

## WORKING GROUP OF PERSONS OF AFRICAN DESCENT (25 May 2022)

### *From the margins to the mainstream: The rights of children of African descent in the child justice system*

Benyam Dawit Mezmur – Professor of Law, University of the Western Cape, and Eleanor Roosevelt Fellow, Harvard Law School Human Rights Program; and Member of the UN Committee on the Rights of the Child.

Thank you for this opportunity- not only for focusing on children and children of African descent, but also for this panel which looks at a very important aspect- child justice.

Now, I would be, as they say, “clever by half”, if I were to start my intervention from Articles 37 or 40 on juvenile justice. Because the circumstances that lead children to come in conflict with the law (actually sometimes it is the law that is in conflict with them as it is not child friendly) including Afro-descendants – are multifold and often have their basis in failures related to the upholding of the right to education, health care, social services, fighting against discrimination, making sure that policies and programmes are well informed by disaggregated data etc.

So let me pause the frame related specifically to child justice for later, and highlight few of the precursors.

The starting emphasis should be on prevention- preventing children from getting in the child justice system- and that requires respecting all rights in the CRC- I highlight few related issues.

Addressing **discrimination**, including **systemic discrimination** is critical. In one country we said “While noting the measures taken to eliminate discrimination against children in marginalized or disadvantaged situations, the Committee is deeply concerned about...children of African descent ...”

In respect of **health and health services** we have noted “While welcoming the progress made in reducing child mortality and malnutrition”, the Committee is concerned that “Child and maternal mortality rates continue to be very high, particularly among rural, indigenous and children of African descent”

The significant differences in **education coverage**, mostly affecting indigenous, children of African descent has also been a concern.

**Disaggregated data** is important. As a Committee we “remain seriously concerned that the State party has one of the highest rates of child homicide in the world, with the majority of victims being adolescent of African descent ...” Focus on “national averages” masks the challenges children of African descent face. In some instances issues faced by other groups, for example indigenous children, might get priority and States allow issues of children of African descent to fall by the way side partly because of lack of disaggregated data.

The lack of **birth registration** principally affects the most excluded children, including those living in remote or isolated rural areas, those living in poverty, those who are indigenous and afro-descendants, ... and under-registration increases the risks of

children becoming the victims of human trafficking, among other crimes, but also being victimised in the criminal justice system. It also limits access to social services.

## **Administration of juvenile justice**

Let me pause this – and use **my last few minutes** focusing directly on the administration of child justice with a particular focus on children of African descent and in this respect I would like to make few points, most of which are based on the General Comment on Child Justice No 24 of the CRC Committee.

The start of **States' interventions** should not be at those that are already above the minimum age of criminal responsibility but include “early intervention for children who are below the minimum age of criminal responsibility requires child-friendly and multidisciplinary responses to the first signs of behaviour that would, if the child were above the minimum age of criminal responsibility, be considered an offence. For this to have positive outcomes, “children should be supported within their families and communities” and for those children of African descent who might be over-represented in the data of children who are deprived of their family environments, alternative care should preferably be in a family setting.

One area that often forces children of African descent to be over represented in the child justice system relates to the extent to which “a systemic approach to prevention also includes **closing pathways** into the child justice system through the decriminalization of **minor offences** such as school absence, running away, begging or trespassing, which often are the result of poverty, homelessness or family violence”.

Poverty, absence of closer family guidance, and other similar shortcomings might force children of African descent to engage in early sexual activities, sometimes among themselves. So “child victims of sexual exploitation and adolescents who engage **with one another in consensual sexual** acts should not be criminalized”.

The extent to which a child system emphasises interventions that avoid resorting to judicial proceedings is critical. Measures dealing with children that avoid resorting to judicial proceedings have been introduced into many systems around the world, and are generally referred to as diversion. In some instances children of African descent, by the mere fact of biases that labels them as “**aggressive**” “**repeat offender**” “**predators**” **etc**, are not offered this opportunity. And when the opportunity is offered and completed the CRC Committee’s guidance is that “it should result in a definite and final closure of the case. Although confidential records of diversion can be kept for administrative, review, investigative and research purposes, they should not be viewed as criminal convictions or result in criminal records”. States need to closely scrutinise in any discrimination in the application of this.

**Oftentimes the challenges are not in the laws but their discriminatory application. In one State that was reviewed by the CRC Committee a recommendation that said (and I quote) “the Committee remains concerned that alternative measures to detention are not applied effectively, resulting, inter alia, in large numbers of children, particularly Afro-descendants, serving prison sentences... including for minor offences that do not justify deprivation of liberty”** was provided.

I have already alluded to the link between **birth registrations, administration of child justice**, and children of African descent. Age determination processes that are non-conclusive, or those that just make predictions on the basis of physical appearance- looks, height, etc could lead to disproportionately arbitrary outcomes for children of African descent – and the recommendation that “if there is no proof of age and it cannot be established that the child is below or above the minimum age of criminal responsibility, the child is to be given the benefit of the doubt and is not to be held criminally responsible” should hold. Moreover “if there is no proof of age by birth certificate, the authority should accept all documentation that can prove age, such as notification of birth, extracts from birth registries, baptismal or equivalent documents or school reports. Documents should be considered genuine unless there is proof to the contrary”.

It is not uncommon for children, and in today’s context children of African descent to be accused **jointly with an adult**. “In cases where a child commits an offence together with one or more adults, the rules of the child justice system applies to the child, whether they are tried jointly or separately”.

**Guarantees for a fair trial** are absolutely critical for any child justice or for that matter any justice system. Safeguards against discrimination are needed from the earliest contact with the criminal justice system and throughout the trial, and discrimination against any group of children requires active redress. What is the extent to which continuous and systematic training of professionals in the child justice system is provided, including on non-discrimination and the needs of marginalised children, to uphold those guarantees.

Needless to say “the **presumption of innocence** requires that the burden of proof of the charge is on the prosecution, regardless of the nature of the offence. Suspicious behaviour on the part of the child should not lead to assumptions of guilt, as it may be due to a lack of understanding of the process, immaturity, fear or other reasons”.

**Free assistance of an interpreter** is critical, especially for children in marginalised situations for example with limited or no education, not benefiting from a family environment etc.

The rule in the CRC is that deprivation of liberty should be a measure of last resort and for the **shortest possible time**. It is the CRC Committee’s view that “ [i]n the application of the principle that deprivation of liberty should be imposed for the shortest appropriate period of time, States parties should provide regular opportunities to permit early release from custody, including police custody, into the care of parents or other appropriate adults. There should be discretion to release with or without conditions, such as reporting to an authorized person or place. The **payment of monetary bail should not be a requirement**, as most children cannot pay and because it discriminates against poor and marginalized families” including children of African descent.

We have seen as a Committee the manner in which **the media** can be a positive tool for the realisation of the rights of the child and at times a negative one. “Children who commit offences are often subjected to negative publicity in the media, which contributes to a discriminatory and negative stereotyping of those children” or even

worse “those groups” that the children come from. This negative presentation or criminalization of children is often based on a misrepresentation and/or misunderstanding of the causes of crime, and regularly results in calls for tougher approaches (zero-tolerance and “three strikes” approaches, mandatory sentences, trial in adult courts and other primarily punitive measures).

The limitations, and I dare to say biases and discriminations of technology, including **facial recognition technology** for law enforcement, and its negative impacts of persons of African descent, including children, is getting more and more attention.

If we are serious about **leaving no child behind**, we should bring the issues of children of African descent from the margins to the mainstream- not only in respect of education, health, social services etc, but also in the context of child justice. The CRC **demands no less**.

Thank you for your attention!