

# Article

# 40

The Dynamics of Youth Justice & the Convention on the Rights of the Child in South Africa

Volume 6 - Number 1  
April 2004



## **Article 40(3)(b):**

*Wherever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected*

## ***Structural interdicts again – the Zuba saga continues*** by Julia Sloth-Nielsen

**T**he December 2003 edition of *Article 40* reported on the judgment of the Eastern Cape Division in *S vs Zuba and others* (case No. CA 40/2003 and CA 207/2003). The matter concerned the absence of reform schools for young offenders in that province, and the plans of the Department of Education to build or commission such a facility to enable the proper use of this sentence for the province's young people. The remedy of a structural interdict, in terms of which the court would exercise supervisory powers to oversee the implementation of reform school proposals, was discussed at some

length in that judgment. Ultimately, though, the court at that point declined to use this 'big stick' because the relevant Departments (Education and Social Development) had consented to file all necessary documentation and reports. The matter was, however, kept on the court roll, and the possibility of a court-imposed monitoring regime was not ruled out altogether. ►

# EDITORIAL

*As you will notice, Article 40 has a new look for 2004. Thanks go to Out of the Blue and Lizanne Murison for their efforts and sponsorship in this regard.*

*This edition has two main focuses. The first relates to experiences and updates on child justice in Africa. Godfrey Odongo provides an insight into developments and practice in East Africa, while Abraham Mwansa relates one of his experiences while working as a legal representative in Zambia.*

*The second focus looks at children in detention. Following the final decision in the Zuba matter, Professor Julia Sloth-Nielsen updates her article entitled "Structural Interdicts – A Big Stick Approach", published in the December 2003 edition of Article 40. Daksha Kassan features the new place of safety in Clanwilliam for young persons awaiting trial – a sign of the commitment of the Department of Social Development to the management of young child offenders.*

*The work of CRED was highlighted in the May 2000 edition of Article 40. We follow this up with articles on two CRED initiatives. The first relates to a collaboration with the Child Justice Alliance whereby children being detained in Bonnytoun Place of Safety were consulted on the process that led to their arrest and their views on what their immediate future held. The second article looks at the Pre-trial Awareness Training programme currently being developed and scheduled for implementation in June 2004.*

*Abraham Mwansa's article, in addition to raising awareness on practices in Zambia, highlights the potential usefulness and value of NGOs and individuals in addressing injustices against children being held in detention.*

*Finally, we wish to pay tribute to the late Dullah Omar, founder of the Community Law Centre and former Minister of Justice who tirelessly championed the rights of children in trouble with the law.*



In February of this year, judgment was again handed down by the same judge, Judge Plasket. By that time, the required Departmental reports had indeed been filed, and it was concluded that there had been substantial compliance with regard to the provision of the requested information. Having identified an existing school of industries as suitable for conversion to a reform school, the Department of Education noted that it was planning to admit the first

sentenced youth in April 2004 (or at the latest, June 2004). The applicants argued that it continued to be necessary that reports were filed from time to time, to ensure follow-through on the implementation and execution of the reform school plans. Judge Plasket agreed, saying "I am in agreement with him as to the necessity for the further filing of reports from time to time, but it is also important to note the progress that has been made (whether as a result of the earlier proceedings or not) in addressing the needs of juvenile offenders in the province."

The order handed down in February therefore directs that reports be filed every four months by the Director: Special Needs in Education, Department of Education, Eastern Cape Provincial Government, until the Judge President authorises in writing a release from this obligation. These reports would have to set out the progress achieved towards the establishment of a reform school in the Eastern Cape Province, and progress made towards the development of a protocol to be followed when designating and transferring juvenile offenders who have been sentenced to reform school in terms of section 290(1)(d) of the Criminal Procedure Act 51 of 1977.

Interestingly, the order requires the reports also to be copied to the Centre for Child Law at the University of Pretoria in view of their expertise in this area, as well as to the Legal Resources Centre, who saw the application come to fruition. Thus, although it may appear that the structural interdict route was not followed in the first Zuba decision, in reality the court has now indeed assumed a significant monitoring and oversight function over the executive in the quest to ensure delivery on constitutional obligations. •

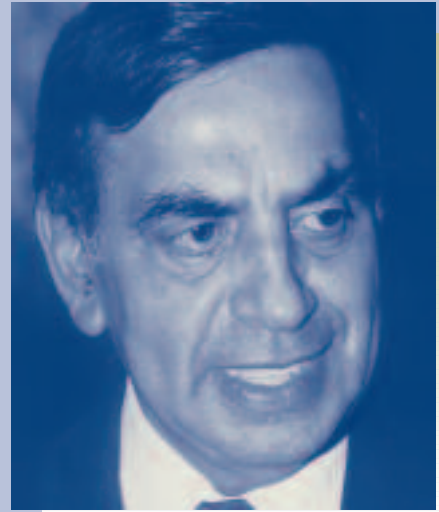
*The matter concerned the absence of reform schools for young offenders in that province, and the plans of the Department of Education to build or commission such a facility to enable the proper use of this sentence for the province's young people.*

# Remembering

## Dullah Omar

### (1934 – 2004)

by Ann Skelton, former Juvenile Justice Project  
Committee member of the South African  
Law Commission



Much has been said in the newspapers about Dullah Omar's wisdom, humility and sense of community. All of those who knew him have stories to vouch for the accuracy of these descriptions. Michelle India Baird who used to work at the Community Law Centre in the early 1990s and who was very close to Dullah told me a story the other day about the first Children's Summit in Cape Town, when the children wrote the Children's Charter. They hoped to hand it to Thabo Mbeki who was to be the keynote speaker. When he was unable to attend at the last minute, Michelle phoned Dullah in a panic to see if he could find a replacement, and he promised to help her. He phoned her back a little later to say, "I can't get hold of anyone important, but I'll come."

The Minister of Justice who did not consider himself to be important, was in fact vitally important to the transformation of the way that children are treated in the criminal justice system. Dullah felt very strongly about children in prison and originally chaired the non-government consortium that drafted the first proposals for a new juvenile justice system for South Africa. He had to withdraw from the consortium because of his deep involvement with CODESA. However, in a wonderful stroke of luck, he was eventually to receive the proposals from that group in 1994, as the Minister of Justice.

It was Dullah who decided that the drafting of a new law relating to child offenders should be done through the South African Law Commission. He appointed the committee that drafted the Bill, and it was surely no

coincidence that the committee was made up of people from the non-government sector who had

worked on the ground in relation to children in the criminal justice system, and who had been at the forefront of calling for change.

During the process of legal drafting Dullah was easily accessible to members of the committee. We often brain-stormed with him, particularly around the issue of children awaiting trial in prison, which became a very thorny issue. He would listen carefully, weighing what we were saying on the one hand with pressures that were bearing on him from other people on the other. I remember him playing devil's advocate on the issue of whether children under the age of 14 years should be able to be imprisoned awaiting trial. Hearing him put forward a theoretical case for such a provision in the law, I became despondent and said to him "Maybe I am being too naive." He responded strongly to me – "No, don't say that, you must always strive for what you believe in!" That was the quintessential Dullah, inviting one to look at the other side, but at the same time encouraging one to remain firm to one's principles. It could be confusing, and sometimes he was criticised for not being decisive. The reason for that was that he had such an inherent belief in justice that he would always be weighing up a range of approaches and views. He brought a lot of balance to debates – and this showed through in the final form of the Truth and Reconciliation Commission, which was largely guided by his hand.

Towards the end of last year I wrote to him to tell him how things were going with the Child Justice Bill as it chugged its way, finally, through the Portfolio Committee process. By then he was the Minister of Transport, but I knew that he had maintained a strong interest in the Bill throughout. Although he was very ill by that time, he responded immediately with a letter saying that he was "excited" to receive my positive comments on progress. Regarding my observation that we would probably not get everything we had wanted, he said: "The ideal is not always attainable, but making progress towards that ideal in itself is great progress."

He urged us all to work hard as we faced the challenges of implementation that lie ahead. And in honour of his memory, I believe we should all pledge to do just that. •

# *Boy, six, in maximum- security prison: Zambia*

*by Abraham Mwansa\**

I rarely spent an entire week in my office, the four and half years I worked for the Legal Resources Foundation (LRF), a non-government organisation in Zambia that offers legal services to the indigent in the community and litigates in public interest.

About six kilometres north of the central town of Kabwe lies the only maximum-security prison in Zambia, which was built in the colonial days. On the morning of 13 February 2003, I made my way to the prison after a tip from one of the prison officials telling me that a boy was being remanded at the prison for a murder charge pending trial by the High Court. The officer intimated that the apparent age of the boy was only six. As usual, I started with my routine work by first talking to my old clients, mostly those on death row but pending appeal to the Supreme Court. My clients confirmed the presence of the juvenile in the prison. I spoke to those who were taking care of the boy in prison; they called him "our last-born". They told me that they kept him well and that he was not abused. I took their word.

Finally, I demanded to see the boy. The receptionist called for the boy and he was brought in. I could not believe my eyes when I saw the young child. I sat down with my new friend so that I could get first-hand information regarding the circumstances of his detention. The boy was able



*The boy recalled that during his six months' stay at Mumbwa prison he was never separated from adults. He shared all the facilities with them.*

to narrate what had happened exactly, especially with regard to dates. He had been brought to the maximum-security prison pending trial in March 2003 at Kabwe High Court on a murder charge from his previous place of detention, the Mumbwa State Prison where he had been remanded for six months.

The boy narrated the ordeal to me. He stated that at the time of his arrest he was in grade one. He said on the morning of 29 June 2002, the deceased, himself and other children had gone into the bush to hunt for rats. At about 14:00 they returned and each of them went their own way. However, the following day in the afternoon he was picked up by the police who were accompanied by the deceased's grandmother. They took him back to the bush where they found the body of the deceased. He was accused of killing the 3-year-old girl. Shortly thereafter the boy was taken into custody and detained at Mumbwa Police Station where he stayed for three days before being taken to Mumbwa State Prison. There he was remanded pending committal for summary trial by the High Court. The boy recalled that during his six months' stay at Mumbwa

prison he was never separated from adults. He shared all the facilities with them. During this period, unfortunately, the boy was visited only three times by his parents. They stayed quite a distance from the prison. Adults who had been committed to the High Court for trial from this prison and had come with the boy confirmed these facts. The boy was committed to the High Court in October 2002, but arrived at the maximum-security prison on 5 January 2003.

The story was touching. I therefore decided to challenge the boy's presence in the prison; first, under section 14(1) of the Penal Code Chapter 87 of the Laws of Zambia, children under the age of eight cannot be criminally liable for any acts or omissions; secondly, subsection (2) states that children above the age of eight but below 12 are only criminally liable once it is proved that, at the time of commission of the offence, they knew what they were doing was wrong. These sections had not been taken into account, otherwise the boy could not have been charged, arrested and remanded to custody. In addition, the boy's constitutional rights were being infringed upon by the state and the state ought to compensate him for the loss of liberty, dignity, the right to education, and for false imprisonment.

I therefore commenced an action against the state, demanding a judicial review of the decision by the state to charge, arrest and remand the child. This matter needed to be heard promptly as we could not wait until March when the boy was to be tried. The matter was widely publicised by the media and almost immediately the state transferred the juvenile to a juvenile cell. This was not sufficient as the boy should not have been charged in the first place because of his age. The High Court Judge Justice REM Mwape granted leave to proceed with the application for a judicial review. At this stage the state decided to reduce the charge from murder to manslaughter. This was a good chance to apply for bail pending the hearing of the application. Accordingly the boy was granted bail and we arranged a school placement for him to rejoin society, pending the hearing of the application for judicial review or his trial on the new charge.

Before the matter could be heard, the state entered a *nolle prosequi* on 3 March 2003. Even though the application for judicial review included a claim for damages, these claims have not been heard till today. The boy was reunited with his parents a few days after he was discharged. It must be noted that this is not the only case that the writer has handled concerning children below the age of 12 in Zambia. There is a tendency to charge young children and incarcerate them with adults, despite the fact that children's rights are protected even under the penal law. Besides this, Zambia is party to a number of International Human Rights instruments, including the International Convention on the Rights of the Child. ●

\* *Principal Advocate, Legal Resources Foundation, Zambia; LLM student, Human Rights and Democratisation in Africa, Centre for Human Rights, Faculty of Law, University of Pretoria.*

# *Bonnytoun 2004:* *a visit by CRED* *and the Child* *Justice Alliance*

*by Stef van Schijndel*



In February 2004 a series of workshops was run by CRED, in collaboration with the Child Justice Alliance, in order to elicit the views and opinions of children awaiting trial regarding their experiences from the point of arrest to their appearance in court.

These views were obtained through the use of creative art. The different disciplines used included drama, visual art, print media and creative writing.

The workshops' main focus was 'decision-making'. While examining the process that led to the participant's arrest, the focus was on the decisions made by the child that led to the arrest. In addition, the children were required to gain insight into the decisions they made from the time of arrest until the present where they found themselves in

Bonnytown. Finally, the children were given an opportunity to reflect on future decisions that would prevent them from ending up in conflict with the law again.

The older boys expressed satisfaction with the fact that they were finally receiving some form of intervention and stimulation during their time of detention. Their level of participation was high. A great deal of their energy was focused on gang-involvement in detention and how this will affect their lives after release.

With the younger boys, the focus was on distinguishing a good decision from a bad one. By examining their own experiences they tried to develop materials to express what bad decisions they had made and what good decisions they should make in future.

Each of the groups presented their findings and outcomes, which include:

*"Change starts with me."*

*"Drugs kill you."*

*"I had to make a choice of when I get out what I am going to do with my life. My choice was to do a computer course, A.B.E.T where they learn to read and write."*

Some of the artworks produced by the children are displayed on these pages. •



*"My choice was to do a computer course."*

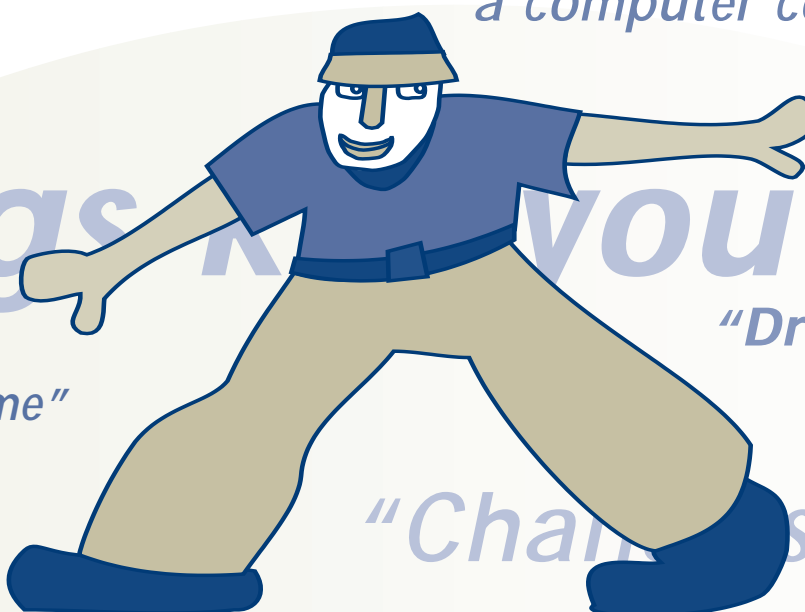
*"Drugs kill you"*

*"Drugs kill y*

*"Change starts with me"*

*"Change starts*

*"I had to make a choice*



# Clanwilliam

## has its own place of safety

by Daksha Kassan

On 27 February 2004, the Department of Social Services and Poverty Alleviation for the Western Cape hosted the official opening of a new place of safety in Clanwilliam for young persons awaiting trial. The opening of this facility is welcome in light of the Child Justice Bill which, when promulgated, will require the availability of such premises to ensure the efficient and successful implementation of the provisions of the Bill when it comes to dealing with the placement of children awaiting trial.

Places of safety are facilities established in terms of the Child Care Act (No. 74 of 1983) and are there to provide temporary care, accommodation and placement for children who are awaiting trial. These children remain at a place of safety until their court cases have been completed and the criminal court has made a ruling on the matter. Children referred to these facilities are often those who cannot be released into the care of their parents because their parents cannot be located or traced.

The facility at Clanwilliam will accommodate approximately 50 children, specifically boys, generally between the ages of 14-18 years. It has primarily been established to serve the West Coast region which includes areas such as Citrusdal, Malmesbury, Lamberts Bay, Vredendal, Vanrhynsdorp, Piketberg and Moorreesburg. In the past, due to a lack of such a facility in this area, children awaiting trial were either kept in prisons in Ceres, Malmesbury and Vanrhynsdorp or sent to places of safety in Cape Town. The long distance between their homes and the places of safety in Cape Town often meant that the children's families were unable to remain in constant contact with them and parents or caregivers were unable to visit them due to lack of transport or funds. Having such a facility in the area would definitely eliminate this problem, as children will be closer to their homes and within a familiar area. In addition, the SAPS will also save on the cost of having to transport children between the centres they were previously held at and the courts which they were required to appear.

The services that are to be provided at the facility will be outsourced to private service providers. Such services would, *inter alia*, include the provision of care, supervision, and the imparting of skills and educational programmes. The latter would possibly include woodwork programmes, welding and computer classes.

The facility opened on 1 April 2004 but no children have been admitted to it as yet. This is on account of the fact that the staff members are undergoing training and are in the process of orientating themselves with their new environment and the tasks they will soon need to carry



Viewing the opening of the facility.

out. It is intended that the first group of children will be admitted to the centre during May 2004.

While there is no immediate plan to establish further facilities for children awaiting trial in the Western Cape, the opening of this facility fulfils one of the main objectives in the Department's Strategic Plan for 2004/2005.

In conclusion, the establishment and opening of this place of safety in Clanwilliam will certainly assist in the efficient implementation of the new child justice legislation in that presiding officers would be able to refer children to a facility close to their homes. In addition, the availability of such a facility would certainly circumvent the likelihood of children who are awaiting trial being referred to prison. •



# *Pre-trial Awareness Training (PAT) – a new programme being developed by CRED*

*by Kristina Muller-Kuckelberg*

**C**RED is a state-funded non-profit organisation working with youth at risk, primarily focusing on youth in conflict with the law. The organisation was founded in 1996 and now has an established history of working with children at risk both in prison and in the community.

CRED's methodology involves using the arts to engage these young people. While educating children in different art forms, the programmes focus on teaching the participants life skills. The aim of CRED programmes is to encourage young people to create economic independence or continue with their education.

CRED offers support to juveniles in pre-trial detention and sentenced youth, as well as post-release care for these young people. In particular, during pre-trial detention children are taken through short cycles where they learn about effective decision-making and anger management.

PAT is a new programme being developed by CRED for youth in pre-trial detention and is funded jointly by the Federal Department of Economic Cooperation and Development of Germany and Streets e.V. (Germany). It is a pre-trial awareness training programme that aims to reinforce young people's sense of responsibility in their dealings with the courts and the justice system. PAT, therefore, supplements the life skills programme already being offered by CRED for children awaiting trial in detention.

The objectives of the programme are:

- Enhancing the information young people have about the pre-trial decisions they have to make, with the aim to prepare the children for these and other important stages arising prior to and during the trial process.
- Enabling youth to reflect on their offences and the potential legal consequences, and demonstrate an awareness, both emotionally and intellectually, of the crime they are accused of having perpetrated.
- Developing the self-concept of youth, encouraging personal responsibility and confidence.
- Equipping youth with appropriate strategies to participate proactively in the courtroom proceedings, and demonstrate initiative in describing the circumstances leading to their detention.

The awareness training will be implemented through an interactive, educative drama performance. Professional actors will perform a play depicting a fictitious trial before the juvenile court. Legal information will be embedded in the story which, as the scenes unfold, recounts a young person's experience before and during the trial.

A group of 20 – 25 children held in pre-trial detention will participate in the performance as the audience. The composition of the group will depend on the severity of the charges against them. Juveniles with similar backgrounds will form an audience group, so that legal and personal problems can be addressed in a target group-specific way. The youth workers of CRED, who have built up a relationship of trust with the children during the life-skills programme, will supervise the performance.

PAT is in its development stage until the end of May 2004 and is scheduled for implementation from June 2004. •



# *The birth of a regional juvenile justice network in East Africa*

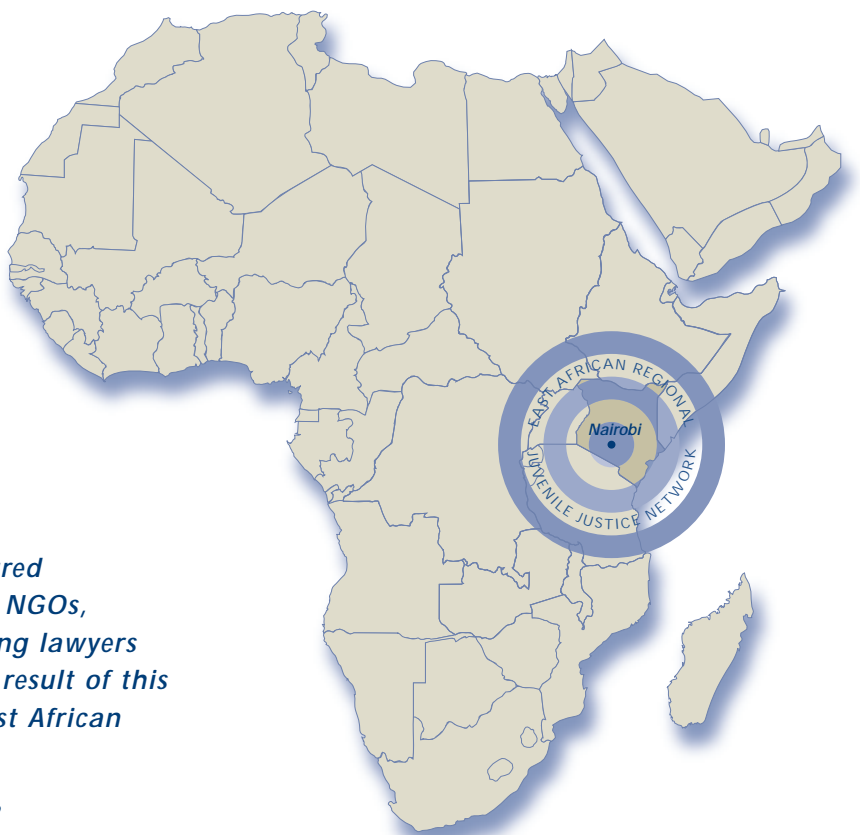
*by Godfrey O Odongo, doctoral intern, Children's Rights Project, Community Law Centre*

*On 20 November 2003, as part of efforts to mark Universal Child Rights Day, the first East African Regional Conference on Juvenile Justice, drawing participants from Kenya, Tanzania and Uganda, was held in Nairobi, Kenya. Organised by The Child Rights Advisory and Legal Documentation Centre (CRADLE), a child rights non-governmental organisation in Kenya, the Conference featured representatives of governments, child rights NGOs, donor organisations and individual practising lawyers drawn from the three countries. It was as a result of this landmark conference that the idea of an East African Juvenile Justice Network was conceived.*

## **Why a regional juvenile justice network?**

During the discussions at the Conference, participants identified some of the common problems that transcend the implementation of children's rights in the region with particular focus on juvenile justice issues. It became apparent that at the apex of these common constraints was the issue of lack of legal representation for children accused of committing crimes or child victims of crime. This is against the background of increasing juvenile offending in the region coupled with skyrocketing statistics on child abuse – the bulk of which comprises cases of sexual offences committed against the girl-child.

Participants appreciated efforts on the part of a number of civil society organisations in providing free legal services to children in the three respective countries. However, it became evident that institutionalised legal aid schemes, not only for children, but also for the general populace was markedly non-existent and still ranked low in the regional governments' priorities. This lacuna exists despite the inclusion of the



child's right to adequate legal representation in the UN Convention on the Rights of the Child, the Constitutions of Uganda and Tanzania and in the recent Children's Statutes of Kenya and Uganda.

The ambivalence on the part of the respective governments towards this aspect of children's rights is made all the more glaring by the case of equally lethargic and indifferent legal professions in the three jurisdictions. Thus, in all three countries, very few lawyers are willing to take up cases on the basis of voluntary legal

... it became evident that institutionalised legal aid schemes, not only for children, but also for the general populace was markedly non-existent and still ranked low in the regional governments' priorities.

aid/assistance. A remarkable exception to this general position is the case of Uganda where participants were informed that it is now a requirement that before the annual renewal of practising certificates for lawyers in private practice such lawyers must have done at least four cases of pro-bono work (voluntary legal aid) which may include litigation of children's cases (albeit not necessarily).

Participants recommended the possibility of tailoring such a rule in a way that may be beneficial to the protection of children's rights, for example, by requiring that part of such voluntary legal work should entail the provision of legal services (within a certain period of time) to the cause of children's rights.

Thus, while participants acknowledged the dire need for institutionalised government-sponsored legal aid schemes for the fulfilment of the right to legal representation within the juvenile justice systems, the place of the private sector in this regard was borne in mind. It was emphasised that civil society and individual legal practitioners alike had obligations to this end.

Yet another common issue identified was that of the general lack of public awareness on the

subject of children's rights coupled with the disinterest on the part of key stakeholders, particularly government officers tasked with child rights issues.

### The network and its objectives

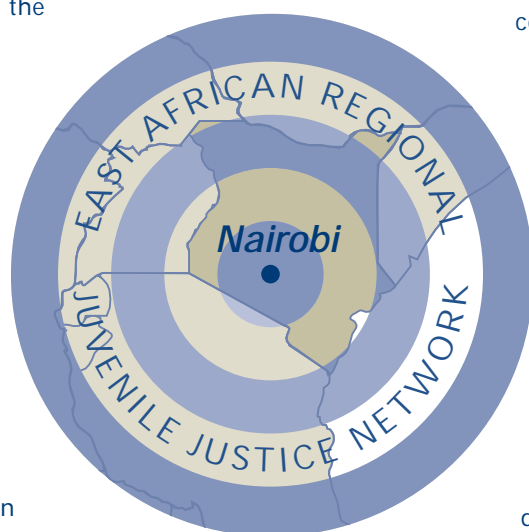
According to the Memorandum of Understanding (MOU) to be signed between the network's members, it is envisaged that the network will bring together child rights NGOs, institutions (including government departments on children's rights) and individuals working within the child rights sector in the East African region. Already, 15 organisations, including one international non-governmental organisation, have indicated the common desire to become members.

The objectives of the regional network include:

- The identification, replication and development of best practices in juvenile justice within the region using international standards and experiences.
- The coordination of juvenile justice issues within the region amongst and between members.
- Undertaking of collaborative efforts on issues of juvenile justice in the region, including the provision of free legal services within the context of cross-border legal practice, training on pro-bono legal aid, and public awareness on the rights of children.
- Identifying gaps in legal provisions, policies and the juvenile justice systems within the region including the need to lobby for and foster coherent child laws.
- Building capacities of members, other non-governmental organisations and government agencies in dealing with juvenile justice issues including through efforts in legal and para-legal training and advocacy.
- The development of joint publications on juvenile justice issues.

### Conclusion

With the common constraints besetting the three countries in mind and the regional integration under the auspices of the EAC already under way, it must be conceded that the idea of a regional juvenile justice network is indeed timely. It is therefore heartening to note that the network's gestation is just about to be completed as evidenced by the drawing up of the MOU between the member organisations. This MOU, *inter alia*, identifies the composition of the steering committee in charge of the network's day-to-day running and a secretariat for the network's day-to-day operations. Further, it is noteworthy that within a short span of three months, at least 15 organisations and institutions have already expressed interest in the regional network's membership. It is hoped that this noble idea will come to fruition for the betterment of the protection of children's rights in the regional juvenile justice systems. •



# NOTICE-BOARD



## Upcoming event

- A workshop on Children in the Law, focusing on child justice will be held on 16 June 2004 at UWC. This will be hosted by the Association of Regional Court Magistrates of South Africa, Faculty of Law, UWC and the Community Law Centre. For further information, contact Ms S Geldenhuys on 021 959 3302.

## Useful contact details

- For more information on the East African Juvenile Justice Network, contact:

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