb the practice of early marriage; and
- (e) the State should follow up on its commitments under the Durban Declaration to legislate for the provision and targeting of social services for children belonging to the most vulnerable groups.

SOUTH AFRICA

4.196 South Africa has had a fairly unique opportunity to re-write its laws in the past two decades by primary reference to the issue of discrimination/equality. As a result

of that, it has, almost necessarily, addressed in legislation many of the issues that impact on child survival.

The Children's Act 2005

4.197 The Children's Act 2005 (*CA 2005*) provides a comprehensive framework on most child-related issues. Its key provisions include:

- (a) Section 9 of the CA 2005 seeks to ensure that the best interests of a child are given paramount importance in every matter concerning the child. Section 6(2) provides that the inherent dignity of the child must be respected, and the child must be treated with fairness and equity and be protected from unfair discrimination;
- (b) Section 11 places particular emphasis on the recognition of a child's disability and on the creation of an enabling environment to respond to the special needs of that child;
- (c) Section 18(2) provides for parental responsibilities in relation to children;
- (d) Section 131 CA 2005 provides for the HIV testing of children for foster care and adoption purposes to ensure that children who are living with AIDS are provided with appropriate family care. Sections 130, 132 and 133 make provision made for counseling before and after HIV-testing as well as for the confidentiality of information relating to the HIV/AIDS status of children; and
- (e) Section 134 CA 2005 makes provision for children over the age of 12 to have access to condoms and other contraceptives. Stakeholders have welcomed this development with the view that it will help to protect children from sexually-transmitted diseases and prevent teenage pregnancies. The general consensus is that this development is a realistic response to the realities in which many teenagers find themselves, particularly sexual vulnerability, sexual abuse, peer pressure and the consequences of unwanted pregnancy. Condoms are also readily available at public places such as railway stations.

Right to an adequate standard of living (including right to food)

4.198 The South African Constitution, 1996 (*the Constitution*) has a Bill of Rights which enshrines the rights of all people in South Africa. The Constitution provides for the following food rights:

- (a) everyone has the right to have access to sufficient food and water ⁸⁹;
- (b) every child has the right to basic nutrition ⁹⁰; and
- (c) everyone who is detained, including every sentenced prisoner, has the right to adequate nutrition at State expense. ⁹¹

⁸⁹ Section 27(1)(b) of the Constitution.

⁹⁰ Section 28(1)(c) of the Constitution.

4.199 Children and prisoners have specific protection in relation to food rights because they do not have the means to provide food for themselves.

4.200 The South African government has not passed any legislation relating to food rights specifically but has adopted many policies and programs to give effect to such rights. Aspects of the right to sufficient food are protected by sections of various laws. For example, the Social Assistance Act 13 of 2004 seeks to ensure that poor people or those threatened by food crises have access to food.

4.201 The government's main food policy is the Integrated Food Security Strategy for South Africa, 2002 (*IFSS*). The IFSS seeks to eradicate hunger, malnutrition and increased food security by 2015, by increasing household food production and trading; improving income generation and job creation opportunities; improving nutrition and food safety; increasing safety nets and food emergency management systems; providing capacity building and holding stakeholder dialogue.

4.202 The government has put in place a number of programs to give effect to the food rights set out in the Constitution. These programs include the following⁹²:

- (a) Primary School Feeding Scheme under the School Nutrition Program - this program funds meals for children at selected primary schools in poverty stricken areas;
- (b) Protein Energy Malnutrition Scheme under the Integrated Nutrition Program - provides clinics and hospitals with nutrition supplements to address and prevent malnutrition. For example, infants, children and mothers of newborn babies get Vitamin A from clinics;
- (c) Social Grants under the Social Assistance Program - this includes the child support grant, pensions, disability grant, foster care grant, war veterans grant and a distress grant for people facing short term crises (given for three months and enables people to buy food); and
- (d) Community based nutrition program - aims to strengthen food security by improving knowledge about nutrition, supporting the care of women and children, and promoting a healthy environment.
- (e) Land Redistribution for Agricultural Development;
- (f) Community Based Public Works Program; and
- (g) Poverty Relief Program.

4.203 Additionally, the Constitution provides for rights to housing, which is also supported by a comprehensive plan of action under the Housing Act 1997, aimed at increasing the standards of living of urban and rural populations.

⁹¹ Section 35(2)(e) of the Constitution.

⁹² See response of local counsel in **Appendix 5**.

Right to Healthcare

4.204 Under section 27(1) of the Constitution, everyone has the right to have access to healthcare services, including reproductive healthcare services. Section 27(3) provides further that no-one may be refused emergency medical treatment. In terms of section 28(1)(c), every child has a right to basic healthcare services.

4.205 The National Health Act seeks to (i) make effective health services available to the population equally and efficiently; (ii) protect, respect and fulfil the rights of the people of South Africa to progressively realise the constitutional right to health; and (iii) establish a national health system that will provide people with the best possible health services that available resources can afford.⁹³

4.206 Legislation provides for free healthcare services for certain categories of people at public institutions.⁹⁴ The National Health Act also gives special protection to people that need emergency medical treatment.

4.207 There are a number of policies and programs that have been implemented by the South African government to give effect to the right to an adequate standard of healthcare.

4.208 In particular⁹⁵, the national Department of Health has instituted a number of policies and programs, including the HIV/AIDS Strategic Plan for South Africa and the National Policy on Quality of Care. Additionally:

- (a) the HIV/AIDS Strategic Plan for South Africa seeks to reduce the number of new HIV infections and its impact on individuals, families and communities. Priority areas are prevention, treatment, care, human rights, monitoring and evaluation. The programs that have been developed to prevent the spread of AIDS include Sexually Transmitted Diseases (STD) Management, Reducing Mother to Child Transmission (MTCT), Post-Exposure Prophylaxis (PEP), and Voluntary Testing and Counseling (VCT); and
- (b) the National Policy on Quality of Care seeks to manage and care for People Living With AIDS (PLWA), AIDS orphans, as well as people living with physical or mental disabilities through home based and community based care programs.

4.209 There are various other health care interventions which include the following:

⁹³ Section 2 of the National Health Act.

⁹⁴ Section 4(3) of the National Health Act. In terms of this section, pregnant and lactating women and children below the age of 6 years who are not members of medical aid schemes are eligible for free healthcare services; all persons, except members of medical aid schemes and their dependants and persons receiving compensation for compensable occupational diseases, are eligible for free primary health care services; and women, subject to the Choice on Termination of Pregnancy Act 92 of 1996 are eligible to free termination of pregnancy services.

⁹⁵ See response of local counsel in **Appendix 5**.

- (a) the Life Skills Program for school children. This is a prevention programs which includes the distribution of information and condoms at no cost to target groups who are most at risk of contracting AIDS. The Life Skills Programs, which was introduced into the outcomes based curricula in schools, educates school children around issues surrounding AIDS and how to deal with them;
- (b) the Human Genetic Policy is aimed at testing and counseling couples with genetic disorders, in order to reduce the incidence of birth defects. It also aims at ameliorating the psychosocial and fiscal impact on the individual, as well as the family and society in general. The objective is to provide a national, PHC-based, medical genetic service for the diagnosis, management and prevention of genetic disorders and birth defects. The target population are women of reproductive age, individuals and families at high risk for genetic disorders and birth defects.

Right to Clean Water/Sanitation

4.210 Section 27(1)(b) of the Constitution provides that everyone has the right to have access to sufficient water. Under section 27(2), the State must take reasonable legislative and other measures within its available resources to achieve the progressive realisation of the right to have access to sufficient water.

4.211 The National Water Act 36 of 1998 directs the government to ensure that South Africa's water resources are managed, used, protected and developed in a sustainable way.

4.212 The Water Services Act 108 of 1997 protects the right to basic water supply and basic sanitation. The Water Services Act seeks to give effect to the right to basic water supply and the right to basic sanitation necessary to secure sufficient water and an environment that is not harmful to human health or wellbeing

4.213 The South African government adopted the free basic water policy in 2001. In terms of Regulation 3 of the Regulations Relating to Compulsory National Standards and Measures to Conserve Water published under the Water Services Act, the minimum standard of basic water supply is a minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month.

Right to Social Security

4.214 Section 27(1)(c) of the Constitution provides that everyone has a right to have access to social security including, if they are unable to support themselves or their dependents, appropriate social assistance. Section 27(2) requires the State to give effect to the progressive realisation of the right. In terms of section 28(1)(c), every child has a right to basic social services.

4.215 The right to have access to social security is realised through several social grant programs. The government does not give grants to all people, not even all poor people. Only certain groups that are considered to be the most vulnerable can receive grants.

Right to Education (including maternal education)

4.216 Under Section 29 of the Constitution, everyone has a right to basic education, including adult education and to further education, which the State, through reasonable measures, must make progressively available and accessible.

4.217 Section 4 of the National Education Policy Act 27 of 1996 requires the principles of the national education policy to be directed toward the advancement and protection of the right of every person to basic education.

4.218 There are a number of policies and programs that seek to give effect to the right to education. These include⁹⁶:

- (a) Poverty Alleviation Programs;
- (b) The Language Policy for Schools;
- (c) The School Curriculum; and
- (d) Adult Basic Education Training.

4.219 The government has implemented poverty alleviation programs in order to increase access to education. Such programs include:

- (a) social grants;
- (b) a nutrition program;
- (c) scholar transport to learners from rural areas and informal settlements;
- (d) the creation of no-fee schools; and
- (e) preferential education funding that is both pro-poor and equitable.

4.220 The School Curriculum includes a course in Life Skills: HIV/AIDS Sexuality Program, which focuses on sexuality health education, substance abuse, child abuse and peer education and other skills needed by children and youth to cope with everyday situations. The government has also included in the curriculum a compulsory subject called Life Orientation; which covers content such as human rights, hygiene, health and well being (including HIV/AIDS), substance abuse, and physical development and movement, amongst other things. Life Orientation is aimed at replacing the traditional subjects of Guidance, Religious Studies and Physical Education.

4.221 With regard to Adult learning, the government has a mandate to deliver Adult Basic Education and Training (**ABET**) programs that will address the socio-economic challenges of the people. The ABET programs focus on basic literacy, skills development and entrepreneurship targeting the out-of-school youth. The ABET

⁹⁶ See response of local counsel in **Appendix 5**.

programs do not appear to cover the same or similar content to that offered to school children under Life Orientation.

Right of Equal Access/non-discrimination

4.222 The Right to Equality is one of the corner stones of the South African Constitution, and is enshrined as both a founding value and a right.

4.223 Section 9 of the Constitutions sets out the right to equality in the following terms:

“(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscious, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”

4.224 The government has enacted specific legislation to give effect to the right to equality. The relevant legislation is discussed briefly below.

4.225 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: This legislation was enacted to give effect to the rights in section 9 of the Constitution in order to prevent and prohibit unfair discrimination and harassment; to promote equality and eliminate unfair discrimination; to prevent and prohibit hate speech; and to provide for related matters.

4.226 Employment Equity Act 55 of 1998 (the **EEA**): The legislation seeks to foster the right to equality by redressing the disparities in employment, occupation and income within the national labour market which resulted from the apartheid and other discriminatory laws and practices. The EEA also recognises that such disparities create pronounced disadvantages for certain categories of people which cannot be redressed by repealing discriminatory laws alone.

4.227 There are various other statutes that make reference to equality, although they do not necessarily provide requirements for the attainment of equality.⁹⁷ For example, the Civil Union Act 17 of 2006 (along with a history of jurisprudence) has led the way in removing discrimination based on sexual orientation. In terms of South African law, homosexual couples may form a civil union (which is essentially the same as a marriage) and may adopt children.

4.228 In 2009, the new administration formed the Ministry of Women, Children and People with Disabilities. It is envisaged that the department will prioritise the rights of women and children.

Gaps and Deficiencies

4.229 Between 1996 and 2006, the South African government built around 1,600 clinics, and 248 out of 400 public hospitals were upgraded. Almost 95% of South Africans live within 5 km of a health facility. However, there are still a number of problems. The most significant problem is the cost of medical care, which is often beyond the means of the poor. Furthermore, the management of health care facilities is variable. There are often long queues in waiting rooms, facilities are not properly managed, and medicines are not always available. There is also a shortage of doctors, nurses and other health care workers. The HIV and AIDS epidemic is also taking a toll on people's health and straining health care resources.

4.230 In 2007, the government of South Africa provided access to clean water to 88% of the population, up from 62% in 1996. Programmes to achieve this have been targeted at the poor. However, there is still a challenge to extend access to water to those still without it, especially in rural areas; to ensure that water is affordable for the poor; and to maintain an adequate supply of usable water into the future.

4.231 Since 1994, the South African government has provided social grants to 12.5 million people, 8 million of whom were children. However, there are still some problems in accessing social security grants. These problems include:

- (a) the lack of staff capacity in the provincial social development departments (due to high take up rates, staff are unable to cope with the workloads and often lack the proper training to budget adequately for grants);
- (b) the accessibility of services is a problem especially in rural areas (the widespread location of clients and bad roads create obstacles in the delivery of services; and it can be costly for the poor to travel to departmental offices to apply for grants or to pay-points to collect grants);
- (c) the lack of proper identity documents required to access the grants and the inaccessibility of the Department of Home Affairs for the issue of such identity documents; and

⁹⁷ Section 4(a)(ii) of the National Education Policy Act 27 of 1996 states as a directive “equal access to education institutions”.

- (d) some pay points do not meet the national norms and standards for pay points and therefore present a security risk.

4.232 There appears to be a lack of government driven educational policies and programs that target women, specifically in relation to education focusing on breast-feeding, disease prevention, hygiene, contraception and general health.

4.233 Education programs of this nature are by-and-large NGO driven, with NGOs determining their own standards and population targets.

4.234 The primary cause of child mortality appears to be a lack of basic service provisions, such as water and sanitation. This fact remains in spite of South Africa having enshrined various Constitutional rights and government policies, such as the Free Basic Water Policy. The same applies in respect of access to health care service, which are highly inequitable across the country, particularly across the rural-urban divide.

Recommendations

4.235 Shortcomings relating to child survival in South Africa do not appear to stem from a deficiency in the legislative scheme. The following key features need to be addressed in particular⁹⁸:

- (a) the lack of basic service provisions/resources and factors hindering the access to such services;
- (b) the inequalities across the urban-rural divide;
- (c) effective targeting of the most vulnerable groups;
- (d) the lack of formal structures and uniformity in and across government departments; and
- (e) the absence of a national structure to collate and analyze child mortality data for the implementation of a child survival plan.

TANZANIA

The Law of the Child Act 2009

4.236 Law of The Child Act 2009 (the *LCA*) which has been passed in Parliament and is awaiting Presidential Assent will specifically provide for many obligations and measures that impact on child survival.⁹⁹

4.237 The LCA defines a “child” as any person under the age of eighteen. Section 8 (1) of the LCA provides that it shall be the duty of a parent, guardian or any other

⁹⁸ See response of local counsel in **Appendix 5**.

⁹⁹ See response of local counsel in **Appendix 5**.

person having custody of the child to maintain that child, in particular that duty gives the child the right to:

- (a) Food;
- (b) Shelter;
- (c) Clothing;
- (d) Medical care including immunisation;
- (e) Education and guidance;
- (f) Liberty; and
- (g) The right to play and leisure.

4.238 Section 9 (1) of the LCA also provides that a child shall have the right to life, dignity, respect, leisure liberty, health, education and shelter from his parents. Furthermore, section 9 (3) (a) and (b) provide that every parent shall have duties and responsibilities whether imposed by law or otherwise towards his child which include the duty to:

- (a) protect the child from neglect, discrimination, violence, abuse, exposure to physical and moral hazards and oppression; and
- (b) provide guidance, care, assistance and maintenance for the child and assurance of the child's survival and development.

4.239 In respect of children's rights the LCA specifically provides that the Act applies to children with disabilities as well. It remains to be seen what the position is once the LCA comes into force in respect of discrimination and/or enforcement of the rights stated therein.

Right to Adequate Standard of Living (including right to food)

4.240 The Constitution of the United Republic of Tanzania of 1977 as amended in 1984 does not grant an express right to an adequate standard of living and there is no specific legislation dealing with such a right at present.

4.241 Poverty reduction efforts in Tanzania are guided by both short and long-term policy frameworks and strategies at the national level to meet the Millennium Development Goals. The strategies are based in light of the Tanzania Development Vision 2025, which envisages and aims for high and shared economic growth, high quality of livelihood, peace, stability and unity, good governance, high quality education and international competitiveness. The specific strategies aimed at reducing poverty, hunger, diseases, illiteracy, environmental degradation and discrimination are¹⁰⁰:

¹⁰⁰ See response of local counsel in **Appendix 5**.

- (a) The National Strategy for Growth and Reduction of Poverty 2005 (*NSGRP*). The NSGRP is geared towards growth and reduction of income poverty, improved quality of life, social wellbeing, good governance and accountability.
- (b) Food security is assured by the government Strategic Grain Reserve. This is used to stabilize food prices and to support poor families in the event of a food crisis.
- (c) Through the other sectors including agriculture and health, measures are being enhanced to address the issues of poverty reduction and community empowerment. This includes prevention of low birth weight, improving child feeding practices, micronutrient supplementation and salt iodations, capacity building for nutrition interventions and treatment of chronically malnourished children.

4.242 The strategy in respect of poverty reduction is aimed at the nation as a whole and therefore is available, in theory, to all citizens. However, in practical terms this is not always possible owing to lack of funding.

Right to Adequate Standard of Healthcare

4.243 There is no specific law that expressly provides for the right to adequate health care in Tanzania; the Constitution does not provide for this right expressly other than providing the right to enjoy fundamental human rights and equal protection without discrimination under the laws of Tanzania.

4.244 There are specific laws that contain express provisions in respect of this right, such as The HIV and AIDS Prevention and Control Act, 2008 (the *HPC*) and The Employment and Labour Relations Act, 2004 (the *ELRA*). Furthermore, there are various National Health Policies provided for by the Ministry of Health and the Ministry of Community Development Gender and Children.

4.245 The HPC contains provisions regarding child survival and reduction of preventable diseases. In this regard the following standards of health care are laid down in the HPC:

- (a) Section 25 (1) requires the Minister of Health to promulgate measures to reduce HIV transmission from mother to child;
- (b) Section 25 (2) provides that in an endeavour to prevent mother to child transmission of HIV only trained and authorised persons shall provide counselling services to HIV infected pregnant mothers and breast feeding women and to men responsible for the pregnancies or spouses. Health care facilities shall monitor, provide treatment, and apply measures necessary to reduce HIV transmission from mother to child.

4.246 This right is available to all pregnant mothers who attend government hospitals and health facilities without discrimination.

4.247 There is specific legislation dealing with the control of mosquitoes in Tanzania, - the Mosquitoes (Control) Act – which effectively provides for prescribed measures in addition to all other measures which are reasonably necessary to prevent the breeding of mosquitoes.

4.248 Furthermore, the National Malaria Medium Term Strategic Plan (*MMTSP*) is a road map for malaria control in Tanzania over a five year period with the aim of reducing mortality and morbidity due to malaria by 25% by 2007 and by 50% by 2010. Under the MMTSP there has been implementation of health system development by the Ministry of Health with an emphasis at the district level. Malaria control activities are catered for in planning guidelines from the Ministry of Health.

4.249 The ELRA contains provisions that are directed to the health of pregnant mothers in the working environment. These provisions protect working pregnant women and mothers with breast feeding children.

Right to Clean Water and Sanitation

4.250 The Constitution of Tanzania does not grant an express right to clean water and there is no specific legislation that provides such a right. However, water sector development in Tanzania is governed by the 2002 National Water Policy (*NWP*) as approved by the Cabinet and launched in 2003¹⁰¹.

4.251 Under the NWP, Tanzania aims at expanding the access to safe water in rural areas from 49% in 2000 to 85% by 2010. The Tanzania Development Vision 2025 goes further, aiming at achieving a high quality livelihood for its people, with universal access to safe water as one of its specific targets. The NWP acknowledges that water is one of the most important resources and is structured around three focal areas: water resource management, rural water supply and urban water supply and sewerage.

4.252 The NWP's policy objectives in respect of rural water supply are to provide adequate and affordable water supply; emphasise on communities paying for part of the capital cost, and the full cost of operation and maintenance of services; shift from a supply driven to a demand driven approach; decentralise management of water supplies; promote participation of the private sector in the delivery of goods and services around water; and improve health through integration of water supply, sanitation and hygiene.

4.253 The ultimate goals of the NWP are to:

- (a) ensure sufficient water requirement for all persons to maintain health, and to restore and maintain ecosystems;
- (b) ensure there is water available to ensure food security, electricity generation and other economic activities;

¹⁰¹ See response of local counsel in **Appendix 5**.

- (c) maintain water quality to meet agreed standards, maintain the long term availability of fresh water stock, ensure that water resources management is financed and raw water priced to promote efficiency, sustainability and equity;
- (d) ensure integrated water resources management approaches are instituted; and
- (e) ensure effective and sustainable strategies to address natural and manmade water resources problems are put in place.
- (f) the specific objectives of the NWP for urban areas are to guide the development and management of efficient, effective and sustainable water supply and waste water disposal systems.

4.254 The National Water Sector Development Strategy sets a number of specific targets for both integrated water resources management and improvement of water supply and sanitation services. There is no separate sanitation policy, but the NWP set operational targets for sanitation for 2010. These targets are that 95% of the people should have access to basic sanitation; adequate sanitary facilities in 100% of the schools; and reduction in the number of cholera outbreaks by 50%.

Right to Social Security

4.255 The right to social security is not specifically provided for in the Constitution. However that right may be construed from other legislation such as the National Social Security Fund Act (the *NSSFA*) and the ELRA.

4.256 The social security benefit provided for in the NSSFA in relation to child survival is maternity and health insurance benefits as provided under section 21. The maternity benefit provided under this legislation includes benefits such as cash benefit for a period of 12 weeks; and medical care during pre-natal and post-natal period, by an accredited medical practitioner or midwife.

4.257 Under the ELRA all pregnant employees are entitled to maternity leave. Section 33 of the ELRA, stipulates that paid maternity leave is to be taken four weeks before the date of confinement or earlier if a medical practitioner deems it fit for the health of the mother and the child. Maternity leave shall be for at least 84 days and 100 days if birth is given to more than one child at the same time. Section 33(3) provides that no employee shall work within six weeks of the birth of their child unless a medical practitioner certifies that she is fit to do so. This right under the ELRA is available to all pregnant employees without discrimination.

Right to Education (including maternal education)

4.258 There is no specific legislation in respect of education of mothers on health or hygiene.

4.259 Article 11 of the Constitution provides that every person has the right to self education, and every citizen is free to pursue education in a field of his/her choice up to the highest level according to his/her merits and ability. Further, under sub-section 3 of this Article, the Government of Tanzania is required to endeavour to ensure that

there are equal and adequate opportunities to all persons to enable them to acquire education and vocational training at all levels of schools and other institutions of learning.

4.260 In addition to the right to as provided under the Constitution, the following laws make various provisions in relation to the right to education:

- (a) The Education Act provides for the education of all children of Tanzania irrespective of their gender.
- (b) The Education (Imposition of Penalties to Persons who Marry or Impregnate School Girls) Rules, 2003 makes provisions that require every head of school to ensure that every school girl enrolled at a school regularly attends school and completes the period of instruction specified in respect of the level of education for the attainment of which she is enrolled.
- (c) In addition, section 8(1) LCA makes provision for duty by a parent, guardian or any other person having custody of the child to give a child the right to education and guidance.
- (d) The Institute of Adult Education Act mandates the Institute of Adult Education to run continuing and informal education programmes in Tanzania, with special emphasis on teaching rural communities. The adult and non-formal education strategy was developed in 2003 to facilitate the implementation of an alternative education programme for out-of-school children and adults.

Right to equal access/non-discrimination legislation

4.261 Tanzania believes in the right to equality and affords human rights to each person. These rights are enshrined in the Constitution.

4.262 Article 13 of the Constitution provides that all persons are equal before the law and are entitled, without any discrimination to protection and equality before the law. It also provides that every person in the United Republic of Tanzania has the right to equal protection under the laws of the country. The Constitution further provides in subsection 3 and 4 of Article 29 that no citizen and no law shall confer a right, status or special position on the basis of a persons lineage, tradition or decent. The rights conferred under the laws of Tanzania are applicable to all citizens without discriminating against any particular group.

4.263 Section 5 of the LCA provides that a child shall have the right to live free from any discrimination. It provides that a person shall not discriminate against a child on the grounds of gender, race, age, religion, disability, health status, customs ethnic origin, rural or urban background, birth, social economic status, being a refugee or of other status.

4.264 Provisions relating to non discrimination can also be found in section 7 of the ELRA which provides that an employer is required to ensure that he/she promotes equal opportunity in employment and strives to eliminate discrimination in any

employment policy or practice on grounds such as (but not limited to) nationality, place of origin, HIV/Aids, age or station of life.

4.265 Part VII of the HPC also makes provisions against formulation of any policy, law and practices that discriminate directly or by its implication on persons living with HIV and AIDS, orphans or their families.

Gaps

4.266 The NWP and the MMTSP strategy are aimed at the whole nation, and therefore in theory, available to all citizens. However, in practical terms this is not always possible owing to complex challenges caused by water shortages, inefficient infrastructure in need of upgrading, fiscal requirement for higher recovery rate of costs for service provisioning and competing uses of water resources. In respect of MMTSP and malaria control the guidelines given to districts by the Ministry of Health are brief and in need of elaboration to ensure that the districts include comprehensive and evidence based plans in their plan. Furthermore, there is a chronic shortage of human resources at all levels of the health system in Tanzania and there is inequitable distribution of existing personnel between urban and rural areas.

4.267 The right to education is inadequately enforced and access to education is still low in Tanzania. For example, although Tanzania has made some progress towards achieving gender parity in education, there are laws in practice that still discriminate against girls. For example, The Law of Marriage Act allows, a girl as young as fifteen (15) to be married. Early marriage tends to cut short a girls education at the upper primary and secondary levels.

4.268 Continued occurrence of child labour is one of the most serious problems in Tanzania. Enrolment in primary schools for girls is lower than for boys, and is even less in secondary schools. Most children are still engaged in economic activities and housekeeping activities. Children must also often perform labour for teachers, with girls typically asked to do domestic chores such as fetching water and firewood, sweeping, cooking and washing dishes.

4.269 Although the African Charter on the Rights and Welfare of the Child explicitly recognizes the right of pregnant girls to an education, there is still implicit acceptance by authorities of the expulsion of pregnant girls from school.

4.270 The right to freedom from discrimination is not substantially equitable in Tanzania. For example, legal protection for women remains limited in part because Tanzania's judicial authorities take into account both customary and Islamic Sharia laws. Further, on the issue of HIV, the general public has not been educated about the need to respect the human rights of HIV/AIDS patients. This has permitted HIV-related prejudices to flourish and has driven HIV/AIDS patients underground in an effort to avoid the discrimination associated with the disease. As a result, HIV/AIDS patients often do not receive adequate treatment.

Recommendations

4.271 The LCA has yet to receive Presidential assent, but the impact that the statute has on child survival is something that should be monitored closely as suggested in Chapter 7 below.

VIETNAM

Relevant provisions

4.272 Vietnam has a plethora of laws affecting child survival. These are coupled with a number of national policies and strategies more specifically aimed at lowering child mortality rates. Laws of particular relevance to child survival include:

- (a) Article 15.2 of the Law on Children and the Law on Child Protection, Care and Education passed on 15 June 2004 provides for free healthcare for children under 6 years of age. The law requires the State to adopt policies, inter alia, to ensure treatment services for children under 6 years of age are adequately funded;
- (b) the Law on Protection of the Peoples' Health passed on 30 June 1989 provides rules for hygiene in education facilities, including kindergartens; and
- (c) the Food Safety Law 2009 provides for a state-level food safety commission to be set up by the State Council to oversee the food monitoring system. This was designed to address food safety scandals, including those pertinent to child survival such as tainted baby milk powder. By Article 5, the law determines the responsibilities of the departments of health, agriculture, quality supervision, industry and commerce administrative assume different responsibilities in relation to monitoring.¹⁰²

Gaps

4.273 Local counsel identified the following gaps in and issues with Vietnam's legislative framework¹⁰³:

- (a) national legislation fails to address disparities between rich and poor, urban and rural, lowlands and highlands, and the Kinh (majority) and minority ethnic groups in the realisation of rights to life and health;
- (b) in relation to PIL, only agencies implementing State policy are empowered to undertake PIL, and such actions must be on matters expressly set forth in the respective agency's constitutional documents and matters within its "realm of authority." Local counsel therefore do not view Vietnam as a jurisdiction suitable for effective strategic litigation;

¹⁰² For further specific analysis on this point, please see **Appendix 5**.

¹⁰³ See response of local counsel in **Appendix 5**.

- (c) notwithstanding efforts to address chronic food shortages (and Vietnam's development into the second largest exporter of rice), child malnutrition was still 25.7% overall, and nearly 50% in respect of ethnic minority groups in the midlands and northern uplands of the country, according to figures from 2002.
- (d) Vietnam's family planning strategies only target married couples and as a result single women have very little information about contraception and family planning. Vietnam's family planning legislation also fails to include sex education in school syllabi;
- (e) Vietnam has also introduced a free healthcare service for poor families by which families who are below the designated poverty line may be provided with a medical insurance card. Under this scheme, Vietnam's poorest are given a fully subsidized health insurance card that covers a comprehensive package of services. However, roll-out of this programme has been patchy;
- (f) there is a lack of harmonisation between domestic legislation and specific undertakings under international treaties or general international standards. One example of this is that Vietnam defines children as those up to 16 years old, which is in conflict with the CRC definition of children as persons under 18 years old; and
- (g) Vietnam does not yet have a NHRI and this is no doubt a factor in the large scale failure of implementation of Vietnam's laws affecting child rights.

4.274 Vietnam has the lowest mortality rank of all of the Premier and Champion Countries, and thus has the best child survival rates. Its percentage reduction in child mortality since 1990 is an impressive 68%.¹⁰⁴ However, local counsel do not seem to attribute Vietnam's improvement in child survival rates to developments in its legal framework. Vietnam's legislative framework for child survival is sub-optimal. It lacks a single children's statute in which all children's rights can be easily found and invoked, and there are no precedents for Vietnam's courts upholding citizens' rights further to Vietnam's obligations under international treaties.

4.275 An analysis of Vietnam's legal framework in conjunction with its child survival statistics demonstrates that there is a multitude of factors affecting child survival, many of which may have a more immediate impact on child mortality rates than legislative reform.

4.276 There is a wide gap between the Kinh majority and ethnic minorities in terms of socio-economic well-being, and this problem has not been addressed in legislation. The CEDAW Committee 2007 comments expressed concern about occupational segregation between men and women, and the persistence of deep-rooted stereotypes of the role of women and men in the community. This results in significant difficulties for women and children to fully enjoy the rights that may be given by the legislative framework in Vietnam.

¹⁰⁴ United Nations Children's Fund, *The state of the world's children 2008: Child Survival* published December 2007, Table 10: The Rate of Progress.

Recommendations

4.277 Recommendations from local counsel¹⁰⁵ and/or the CRC Committee in its *Concluding Observations* dated March 2003 which might be used to amend Vietnam's legal framework include:

- (a) the drafting of a child rights statute containing all legislation pertinent to child rights, and child survival more specifically;
- (b) amending domestic legislation to ensure that it corresponds fully with all the provisions of Article 2 CRC and, in particular, to provide that discrimination against children is prohibited by law; and
- (c) amending school syllabi, either by legislation or by the Ministry of Education and Training, to address the urgent need for sex and contraception education in schools.

4.278 Finally, local counsel emphasise that, relative to legislation and litigation, national strategies and country action plans are more open to participation by non-State parties such as international NGOs, and bilateral and multilateral donors.

ZIMBABWE

Relevant provisions

4.279 The Constitution is the highest law of the land in Zimbabwe, and any other law inconsistent with it is considered to be void to the extent of the inconsistency. It must be noted that although Zimbabwe has assented to and/or ratified various international treaties pertaining to the rights of the child and passed several statutes that give rights to children, the Constitution does not contain any children's rights. Children's rights are bundled together with the rights of adults.

4.280 Moreover, the Declaration of Rights only contains civil and political rights which are subject to extensive derogations, and there is a notable absence of any socio-economic rights. The absence of children's rights and socio-economic rights in the Constitution reduces the protection that the Declaration of Rights provides and undermines the effectiveness with which the courts can enforce relevant laws and obligations in other statutes.

4.281 The key statutes affecting child survival are the Constitution of Zimbabwe and the Children's Act.

Gaps

4.282 Children and women's rights are affected by section 23(3) of the Constitution which accords primacy to customary law. Although section 23(1) of the Constitution prohibits discrimination, section 23(3) sets out certain exceptions to this general prohibition. These exceptions include issues relating to matters of personal law and

¹⁰⁵ See response of local counsel in **Appendix 5**.

the application of African Customary Law. Accordingly, the exceptions allow for decisions that would otherwise be regarded as discriminatory to be taken.¹⁰⁶

4.283 Local counsel noted that there has been a breakdown in the rule of law in Zimbabwe. As a whole, the judiciary is regarded as an agent of the government and is not seen as an impartial and independent law enforcement body. As a result, the efficiency and ability of the court to impartially and independently adjudicate and enforce laws relating to the rights of children and the obligations in relation to children is doubted.

4.284 There are no rights specifically enshrined for children in the Constitution, although children are entitled to the rights guaranteed to all persons in the country. This makes it easier to omit issues that affect children as a specific group (i.e. children's rights to be included in the Constitution should cover survival (the right to health, basic social services, food, shelter, sanitation and safe and clean water); development (the right to education and the right to nutrition), participation (the right to freedom of association and the right to be heard in matters that affect them) and protection (the right to identity and nationality, the right to be protected against all forms of abuse and the right to alternative care where parental care is not possible)).

4.285 The right to healthcare is also not enshrined in the Constitution. The country's health sector has come under heavy strain over the years due to inadequate government funding; lack of foreign currency to purchase drugs and medicines; and a shortage of experienced doctors and nurses most of who have gone abroad for better pay and working conditions. These problems are best depicted by the 2008 cholera epidemic that swept the country, resulting in a large number of deaths.

4.286 There is no statutory right to social security.

4.287 While the Constitution proclaims all citizens to be equal, the reality is very different, with large sections of society, including women, children and disabled people suffering disproportionately.

Recommendations

4.288 The CRC Committee recommends a comprehensive review of the legal framework of the State with a view to ensuring full compatibility with the principles and provisions of the Convention. That said, within the current political structure of Zimbabwe, legislative change alone will clearly achieve little.

4.289 The CRC Committee is concerned at the number of orphans and abandoned children as well as at the increase in child-headed families, as a result of , among other things, the high incidences of HIV/AIDS, and wants measures to be taken to ensure realisation of their fundamental rights.

¹⁰⁶ In *Magaya v Magaya* , (1999) 3 L.R.C 35 (Zimb. Sup. Ct.) 16 February 1999, the Supreme Court of Zimbabwe upheld the appellate magistrate's decision to prohibit a woman being heir to her father's estate, stating that, despite constitutional protections against discrimination, the fact that this case arose under customary law exempted its discriminatory aspects from court scrutiny.

4.290 The CRC Committee encourages the State to adopt all appropriate measures to ensure the registration of all children at birth.

4.291 Special attention should be paid to the situation of the most disadvantaged groups of children, including those living in rural areas, poor urban areas and on commercial farms, as well as orphans or abandoned children, and measures to assist parents in the performance of their child-rearing responsibilities.

5. MODEL COUNTRIES – BRAZIL AND EGYPT

RATIONALE FOR CHOOSING BRAZIL AND EGYPT

5.1 The current focus of the development community in relation to child survival is the Millennium Development Goal 4 (*MDG 4*), which aims to reduce the global rate of under five mortality by two thirds (67%) between 1990 and 2015.

5.2 Child deaths in 1990 numbered around 13 million in absolute terms. For MDG 4 to be met, it will require an increased effort on the part of developing countries highlighted in this report.

5.3 As a UNICEF report on the state of the world's children in 2008 showed, it is an enormous challenge. "The world will have to reduce the number of child deaths between 2008 and 2015 at a far faster rate than it has managed since 1990".¹⁰⁷

5.4 However, some developing countries have shown that such reduction is possible. Two of the Champion countries are examined below. Brazil and Egypt are considered to be on track to meet MDG 4 by 2015.¹⁰⁸ There are still ways to improve upon this performance, but the success should be celebrated, and examples made, to inspire other developing countries.

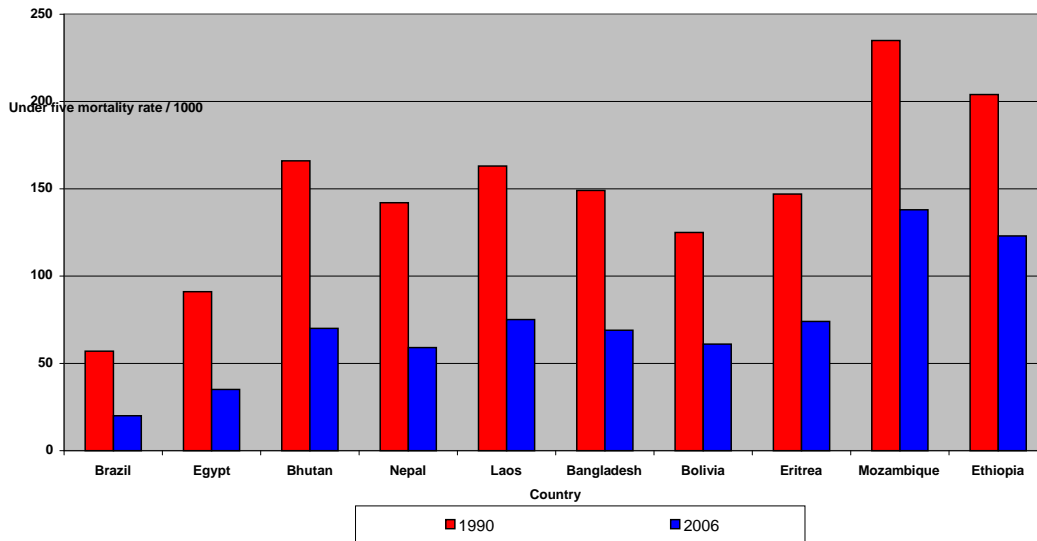
5.5 Since 1990, Brazil has reduced its under five child mortality rate by 65 per cent, and Egypt has reduced its under five child mortality rate by 62 per cent.

5.6 The graph below shows the progress that both countries have made in reducing the rate of under five mortality in comparison with other top performing countries in the developing world.

¹⁰⁷ UNICEF paper, The state of the world's children 2008: Child Survival published December 2007, p.1

¹⁰⁸ UNICEF paper, The state of the world's children 2008: Child Survival published December 2007, p.18

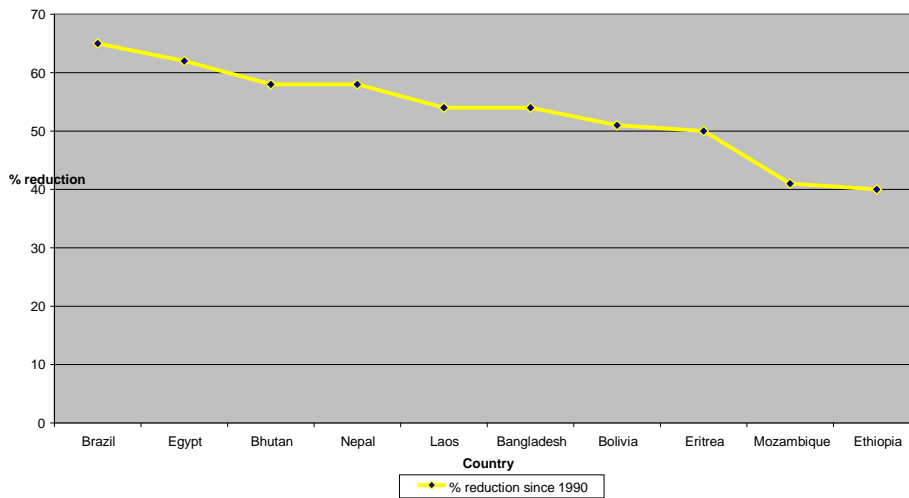
Figure 1: Under 5 Mortality Rate by Country - The Rate of Progress - Most Improved Countries



Data Source: UNICEF paper, *The State of the World's Children 2008: Child Survival*, published December 2008, Table 10: The Rate of Progress

5.7 The graph below compares the percentage reduction in the under five child mortality rate across the top-performing developing countries. It demonstrates why both Egypt and Brazil should be viewed as model countries.

Figure 2: Top-Performing Developing Countries - % reduction of Under 5 Mortality Rate since 1990



Data Source: UNICEF paper *The State of the World's Children 2008: Child Survival*, published December 2008, Table 10: The Rate of Progress

5.8 We set out below an overview of the legal frameworks in Egypt and Brazil. We have focussed on the intermediate causes to see whether there is any link between positive developments in combating preventable under five child mortality and legislative frameworks in those countries.

5.9 This chapter is an overview, and should not be viewed as a substitute for reviewing the detailed responses from those countries in **Appendix 5**.

BRAZIL

The status of international law in Brazil

5.10 In order to become part of the Brazilian legal system, treaties must be ratified by the Brazilian Congress. Once ratified, the President can then issues a formal decree which, once published, incorporates such treaty into the Brazilian legal system.

5.11 The legal status of a treaty (once ratified) will depend on whether such ratification took place before or after 2004. Until 2004, a ratified treaty would have the same legal status of a formal Brazilian federal law. Therefore, it would supersede previously established Brazilian laws on the same subject and similarly would be superseded should a Brazilian law regulate the same matter differently in the future.

5.12 However, Amendment No. 45 (*Amendment 45*) to the Brazilian Federal Constitution of 1988 (the *1988 Constitution*) elevated the status of treaties on human rights to a constitutional level, provided that they are approved in the same way and according to the same procedures applied in the adoption of constitutional amendments.

5.13 The most relevant international treaties on child survival issues were ratified prior to Amendment No. 45, giving them formal law rather than constitutional status. Neither Amendment No. 45, nor any other law, provides for a mechanism by which such older treaties already incorporated into the domestic legal system could be given constitutional status.

Analysis of domestic laws in Brazil

5.14 Laws of particular relevance to child survival include:

Right to adequate standard of living

5.15 Implicit in this right are the fundamental rights of everyone to be free from hunger and have access to food for their family.

5.16 Article 6 of the Brazilian Constitution of 1988 (hereafter, the *Constitution*) assures to all citizens the right to health, work, housing, leisure, security, social security, protection of motherhood and childhood and to assistance to disabled.

5.17 Since 2003, the Brazilian Senate has been considering a proposal to amend Article 6 of the Constitution to expressly include the right to “food” as a social right. The text is currently being discussed by the Senate and will be submitted to vote in due course. This change would make clearer that the right to access to food is protected by the Constitution, which would enable the enforcement of this right through public civil actions.

5.18 The Federal Government has also enacted a series of formal laws seeking to improving access to food, through the so-called Zero Hunger Programme (*ZHP*). The

ZHP consists of more than 50 different action points to help low-income families, to assure access to and supply of food, as well as to alleviate hunger and malnutrition.¹⁰⁹

5.19 The Family Grant Scheme (*FGS*) should be highlighted as a successful project instituted under the ZHP:

- (a) The FGS had two basic goals: to fight poverty and social exclusion; and to foster the independence of poor and deprived families, enabling them to gradually free themselves of government support and become self-sufficient.
- (b) Pursuant to the FGS, families with a monthly per capita income of R\$120 (c. US\$60) or lower could benefit from a basic monetary support, including additional benefits, including, inter alia, a grant for each child up to the age of twelve within the same family.
- (c) In order to receive these grants, families are required to carry out certain activities that may have a direct impact on the health and welfare of children between 0 and 5 years of age, including, but not limited to, pre-natal exams, nutrition and health monitoring, enrolment in school with regular attendance at least 85% of the time. Overall, the programme has had a positive impact, helping to reduce poverty.¹¹⁰

5.20 The Children and Adolescents Law 1990¹¹¹ (*CAL*) is the key Brazilian statute on the protection of children in all aspects of their lives. Article 7 of the *CAL* establishes that children have the right to the protection of their life and health through the implementation of social public policies, which should provide children with adequate birth and health conditions, as well as adequate conditions for their growth.

5.21 The *CAL* provides for a non-exclusive list of rights that can be enforced through strategic litigation (Articles 208 to 224). These include the rights to:

- (a) mandatory education;
- (b) special school system for disabled children;
- (c) pre-school or day-care services for children under 6 years old;
- (d) adequate night school that is compatible with students' needs;
- (e) supplementary programs offering school materials, transportation and health care to students in the fundamental studies (up to the 8th grade);

¹⁰⁹ Laws related to the Zero Hunger Programme are outlined in local counsel's responses in **Appendix 5**.

¹¹⁰ In particular, the *Economist* Special Report on bonuses and finance in Brazil, dated 14 November 2009 stated that the FGS had contributed to a 10% increase in the size of the Brazilian middle class between 2004 and 2008.

¹¹¹ Federal Law No. 8,069 of 13 July 1990

- (f) social welfare services designed to protect the family, maternity, childhood and adolescence, as well as to provide care for children and adolescents in need of this assistance; and
- (g) access to healthcare services and programs.

Right to adequate standard of healthcare

5.22 This focuses on physical and mental health, and the provision for the reduction of infant mortality and promoting the healthy development of children.

5.23 This right is reflected in the Constitution. Articles 6 and 227 determine, *inter alia*, that health is a social right and that the family, the society as a whole and the State have the duty to ensure, with absolute priority to children, the right to life, health, nourishment, education, leisure, professional training, culture, dignity, respect, freedom, family and community life, as well as to protect them from all forms of negligence, discrimination, exploitation, violence, cruelty, and oppression.

5.24 Additionally, Article 7 of the Constitution provides that workers in urban and rural areas are entitled to measures reducing labour risk through regulations on health, hygiene and safety. Employers in Brazil are therefore under a positive obligation to promote health and safety, a provision which may in turn impact on hygiene and health in the family context.

5.25 The Health Services Law 1990¹¹² (*HSL*) regulates the health services and the policies related to healthcare. It establishes that health is a fundamental human right, thus including children, and that the State is therefore obliged to establish the conditions necessary to enable individuals to fully exercise this right (Article 2).

5.26 The provisions of the HSL can be enforced to ensure that a child's right to adequate health care is respected, in particular during the period preceding and immediately following birth (Article 19-J).

Right to clean water and sanitation

5.27 The right to water and sanitation is broadly covered by the right to life in Article 5 and social rights in Article 6 of the Constitution, which provide all citizens the right to health. Water and sanitation are responsibility of the State and highly regulated under Brazilian law.

5.28 The Water and Sanitation Law 2007¹¹³ (*WSL*) sets out the regulatory framework for the management of water and sanitation resources in Brazil. It should be noted that socio-economic aspects are taken into account in the regulation of water supply in Brazil. The WSL expressly provides that water and sewage services shall be provided at reasonable prices and shall take into account the income level of each population in each specific area.

¹¹² Federal Law No. 8,080 of 19 September 1990 – Please see local counsel's report in **Appendix 5** for further information.

¹¹³ Federal Law No. 11,445 of 5 January 2007 – See *Ibid.* for further information.

5.29 There is some degree of uncertainty, however, about who is ultimately responsible for the provision of water and sanitation. Since the Brazilian Supreme Court has not yet decided which of the members of the Brazilian Federation are responsible for water and sanitation (i.e. States or Municipalities), the WSL did not expressly assign competence to any member of the Brazilian federation (e.g. States or Municipalities), but rather refers in Article 8 to the “holders” of water and sanitation rights. To ensure that efficient implementation of the WSL, Brazil would benefit from a clearer determination of responsibilities and allocation of jurisdiction for the provision of water and sanitation.

5.30 However, any difficulty in determining the member of the Brazilian federation responsible for implementing the rights granted in the Constitution does not seem to have impaired the ability of the Brazilian Government to reduce child mortality related to water diseases.

5.31 Between 1990 and 2004 the percentage of under five children whose deaths were attributable to dysentery was reduced from 10.8% to 4.0%. In the North-East Region, the percentage was reduced by 50% from 12.6% to 6.2%.¹¹⁴

Right to social security

5.32 The right to social security is a universal right embedded in the Constitution and Brazilian Labour Code (*BLC*)¹¹⁵, available to all, including women, without discrimination.

5.33 The Constitution establishes that the social security system shall protect maternity and pregnant women (Article 201). More specifically the right to a 120-day maternity leave is expressly granted as a constitutional right (Article 7, XVIII). The 120-day maternity leave is split into 28 days before and 92 days after the birth (Article 392 of the BLC).

5.34 During the maternity leave, all labour rights are maintained, including full payment of salaries and right to employment.

5.35 Articles 396 to 401 of the BLC govern the protection of mothers when returning to their jobs after giving birth. The BLC specifically requires all employers, regardless of size of the company, to provide their breastfeeding employees with two breaks per day, each lasting half an hour, in order to breastfeed their child up to the age of 6 months (Article 396). Article 400 of BLC establishes minimum requirements for areas in which mothers breastfeed.

5.36 The BLC also establishes that maternity schools shall be maintained near highly-populated areas (Article 397). The law also provides that merit awards will be granted to employers that improve make reasonable efforts to provide and maintain childcare for pre-school infants (Article 399).

¹¹⁴ Basic Indicators for Health in Brazil 2008 (<http://www.datasus.gov.br/idb>) by Rede Interagencial de Informação para a Saúde (<http://www.ripsa.org.br>), p.127.

¹¹⁵ Decree-Law No. 5,452 of 1 May 1943. Local counsel explains in their response at Appendix 5 that Brazilian Labour Laws were consolidated into the Brazilian Labour Code in 1943.

Right to education, especially for mothers

5.37 The Brazilian National Pact for Reduction of Maternal and Neonatal Mortality Rates (the *Pact*) was made in 2004.¹¹⁶ The Pact addresses the right to education and the right to healthcare for mothers and their children. It provides that public and private entities, such as governmental and non-governmental organizations should, inter alia, give their support to the public administration in order:

- (a) To provide for health programmes to teach mothers about breastfeeding, vaccination, and contraceptive methods;
- (b) To admit pregnant women as a priority to health care centres;
- (c) To provide care to women who have had an abortion (unsafe abortion remains a public health concern today due to the high incidence and severity of its associated complications);
- (d) To increase the number of laboratories that carry out antenatal exams;
- (e) To provide investment to hospitals and support service centres which are in charge of maternal and child care; and
- (f) To strengthen projects which aim to reward hospitals that provide the best quality of care when treating women in high-risk pregnancies.

5.38 Implementation of the fact has been aided by the web-based system “SISPACTO” developed by the Brazilian government to implement and monitor the targets set by the fact. It provides a valuable data source demonstrating the impact of the fact and ensuring transparency of implementation.

Right to equal access / non-discrimination legislation

5.39 There are differing rates of child survival across different regions of Brazil, which cannot be explained by regional laws. All legislation concerning child protection are at a national level in Brazil.

5.40 Such differing rates are much more related to the level of economic and social development among the different regions of the country. The ten Brazilian States with higher child mortality rates are Alagoas, Maranhão, Pernambuco, Paraíba, Rio Grande do Norte, Sergipe, Bahia, Acre, Ceará and Piauí. Nine of such States are located at the north-east region which has a historic problem of lack of development. None of these ten states are located in the north-east region of Brazil, which has historically suffered from a lack of development.

¹¹⁶ The Pact was established to implement the government’s international obligations to reduce neonatal and maternal mortality rates. Data and statistics regarding its implantation can be found at www.saude.gov.br/sispacto. Please see local counsel’s responses in **Appendix 5** for further information.

5.41 The Constitution states that it is a fundamental objective to promote the well-being of all citizens regardless of any prejudice relating to origin, race, sex, colour, age and any other form of discrimination (Article 3, IV).

5.42 Brazilian legislation with regards to anti-racism and discrimination is vast. It attempts to implement the constitutional principles by giving opportunities to minority groups. There has been an increase in governmental policies and legislation in an effort to protect Brazilians of African descent and to address women's rights in Brazil after 2004, the year in which the United Nations issued the CRC report.

5.43 Moreover, the Pact provides for strategic actions aimed at indigenous and African maternal, prenatal, and postnatal healthcare. The text of the Pact establishes that attention to women and postnatal African or Indian children should be given taking into account their culture and ethnicity.

Gaps

5.44 Local counsel did not identify any large gaps affecting Brazil's legislative framework. In fact, a very large amount of laws were cited in the country report. The best approach seems to be to focus on the continuous implementation of national programs, such as the Pact and the FGS, by for instance increasing the number of educational programs, increasing indoor plumbing in homes and providing more access to healthcare. Brazil would benefit from greater monitoring of such implementation by independent groups, such as NGOs..

EGYPT

The status of international law in Egypt

5.45 Upon ratification by the Egyptian Parliament, international treaties, whether bilateral or multilateral, become an integral part of Egyptian laws and gain a level of enforceability that's higher than that of national laws. In the event of a conflict between a provision in a ratified international treaty and a provision in a national law, the former prevails over the latter. This is a near optimal relationship between international and national treaties in relation to child survival, since it automatically grants primacy to, inter alia, the CRC.

Analysis of domestic laws in Egypt

5.46 Laws of particular relevance to child survival include:

Right to adequate standard of living

5.47 Implicit in this right are the fundamental rights of everyone to be free from hunger and have access to food for their family.

5.48 The Egyptian Constitution of 1971 (the *Constitution*) aims to guarantee a minimum standard of living for all Egyptians. Article 7 states that "social solidarity is the basis of the Society". More specifically for children, Article 10 states that "the State shall guarantee the protection of motherhood and childhood and provide care for

children and youth and provide them with suitable conditions for the development of their talents.”¹¹⁷

5.49 In addition, there are a number of programmes sponsored by the Ministry of Social Solidarity that aim at improving the distribution of food.¹¹⁸

5.50 Government programme for the distribution of bread, which is an essential food product for all Egyptians. This programme was launched by the government in order to combat major distribution problems that took place in recent years. So far this programme has proved to be very effective in putting an end to the long lines that Egyptian, particularly low-income citizens had to wait everyday to get bread.¹¹⁹

5.51 The government, through the Ministry of Social Solidarity, has adopted a new “Smart Cards” programme which aims to provide low-income families access to essential food products. This programme allows eligible families to use their Smart Cards to obtain minimum quantities of subsidized food products at from certain distribution units existing throughout the country. Although the programme has only been implemented in a limited number of Governorates/regions, the Ministry of Social Solidarity is currently working on extending the programme to other regions in Egypt.¹²⁰

5.52 The Ministry of Solidarity is currently in the process of developing a new programme to establish “Social Services Units” throughout the country to provide social services, including distribution of food subsidies and subsidised healthcare services to those segments of the society who are in need. The programme is still in its formative stage and is expected to be fully implemented in the next 3-5 years.¹²¹

Right to adequate standard of healthcare

5.53 This focuses on physical and mental health, the reduction of infant mortality, and the promotion of healthy development of children.

5.54 This right is reflected in the Constitution. Article 17 provides that the State “shall guarantee social and health insurance services and all citizens have the right in accordance with the law to pension in cases of incapacity, unemployment and old age”. Article 16 states that the State shall guarantee cultural, social and health services, and work to ensure them particularly for villages in an accessible and regular manner in order to raise their living standard.

5.55 More specifically, Law 126 of 2008 amended the Child Law of 1996 (the *Child Law*) and includes a number of provisions that aim to ensure a healthy childhood for Egyptian children:

¹¹⁷ See response from local counsel in Egypt, at **Appendix 5**.

¹¹⁸ For a fuller explanation of these programmes, please see local counsel’s responses, *Ibid*.

¹¹⁹ *Ibid*.

¹²⁰ *Ibid*.

¹²¹ *Ibid*.

- (a) It raised the minimum age for marriage for males and females to 18, and gave mothers the right to register a child born out of wedlock. It established a special fund for the protection of childhood and motherhood. It also re-categorised homeless children from “children vulnerable to deviation” to “children vulnerable to danger”;
- (b) Article 7 of the Child Law of 1996 specifically grants children the right to breastfeeding, nursery, food, clothing and shelter. The Child Law also legislates for the provision of free state-provided immunisations to all children.
- (c) Article 25 of the Child Law imposes an obligation on the child’s parents or legal guardian to ensure that the child receives vaccination against epidemic diseases. Article 26 imposes a fine (EGP 20-200) on any person who fails to comply with this requirement. Also, Articles 27-29 of the same law regulates the issue of child medical report which the child’s family needs to maintain and provide to the child’s school on a regular basis.
- (d) Article 30 of the Child Law prohibits the use of preservatives and colouring additions which do not comply with the standards required by the Executive Regulations of the Law. The same Article also requires that packaging of child food products must comply with hygiene standards imposed by the Ministry of Health and all such products may not be distributed or sold in the market without a license from the Ministry of Health.
- (e) Law No. 99 of 1992 grants health insurance to all children enrolled in school and by Ministerial Decree No. 380 of 1997 extends this provision to all children aged 1 to 6 years.

Right to clean water and sanitation

5.56 The Environmental Law, Law No 4 of 1994 includes provisions that aim to protect the environment from all pollution by harmful substances. For example, Article 38 of the law states that: “It is prohibited to spray or use pesticides or any other chemical compound for agriculture, public health or other purpose except after observing the conditions, regulations and safety measures laid down in the executive regulations of this Law and in a manner that will not expose humans, animals, plants, waterways and other components of the environment, directly or indirectly, now or in future, to the harmful effects of such pesticides or chemical compounds.”

Right to social security

5.57 Article 70 of the Child Law provides working mothers with the right to fully paid leave for three months after each childbirth, with a maximum of three such leave periods for each working mother. Article 72 of the Child law provides working mothers with the right for unpaid leave of two years after the birth of a child, during which period, the employer is responsible for paying the social security

5.58 Article 71 of the Child Law allows mothers at work two paid breaks during working hours for breastfeeding, the length of each break is required to be at least 30 minutes.

5.59 Article 73 of the Child Law imposes an obligation on each employer who employs more than 100 women to provide child day-care service for his employees. The Article also imposes an obligation on employers who each employs less than 100 women to provide child day-care service jointly with other employers in the district.

Right to education, especially for mothers

5.60 Legislation is in place to ensure education is of paramount importance. It is a basic right under Article 18 of the Constitution. Article 20 of the Constitution promises free state education and Article 21 of the Constitution makes combating illiteracy a national duty.

5.61 Law No. 8 of 1991 places an obligation on all state institutions to aid the eradication of adult illiteracy and promote adult education. There are no special provisions for women as legislation and regulations in Egypt are predominantly gender-neutral.

5.62 However, the “One-class schools” programme has seen schools being set up in rural areas lacking formal schools. The schools are female only and educate young girls from the ages of 8-14 years old.

Right to equal access / non-discrimination legislation

5.63 Article 8 of the Constitution requires the State to guarantee equality of opportunity to all citizens. Article 40 of the Constitution states that: “All citizens are equal before the law. They have equal public rights and duties without discrimination on grounds of race, ethnic origin, language, religion or creed.

5.64 Law 126 of 2008 (amending the Child Law of 1996 (the *Child Law*)) reiterates this, with a prohibition of any discrimination against children on any basis. Articles 75-86 of the Child Law are provisions for the protection of disabled children and their development.

5.65 The Constitution, Egyptian law and government policies prohibit any kind of discrimination against any citizen. However, local counsel advised that there are claims of discrimination raised by certain groups in the Egypt, such as the Egyptian Copts, gays and lesbians.

5.66 The government acknowledges that rights of equal opportunities and non-discrimination are not implemented to their fullest extents, and that there is a gap between what it is mandated by the law the reality. This gap reflects the government’s failure to implement measures and regulations that are necessary to ensure the full respect of the human rights of all citizens.

Gaps

5.67 Local counsel identified the following gaps and issues affecting Egypt’s legislative framework¹²²:

¹²² Please see local counsel’s report for further information on the highlighted issues, *Ibid*.

- (a) the Child Law does not extend to non-citizen residents, refugees, foreign visitors, illegal immigrants or other children within the borders of Egypt;
- (b) a proposed amendment to the Child Law imposing an obligation on all public schools to offer students daily meals was not successfully passed and therefore failed to be made it onto the statute book in Law 126 of 2008. This proposal might have had a significant impact since a large percentage of school children suffer from serious diseases caused by or related to malnutrition. A few decades ago, Egyptian schools used to provide such meals;
- (c) once ratified and published in the Official Gazette, treaties have status of national law. However, they remain subject to the Egyptian Constitution and a general public policy exception. Sharia principles do currently form part of public policy but the Supreme Constitutional Court has been reluctant to strike down legislation on the basis of non-compliance with Sharia; and
- (d) there is currently no legal space for public interest litigations. According to Article 3 of the Egyptian Civil Procedure Law, a civil action can only be initiated by a person who has a direct interest in the action. NGOs and members of the public would not have standing to bring such actions before Egyptian courts, unless they can prove that they have direct interest in the relevant claims.

5.68 Egypt's legal framework for child survival could be improved by giving absolute primacy to the CRC and other international treaties affecting child survival to which Egypt is a party. Moreover, given the historical provision by Egyptian schools of meals, there is clearly a strong case for a further amendment to the Child Law to reinstate this practice and consolidate it into a legal obligation.

Conclusion

5.69 Egypt and Brazil are two Champion countries that have made great strides forward since 1990. It shows that this improvement is possible for the other Premier and Champion countries in our list.

5.70 Both countries seem to have legislated extensively in this period around issues that impact on child survival.

5.71 The action is not limited to legislation in Egypt or Brazil. The framework that has been created is supported by real action/programmes. Some have demonstrably improved child survival rates. Such model programmes should be examined by other countries to see whether they would allow similar improvements to be made.

5.72 It should be noted that both of these countries have enjoyed great economic development in this period (please see Chapter 7 (Suggestions for Further Work). It is not certain whether the catalyst for change has been a drive for economic development (in which case the decrease in under five child mortality is a welcome beneficial side effect) or if there has been a specific desire to tackle the issue of child survival.

5.73 There is one significant difference in the Egypt and Brazil stories. Whereas statistics indicate that there has been relatively equal progress in reducing child mortality across all people in Egypt, the same cannot be said of Brazil. For much of the past two decades, there has been a large divide in child mortality rates in Brazil between the rich and poor. While, overall, national child mortality rates have fallen, they have fallen at significantly lower rates among the poor communities in Brazil, which tend to be indigenous or Black.¹²³ If one compares child mortality between the poorest 20% of the population and the child mortality amongst the wealthiest 20% of the population the comparative position is as follows:

- (a) In Egypt, the absolute gap in under five child mortality between rich and poor is 49.5 i.e. 49.5 more poor people than rich people die in every 1000 child deaths;
- (b) In Brazil, the absolute gap is 65.6 i.e. 65.6 more poor people than rich people die in every 1000 child deaths.¹²⁴

5.74 However, there are signs that Brazil has appreciated the inequalities in its historic approach and is seeking to address this issue.¹²⁵

¹²³ See Wagstaff, *Socioeconomic inequalities in child mortality: comparisons across nine developing countries*, Bulletin of the World Health Organisation, 2000, p. 78.

¹²⁴ See Save the Children, *The Next Revolution – Giving Every Child the Chance to Survive*, October 2009, Appendix 1.

¹²⁵ *Targeting Inequalities in Child Mortality*, centre for Development Policy and Research, SOAS, No. 40, October 2009.

6. RECOMMENDATIONS AND EXAMPLES OF BEST PRACTICE

Holistic Targeting of Child Mortality Issues: Legislative Reform

6.1 Certain common themes and areas of focus emerge from our review. In particular, the following recommendations and examples of best practice are worth highlighting.

- (a) consolidating and reinforcing all child-related legislation in a comprehensive child welfare statute;
- (b) placing greater emphasis on early childhood;
- (c) the importance of birth registration;
- (d) providing for the right of a child to be heard;
- (e) establishing a National Human Rights Institution;
- (f) providing constitutional guarantees for children's rights;
- (g) legal space for public interest litigation; and

Health Systems

- (h) health services statutes targeting specific diseases and medical issues affecting the country in question e.g. malaria;

Nutrition

- (i) legislation regulating the marketing of breast-milk substitutes;
- (j) additional provisions for children attending school (school meals entitlements);

Clean Water And Sanitation

- (k) defining the content of a right to water;

Literacy

- (l) education – access and content;
- (m) education statutes;

Equality

- (n) providing frameworks of equality;
- (o) targeting particularly vulnerable groups;
- (p) addressing the urban versus rural divide;

- (q) legal minimum age for marriage; and
- (r) access to contraception.

Each of these is considered in further detail below.

Consolidating and reinforcing all child-related legislation into a comprehensive child welfare statute

6.2 As lawyers, we tend to assume that law is necessary to construct and order society. However, we did not begin this project assuming that an overarching child welfare framework is necessary in order to address the intermediate causes of child mortality.

6.3 As we have seen above, some countries do have comprehensive legal frameworks in the form of a child welfare statute. Ten of the Premier and Champion countries - Brazil, China, Egypt, Kenya, Mozambique, Nigeria, Sierra Leone, South Africa, Tanzania and Vietnam – have such legislation. However, given that those ten states are among the twenty worst performers (in absolute terms) in terms of child mortality, it clearly cannot be the case that an overarching statutory framework in itself will lead to any change.

6.4 However, by the same token, it is apparent that the two states considered that had no legislation impacting on any of the intermediate causes of child mortality – Afghanistan and Niger – were also states in which almost no action was being taken on the ground in addressing the problem of child mortality, save in the form of NGO intervention.

6.5 Therefore, our view is that a comprehensive child welfare statute is desirable, provided that:

- (a) It clearly defines the content of rights and obligations, and makes those rights and obligations enforceable;
- (b) It creates a solid framework that can set the agenda for national and local programs that tackle child mortality; and
- (c) It provides for a monitoring/reporting system to help deliver against targets.

6.6 Our review has shown that there is still an issue in some countries with their legislative mindset when it comes to child rights. For example, the constitutional/legislative approaches in countries such as Nigeria and Sierra Leone is to assume that the law's principle concern is to protect children from criminal acts. While that is clearly an important role of law, this paternalistic attitude is more about criminalising abusive adult behaviour and less about putting the needs of the child first, creating a wider framework in which children can be nurtured and developed.

6.7 Where political pressures or other factors exist that mean that the negotiation and drafting of a comprehensive statute is impossible or time-consuming, then the experience of several of the Premier and Champion countries indicates that specific, limited statutes may be just as effective (if not more so) in dealing with local

problems impacting on child mortality e.g. legislation in Tanzania tackling HIV/AIDS and malaria.

6.8 It goes without saying that legislation can only provide a framework. It is no substitute for real action. The majority of national programs having a direct impact on child survival that have been listed by local counsel do not appear to have a direct statutory basis.

6.9 Brazil's CAL is the most sophisticated paradigm for a child welfare statute, and its key features are explored in the model country analysis in chapter 5.

A legal emphasis on early childhood

6.10 In its General Comment No. 7 (2005) *Implementing child rights in early childhood*, the CRC Committee advises that legal priority should be given to children under five years of age. Whilst the best interests principle should be central in all legislative, policy, administrative and judicial decision-making and service provisions that affect children, State legislation should be most keenly informed by this principle in respect of its actions affecting young children. This recommendation is particularly relevant in the context of reducing child mortality rates as defined for the purposes of this report.

6.11 In recommending comprehensive policies and programmes for early childhood, the CRC Committee recommends providing, *inter alia*:

- (a) access to services, especially for the most vulnerable;
- (b) birth registration;
- (c) healthcare provision;
- (d) early childhood education;
- (e) standard of living and social security; and
- (f) an environment in which the private and NGO sectors are integrated with the public sector as providers of care where necessary.

6.12 The implementation of all of the above can be underpinned, assisted, expedited and prioritised by means of legislative change.

6.13 In India, legal priority for the under fives is manifest in an ultimately non-justiciable obligation under Article 45 of its Constitution to provide education for children under five years old. Into such a duty may be implied a duty to provide such children with healthcare or nourishment. In Brazil, the State is obliged to provide pre-school or day care services for children under 6 years old.

6.14 In other countries such as Vietnam and Kenya, this priority is expressed in healthcare legislation to ensure that children under five receive free immunisations and medical care when they are at their most vulnerable.

6.15 Beyond this, child rights statutes should give particular attention to the rights accorded therein to particularly young children, as per several CRC Committee *Concluding Observations*.

Legal requirement for birth registration – an integrated approach

6.16 The right to a name and a nationality is well established by the CRC. Article 7 requires the registration of a child immediately after birth. Yet every year the births of around 51 million children go unregistered. These children are almost always from poor, marginalized or displaced families or from countries where systems of registration are not functional, and the consequences for their health and well-being are often severe and long-lasting.

6.17 The legal requirement of birth registration of all children has the potential to dramatically impact child survival. This legal acknowledgement of a child's existence is often required to access essential services, such as vaccinations and vitamin A supplementation. It also establishes family ties where inheritance is an issue.¹²⁶

6.18 Birth registration and access to healthcare in particular are closely linked, especially for children under five. For example, data from several African countries suggest a close correlation between the presence of a skilled attendant at birth and child registration.¹²⁷

6.19 This legal solution, however, needs to address inequities between children of different economic backgrounds, since:

“[E]ven when parents do plan to register a birth, the high cost of registration and long distances to registration centres often act as powerful deterrents. High cost in particular was revealed by a recent UNICEF analysis to be the primary reason for the lack of birth registration in no fewer than 20 developing countries, resulting in large registration disparities between rich and poor children. In the United Republic of Tanzania, where overall birth registration is very low, there is a strong disparity between rich and poor, with only 2 per cent of the poorest fifth of children being registered compared to 25 per cent of the richest fifth.”¹²⁸

6.20 Achieving universal birth registration requires governments, parents and communities to work together to make birth registration a priority. An integrated approach – such as combining legislative efforts with national immunization campaigns and birth registration campaigns – often provides the best strategy.¹²⁹ Where such cooperation has been achieved, it has led to remarkable results. In Afghanistan, in 2003, a nationwide campaign to register all children under the age of

¹²⁶ United Nations Children's Fund, *The 'Rights' Start to Life: A statistical analysis of birth registration*, UNICEF, New York, 2005, pp. 1, 13.

¹²⁷ United Nations Children's Fund, *The State of the World's Children 2008: Child Survival*, p. 23.

¹²⁸ Ibid.

¹²⁹ Ibid.

one was combined with the country's National Polio Immunization Days. The campaign was expanded in 2004 and had reached 2 million children under five by mid-October of that year.¹³⁰

6.21 Thus the legal requirement for births to be registered and its provision on a free basis is particularly important in widening access to early childhood care and should be adopted by all countries seeking to create an environment in which children can survive and thrive.¹³¹

Right of the child to be heard

6.22 Under Article 12 CRC, opportunities for a child to be heard must be provided, in particular "*in any judicial and administrative proceedings affecting the child*". The CRC Committee emphasises that this provision applies to all relevant proceedings affecting the child without limitation, "*including, for example... health care, social security... refugee children... Typical administrative proceedings include, for example, decisions about children's education, health, environment, living conditions...*"¹³²

6.23 Article 12 CRC affords children the right to be heard "*either directly, or through a representative or appropriate body.*" It also provides that children must be given the opportunity for representation "*in a manner consistent with the procedural rules of the nation.*" Importantly, the CRC Committee states that:

*"this clause should not be interpreted as permitting the use of procedural legislation which restricts or prevents enjoyment of this fundamental right."*¹³³

6.24 In order to fulfil its obligations under Art. 12 CRC, States should:

- (a) review and withdraw restrictive declarations and reservations to Article 12;
- (b) establish independent human rights institutions, such as children's ombudsmen or commissions with a broad children's rights mandate;
- (c) ensure appropriate conditions for supporting and encouraging children to express their views, and make sure that these views are given due weight, by regulations and arrangements firmly anchored in laws and institutional codes that are regularly evaluated with regard to their effectiveness; and
- (d) provide training to professionals working with and for children and combating negative attitudes preventing the full realisation of children's right to be heard, through public campaigns.¹³⁴

¹³⁰ Ibid.

¹³¹ CRC Committee on the Rights of the Child General Comment No. 7 (2005) *Implementing child rights in early childhood*, Part V.

¹³² CRC Committee on the Rights of the Child General Comment No. 12 (2009) *The right of the child to be heard*, paragraph 32.

¹³³ Ibid. paragraph 38.

6.25 The CRC Committee encourages States to address discrimination, including against vulnerable or marginalised groups of children, to ensure that children are assured their right to be heard and are enabled to participate in all matters affecting them on an equal basis with other children. In particular, the CRC Committee urges States to pay special attention to the right of the girl child to be heard, to receive support, if needed, to voice her view and her view be given due weight.¹³⁵

*“The Convention requires respect for the child’s right to express his or her views and to participate in promoting the healthy development and well-being of children. This applies to individual health-care decisions, as well as to children’s involvement in the development of health policy and services.”*¹³⁶

6.26 To achieve this, the CRC Committee recommends that States should introduce measures enabling children to contribute their views and experiences to the planning and programming of services for their health and development. Their views should be sought on all aspects of health provision, including what services are needed, how and where they are best provided, discriminatory barriers to accessing services, quality and attitudes of health professionals.

6.27 In all educational environments, including educational programmes in the early years, the active role of children in a participatory learning environment should be promoted. Teaching and learning must take into account life conditions and prospects of the children. For this reason, education authorities must include children’s and their parents’ views in the planning of the curricula and school programmes.

6.28 The right of the child to be heard can therefore be seen as an important legal basis on which NGOs may launch strategic litigation on issues pertinent to child survival. It also has the potential to transform structural issues responsible for perpetuating child mortality rates.

Permanent monitoring mechanisms – National Human Rights Institutions

6.29 In its *Report of the CRC Committee on the Rights of the Child*, 2004, the CRC Committee recommends that States take appropriate legislative measures to establish a permanent monitoring mechanism aimed at ensuring that both State and non-State service providers respect the relevant principles and provisions of the CRC. In particular, all service providers must incorporate and apply to their programmes and services all the relevant provisions of the CRC.¹³⁷

6.30 One monitoring mechanism endorsed by the CRC Committee are National Human Rights Institutions (*NHRIs*). The following Premier and Champion Countries have an NHRI: Mozambique, Angola, India, Kenya, Zimbabwe, Brazil, Egypt and

¹³⁴ Ibid, paragraph 49.

¹³⁵ Ibid, paragraphs 75-77.

¹³⁶ Ibid, paragraph 98.

¹³⁷ CRC Committee on the Rights of the Child *Report of the CRC Committee on the Rights of the Child*, 2004, p. 22.

Afghanistan. These are important in promoting and ensuring the implementation of the CRC, and the CRC Committee considers the establishment of such bodies to fall within the commitment by States to ensure the implementation of the CRC and advance the universal realisation of children's rights.

6.31 NHRIs should, if possible, be constitutionally entrenched and must at least be legislatively mandated.¹³⁸ It is the view of the CRC Committee that their mandate should include as broad a scope as possible for promoting and protecting human rights, incorporating the CRC, its Optional Protocols and other relevant international human rights instruments.¹³⁹

6.32 Legislation mandating NHRIs should include provisions setting out specific functions, powers and duties relating to children linked to the CRC and its Optional Protocols.¹⁴⁰ Where NHRIs have been established prior to the CRC, or without expressly incorporating it, necessary arrangements should be put in place so as to ensure conformity of the institution's mandate with the principles and provisions of the CRC.¹⁴¹

6.33 NHRIs should be accorded such powers as are necessary to enable them to discharge their mandate effectively, including the power to hear any person and obtain any information and document necessary for assessing the situations falling within their competence. These powers should include the promotion and protection of the rights of all children under the jurisdiction of the State in relation not only to the State but to all relevant public and private entities.¹⁴²

6.34 One of the recommended activities of NHRIs is the promotion of harmonisation of national legislation, regulations and practices with the CRC, its Optional Protocols and other international human rights instruments relevant to children's rights and the promotion of their effective implementation, including through the provision of public and private bodies in construing and applying the CRC.¹⁴³

6.35 Critical to the success of NHRIs in the context of child survival is the availability of data to allow the NHRIs to assess the impact of measures being taken to address child mortality. Several local counsel pointed to a lack to data in their countries. On the other hand, there were concerted efforts being made in projects in South Africa and India aimed precisely at addressing this issue.

¹³⁸ General Comment No. 2 (2002) *The role of independent national human rights institutions in the promotion and protection of the rights of the child*, paragraph 8.

¹³⁹ Ibid.

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

¹⁴² Ibid, paragraph 9.

¹⁴³ Ibid, paragraph 19(e).

Constitutional guarantees for children's rights

6.36 Many of the Premier and Champion Countries lack clarity on the legal status of ratified international treaties. Almost invariably, however, and in stark contrast to the English legal system, they have written constitutions which represent the undisputed highest legal authority in the jurisdiction.

6.37 It is with this in mind that the constitutional guarantee of children's rights – and in particular those relevant to child survival – represents a positive step in the formulation of any State's optimum legal framework for child survival.

4.1.1 Several of the constitutions reviewed contained provisions pertinent to child survival, including, inter alia:

- (a) rights granted to children with respect of nutrition, standard of living and education under the Indian and Vietnam Constitutions;
- (b) rights to equality and freedom from discrimination under the Chinese and Nigerian Constitutions; and
- (c) rights to healthcare granted to children under the Constitution of Afghanistan.

6.38 It should be noted, however, that in certain jurisdictions, particular constitutional provisions are acknowledged as being morally rather than legally binding, and as such, aspirational.¹⁴⁴ As such, they cannot be deemed as ideal legal provisions supporting child survival, since they are insufficiently robust.

Legal route for Public Interest Litigation (PIL) commenced by third parties

6.39 Of the jurisdictions reviewed, India and Brazil are the two States with the most developed legal systems in terms of hearing PIL from non-party NGOs.

6.40 The enforceability of child rights by means of PIL is important because it goes to the justiciability of such rights and signifies the primacy allocated to such rights by the State. It also assists with the implementation of such laws, since it represents the sanctions that might result from non-compliance.

HEALTH SYSTEMS

Health services statute

6.41 Several jurisdictions reviewed had enacted health services legislation, including Brazil, China, Kenya, South African, Tanzania and Vietnam.

6.42 Such statutes should ideally give priority to particularly vulnerable people, such as pregnant mothers and children aged 5 years old and under. Provision of care to such vulnerable groups should be free of charge and, as appropriate, target:

- (a) immunisation;

¹⁴⁴ See for example, the discussion of Part IV of the 1949 Indian Constitution above.

- (b) family planning;
- (c) anti-malarial measures; and
- (d) vitamin supplements.

NUTRITION

Legislation regulating the marketing of breast-milk substitutes

6.43 Immediate and exclusive breastfeeding is the best source of nutrition for a young child, providing physical warmth and strengthening immune systems.¹⁴⁵ Adequate nutrition, particularly in the form of early and exclusive breastfeeding, is vital in ensuring the health of young children.

6.44 Because of this, it is important that countries regulate the marketing of breast-milk substitutes. Such legislation, combined with education about the benefits of exclusive breastfeeding and campaigns thereon, can be effective in impacting child survival rates. Article 7 of Egypt's Child Law specifically grants children the right to breastfeeding, which is another way in which such behaviour can be encouraged.

6.45 Similarly, Vietnam and China have legislation designed to ensure the dissemination of information and security of supply of food products for children. In countries where food contamination and security of supply fail, such legislation is particularly pertinent.

School Meals Entitlement

6.46 Several Premier and Champion countries have implemented school meals programs. While some of this has been by legislative design, for example in Angola and South Africa, in the case of India, this has been the result of (fairly convoluted) judicial innovation. Clearly, the certainty (and political will) of legislation is preferable.

6.47 A statutory school meal entitlement not only addresses the issue of child nutrition, but also incentivises parents to send their children to school.

CLEAN WATER AND SANITATION

6.48 The fact that our review has found almost no examples – save for a reference in the South African constitution – of any legislative provision enshrining a right to water demonstrates the fact that this is one of the most controversial human rights. However, there is evidence of a willingness to take action through national or local programs in addressing this issue, often with the help of NGOs.

6.49 Given likely future strain on water resources, and given clear legislative reluctance to draft statutes granting positive rights to water, it may be more effective

¹⁴⁵ United Nations Children's Fund, *The State of the World's Children 2008: Child Survival*, p. 11.

to legislate in a prohibitive fashion i.e. to require environmental impacts of large industrial or other projects that may adversely affect water resources, or otherwise to restrict large-scale water use, freeing up more of it for use by the mass population. This is an area where further work will be useful.

LITERACY

Education – access and content

6.50 UNICEF advocates that “[t]he main challenge to child survival no longer lies in determining the proximate causes of or solutions to child mortality but in ensuring that the services and education required for these solutions reach the most marginalized countries and communities.”¹⁴⁶

6.51 Health problems causing child mortality do not occur in isolation from other basic needs, such as adequate nutrition, clean water, sanitation, housing and primary education. In fact, they are exacerbated by the absence of any one of these needs. Education has a particularly transformative power insofar as it may directly affect knowledge about:

- (a) nutrition;
- (b) clean water and sanitation;
- (c) health; and
- (d) contraception and family planning.

6.52 Additionally, a legally entrenched right to free education can indirectly affect child survival rates, by means of:

- (a) improving literacy rates which in turn transform socio-economic prospects intrinsically linked to child survival rates; and
- (b) giving children the opportunity to benefit from additional services by virtue of attending school, such as immunisations, meals and water and sanitation.

6.53 Education legislation should also target adult, and more specifically, *maternal* literacy. The latest estimates indicate that 1 in every 4 adults (defined here as those aged 15 and over) is illiterate. Almost two thirds are women, according to the most recent data from the UNESCO Institute for Statistics.¹⁴⁷ Research shows that less-educated caregivers generally have poorer access to information on basic healthcare than their better-educated peers.¹⁴⁸ This, in turn, can lead to ill-informed decisions about when and how to seek care for sick children.¹⁴⁹

¹⁴⁶ United Nations Children’s Fund, *The State of the World’s Children 2008: Child Survival*, p. 25.

¹⁴⁷ United Nations Educational, Scientific and Cultural Organization, *EFA Global Monitoring Report 2007: Strong foundations – Early childhood care and education*, UNESCO, Paris, 2006, p. 2.

¹⁴⁸ Porterfield, Shirley L., and Timothy D. McBride, ‘The Effect of Poverty and Caregiver Education on Perceived Need and Access to Health Services among Children with Special Healthcare Needs’,

6.54 In contrast, evidence from Bangladesh shows that a child born to a mother with primary education is about 20% more likely to survive compared to a child born to a mother with no education; the odds increase to 80% when the mother has obtained a secondary education.¹⁵⁰

6.55 The right to education granted under Article 29(1) CRC is not only a matter of access (Article 28 CRC) – for children and for mothers – but also a matter of content. The aims and values reflected in this article are stated in quite general terms and their implications are potentially very wide ranging. In its General Comment No. 1 (2001) *The Aims of Education*, the CRC Committee observes that the drafting style of Article 29 seems to have led many States to assume that it is unnecessary/ inappropriate to ensure that the relevant principles are reflected in legislation or administrative directives.¹⁵¹ The CRC Committee here emphasises that this assumption is unwarranted and expresses concern that in the absence of any specific formal endorsement in national law or policy, it seems unlikely that the relevant principles are or will be used to genuinely inform educational policies.¹⁵² The CRC Committee therefore calls upon all States parties to take the necessary steps to formally incorporate these principles into their education policies and legislation at all levels.

6.56 The effective promotion of Article 29(1) requires the fundamental reworking of curricula to include the various aims of education and the systematic revision of textbooks and other teaching materials and technologies and school policies. The CRC Committee calls upon States to develop a comprehensive national plan of action to promote and monitor realisation of the objectives listed in Article 29(1).¹⁵³

6.57 In conclusion, free and compulsory primary education is a right that should be reflected in the legislation of any State seeking to honour its obligations under the CRC and aiming to reduce child mortality rates. Maternal literacy is also important in transforming child survival statistics, and should ideally find support in law.

Education statute

6.58 The right to education should not be overlooked in a campaign targeting child survival, because it forms a basis on which children can learn about health, diet and

American Journal of Public Health, vol. 97, no. 2, Feb. 2007, p. 323, cited in United Nations Children's Fund, *The State of the World's Children 2008: Child Survival*, p. 22.

¹⁴⁹ Ibid.

¹⁵⁰ White, Howard, *Maintaining Momentum to 2015? An impact evaluation of interventions to improve maternal and child health and nutrition in Bangladesh*, World Bank, Washington, D.C., Sept. 2005, p.25, cited in United Nations Children's Fund, *The State of the World's Children 2008: Child Survival*, p. 22.

¹⁵¹ CRC Committee on the Rights of the Child General Comment No. 1 (2001) *The Aims of Education*, paragraph 17.

¹⁵² Ibid.

¹⁵³ Ibid, paragraph 21.

contraception and moreover may be entitled under domestic law to basic nourishment whilst at school.¹⁵⁴

Additional legal provisions for children attending school

6.59 Such additional statutory provisions include:

- (a) textbooks and healthcare provisions in China; and
- (b) school meals programmes in Nigeria, Kenya and India.

6.60 Many of the countries reviewed, including India, Egypt, Kenya and Pakistan, have education statutes providing for compulsory attendance at school for children of particular ages and a corresponding duty on the State to provide such an education in public schools for free. As explored above, issues such as:

- (a) the age groups provided with free education; and
- (b) its content,

are key in maximising the impact of such legislation on child survival.

EQUALITY

Frameworks of equality

6.61 Legal and policy interventions to eliminate inequalities – that is, bringing child mortality rates in the poorest 80 per cent of the population up to par with those of the richest 20 per cent – would have a dramatic effect on the under five mortality rate for a country as a whole. Worldwide, about 40 per cent of under five deaths could be prevented in this way.¹⁵⁵

6.62 Successful approaches used to tackle inequities include:

- (a) programmes that bring health interventions to those who are hardest to reach;
- (b) subsidising health care for the poor and directing social marketing to those who have been excluded are other options; and

¹⁵⁴ A national example of the transformative power of education is that of the Indian Constitution (86th Amendment) Act 2002. The amendment makes it a requirement under Art. 45 of the Indian Constitution to provide a state education for children:

“Provision for early childhood care and education to children below the age of six years.—The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years.”

This, combined with governmental efforts to increase girls’ enrolment in school and the introduction of the Midday Meal Scheme affects children’s access to nutrition and education, two vital components for eradicating poverty and most notably malnutrition, which is estimated to be an underlying cause of more than one third of all deaths in children under five.

¹⁵⁵ Cesar G. Victora, et al, “Applying an Equity Lens to Child Health and Mortality: More of the same is not enough”, *The Lancet* vol. 362, no. 9379, 19 July 2003, p. 234, quoted in *ibid*.

- (c) ensuring that equity is a priority in the design of child survival interventions and delivery strategies at every level and in particular in every aspect of legislative reform, strategic litigation and lobbying agendas.

Doing so will require a thorough knowledge of the situation through the collection of survey data, which can also be used for education and advocacy. Regular monitoring must be instituted along with mechanisms to ensure accountability, both at national and international levels.¹⁵⁶

6.63 Brazil, China, India, Nigeria and Vietnam all have some basic legislative provision for “social insurance” and “social safety net” programmes for their most vulnerable citizens. In Bangladesh, the roll-out of a healthcare voucher system to cover transportation and small items for newborns has had some success. Brazil’s social security provisions will be explored further below in Chapter 5.

6.64 In countries where resources are scarce, these social security frameworks require robust assessment mechanisms in order to ensure the identification of incidences of inequality and discrimination, recognise the most needy beneficiaries and implement appropriate remedies.

6.65 Most countries with modern constitutions have tried to address the issue of discrimination. However, the legislative framework can only go so far. As the local counsel in Nigeria said, “cultural practices die hard”. Sometimes it is not a review of legislative frameworks that is required, it is a review of pervading social/traditional attitudes. This is explored further, with regards to Brazil, below in Chapter 5.

6.66 Any truly effective legislative scheme to tackle inequality must aim to target the most vulnerable part of the population e.g. street children and orphans. This principle should be enshrined within the constitution and inform national plans of action. Further, the Premier and Champion states need specifically to address the “urban versus rural” dichotomy that seems pervasive in those countries.

Legal minimum age for marriage

6.67 Several jurisdictions, including Sierra Leone, have changed the legal minimum age for girls to fit with that of boys and to correspond with the CRC definition of the child, thus reducing child marriage rates and targeting discriminatory practices against the girl child.

6.68 Research shows that children born to young mothers are less likely to survive.¹⁵⁷ In this way such legislative amendments may improve child survival rates in the Premier and Champion Countries surveyed, many of whom continue to have a discriminatory framework in this context.

¹⁵⁶ United Nations Children’s Fund, *The State of the World’s Children 2008: Child Survival*, p. 24.

¹⁵⁷ See United Nations Children’s Fund, *Early Marriage, Child spouses, Innocenti Digest*, no. 7, UNICEF Innocenti Research Centre, Florence, March 2007.

7. SUGGESTIONS FOR FURTHER WORK BY SAVE THE CHILDREN

Introduction

7.1 A balance needs to be struck between stimulating government action by way of gentle encouragement and partnership on the one hand, and contentious litigation on the other.

7.2 We consider below avenues for further engagement and partnership before going on to consider a more contentious option.

Causal link between legislative frameworks and reduction in child mortality

7.3 In Chapter 4, and particularly Chapter 5, we have seen that, in some States, there has been considerable legislative action, backed by real action on the ground, that has addressed many of the intermediate causes of child mortality.

7.4 However, as we have pointed out, it is difficult to assess whether the legislative action has, in itself, caused a reduction in child mortality in those countries. It would seem reasonable that they had some effect but it may be difficult to quantify the effect, particularly given possible concurrent causes – such as development of action on the ground (not all of which had a legislative basis) and general economic development in those countries (on which see further below).

7.5 To the extent that the causal link cannot be presumed, this may be a valuable workstream to pursue, although it would require a multidisciplinary team. We are aware of similar studies that have been conducted in recent times. See, for example, Palmer, Tomkinson et al., *Does ratification of human-rights treaties have effects on population health?*¹⁵⁸

7.6 In this regard, Tanzania may be a good test of causality, if it gains Presidential assent to the Law of the Child Act 2009, which has been passed by parliament in the course of drafting this report.

Non-state actors and foreign investment

7.7 The focus of this report has necessarily been on State actors, given the overall aim of identifying international law obligations that impact on the issue of child mortality and how these rights and obligations have been implemented by the Premier and Champion countries.

7.8 However, the role of non-State actors is equally important in helping to bring about change. In this regard, there may be value in considering further work on two additional (but related) fronts in an effort to tackle the issue of child mortality:

- (a) Examining the correlation between foreign investment and child mortality and engaging with States to promote inward investment that may – directly or indirectly – assist in reducing the level of child mortality.

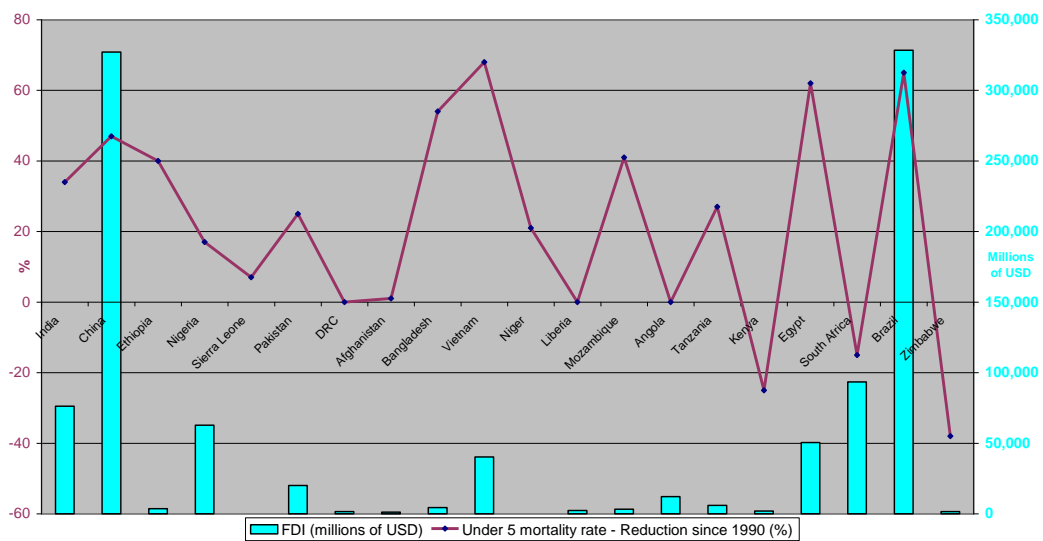
¹⁵⁸ Lancet 2009, Vol. 373, p1987.

- (b) Engaging with multinational corporations (*MNCs*) to encourage them to take steps as part of their corporate social responsibility (*CSR*) commitments and obligations that may have a beneficial impact on child mortality.

Is there a correlation between the level of foreign investment and child mortality?

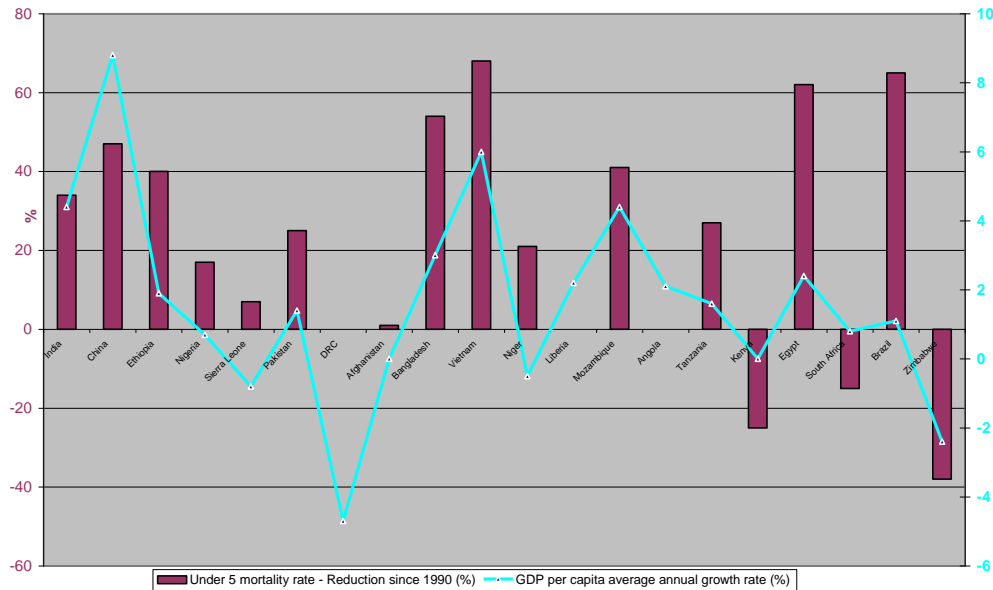
7.9 **Figure 3** below sets out the correlation between Foreign Direct Investment (*FDI*) and under five child mortality, and **Figure 4** sets out the correlation between the average annual growth rate per capita of GDP since 1990 and under five child mortality.

Figure 3: FDI and Under-5 Child Mortality



Data Source: UNICEF paper, *The State of the World's Children 2008: Child Survival*, published December 2007, Table 7: Economic Indicators, and Table 10: The Rate of Progress

Figure 4: GDP and Under-5 Child Mortality



Data Source: UNICEF paper, *The State of the World's Children 2008: Child Survival*, published December 2007, Table 7: Economic Indicators, and Table 10: The Rate of Progress

7.10 Whilst this is a somewhat superficial demonstration of the potential links between such figures and under five child mortality, it may be worth looking at other figures (for example Transparency International’s perception of corruption indices), to see whether there is a correlation between the rate of foreign investment (and factors relating thereto) and the rate of child mortality.

7.11 If there is a correlation, the question that then needs to be considered is whether this may provide another avenue for tackling the issue of child mortality. While it may seem rather obvious that the level of economic development in a country will have an impact on the level of child mortality, the point may still be lost on certain governments. The lack of, or inadequate, legal structures in many of the Premier and Champion countries is merely indicative of wider infrastructure deficiencies in those countries. It is not a coincidence that countries with ineffective legal systems often also tend to have weak government, poor healthcare provision, and little corporate governance. Whereas some governments may see little benefit to themselves in tackling the issue of child mortality in its own right, they may see great benefit tackling certain infrastructure issues if that may encourage foreign investment. Such foreign investment may have a direct or indirect impact on child mortality.

Invoking Corporate Social Responsibility Obligations

7.12 Additionally, it would be worthwhile exploring how Save the Children can engage with corporates (especially MNCs) to see if they can take steps as part of their commitments to CSR as a means of supplementing (or even encouraging) the effort made by States themselves.

7.13 The following CSR instruments provide a natural starting point for further work:

| CSR instrument | Relevant Provisions |
|---|--|
| <p>UN Global Compact</p> <p>Principles 1 and 8</p> | <p><i>Businesses should:</i></p> <p><i>“support and respect the protection of internationally proclaimed human rights”</i></p> <p><i>“undertake initiatives to promote greater environmental responsibility”.</i></p> |
| <p>OECD Guidelines for Multinational Enterprises</p> <p>Chapters II and V</p> | <p><i>“Enterprises should contribute to economic, social and environmental progress with a view to achieving sustainable development.”</i></p> <p><i>“Enterprises should, within the framework of laws, regulations and administrative practices in the countries in which they operate, and in consideration of relevant international agreements, principles, objectives, and standards, take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development. In particular, enterprises should...assess, and address in decision-making, the foreseeable environmental, health, and safety-related impacts associated with the processes, goods and services of the enterprise over their full life cycle.”</i></p> |
| <p>UN Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights.</p> <p>Arts 1, 2, 14.</p> | <p><i>“Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups.”</i></p> <p><i>“Transnational corporations and other business enterprises shall ensure equality of opportunity and treatment, as provided in the relevant international instruments and national legislation as well as international human rights law, for the purpose of eliminating discrimination based on race, colour, sex, language, religion, political opinion, national or social origin, social status, indigenous status, disability, age - except for children, who may be given greater protection - or other status of the individual unrelated to the inherent requirements to perform the job, or of complying with special measures designed to overcome past discrimination against certain groups.”</i></p> |

| | |
|--|--|
| | <p><i>“Transnational corporations and other business enterprises shall carry out their activities in accordance with national laws, regulations, administrative practices and policies relating to the preservation of the environment of the countries in which they operate, as well as in accordance with relevant international agreements, principles, objectives, responsibilities and standards with regard to the environment as well as human rights, public health and safety, bioethics and the precautionary principle, and shall generally conduct their activities in a manner contributing to the wider goal of sustainable development.”</i></p> |
|--|--|

Table B: Relevant provisions of CSR instruments

7.14 Over 7000 organisations have signed the UN Global Compact. As well as the 30 OECD States themselves, 12 non-member states – including Brazil and Egypt - have signed the OECD Declaration on International Investment and Multinational Enterprises, pursuant to which the OECD Guidelines were developed. The UN Norms are the latest attempt to flesh out commitments and obligations on the part of multinationals.

7.15 Engagement with multinationals may take at least two forms:

- (a) Collaboration with MNCs to encourage and assist them in fulfilling their (express and implied) CSR commitments. For example, MNCs could be encouraged to provide basic healthcare services to factory employees in their operations in Premier and Champion countries.
- (b) Holding MNCs legally to account for acts or omissions that have a direct or indirect adverse impact on child mortality, either by way of:
 - (i) National litigation; or
 - (ii) Under the Specific Instance¹⁵⁹ procedure under the OECD Guidelines (where the MNCs are nationals of signatory states). Whereas most CSR instruments have no enforcement mechanism, the Specific Instance process has teeth and can be invoked by NGOs.

The possible use of strategic litigation

7.16 The present project was concerned with mapping the current state of legislative and related practices in the Premier and Champion countries that impact on the issue of child survival.

7.17 Now that this has been done, to a lesser or greater degree, for the majority of those countries, Save the Children may wish to consider whether there are any legal/judicial remedies that could be sought in those countries in order to compel

¹⁵⁹ See http://www.oecd.org/document/60/0,3343,en_2649_34889_1933116_1_1_1_1,00.html

States into implementing their international law obligations. Strategic litigation has proven a successful strategy in some situations, for example in relation to the right to food litigation in India. However, it seems logical to treat it as a remedy of last resort.

8. ACKNOWLEDGEMENTS

8.1 This report is the result of a collaboration, which has brought together lawyers in various offices of Freshfields Bruckhaus Deringer LLP (*Freshfields*) and other law firms.

8.2 The participating firms and lawyers were:

- (a) **Afghanistan:** Sonia Abdul-Rahman.
- (b) **Angola and Mozambique:** Freshfields (Miguel Klingenberg, Madrid); Tânia Cascais, Susana Pinto Coelho, Rui Amendoeira, Luis Borba Rodrigues, Diogo Xavier da Cunha – Miranda Correia Amendoeira & Associados.
- (c) **Brazil:** Freshfields (Melissa Raciti, New York; Luiz Aboim, Tatiana Metran and Gustavo Scheffer da Silveira, Paris); Brazilian Public Prosecutors (Rosa Maria Xavier Gomes Carneiro, Ida Maria Moulin Aledi Monteiro, Nadia de Araujo); Brazilian Counsel (Fernando Eduardo Serec, Antonio Marzagão Barbuto Neto).
- (d) **China:** Freshfields (Alan Wang, Katja Schmitt); Save the Children (James Wyndham).
- (e) **Egypt:** Freshfields (Walid Hegazy, Clare O'Hare, Ahmed Arif); Save the Children (Amira El Messeiry);
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- (i) **Nigeria:** Collins Okpanum and Oghogho Akpatra – Templars Law.
- (j) **Sierra Leone:** Sabrina Mahtani.

- (k) **South Africa and Zimbabwe:** Twaambo Susan Muleza, David Geral, Chris Todd, Claire Avidon, Bontle Pilane and Lebohang Lengoasa - Bowman Gilfillan.
- (l) **Tanzania:** Sarah Thomas, Amish Shah and Mustafa Tharoo, Ringo & Associates.
- (m) **Vietnam:** Freshfields Bruckhaus Deringer (Tony Foster, Eli Mazur and My-Linh Dang).

8.3 The individual submissions made by the local legal teams can be found in **Appendix 5**.

8.4 The research and report-drafting has been co-ordinated and drafted by a team from Freshfields in London led by Rajesh Singh, with support from Kate Bland, Jeremy Cronk and Nigel Rawding. They wish to express their gratitude to the local legal teams for all their efforts in conducting (often very difficult) research and responding readily to queries. They also wish to thank Jennifer Grant (Global Rights Advocate and Adviser), Alex Woods and Nick Williams (Legal Advisers) of Save the Children in London, for their guidance and comments throughout this process.