INVESTIGATING THE MINIMUM AGE OF CRIMINAL RESPONSIBILITY IN AFRICAN LEGAL SYSTEMS

By

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Prepared under the supervision of Professor Julia Sloth-Nielsen

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DECLARATION

I, Kelly-Anne Ramages, hereby declare that this work is original and the result of my own effort. It has never on any previous occasion been presented in part or whole to any Board for any Degree.

I further declare that all secondary information used has been duly acknowledged in the work.

Student

Signed……………………………   Date………………………

Supervisor

Signed……………………………   Date………………………
ACKNOWLEDGEMENTS

‘Trust in the Lord with all your heart; do not depend on your own understanding. Seek his will in all you do, and he will direct your paths. Don’t be impressed with your own wisdom. Instead, fear the Lord and turn your back on evil. Then you will gain renewed health and vitality’. Proverbs 3: 5-8 (NLT).

I am grateful to my parents who have given me the opportunity to attain the highest levels of education and who have supported me throughout my studies. My dad deserves a special mention for his devotion, help and encouragement. He has never given up on me or doubted my ability to achieve my dreams. To my siblings for their constant interest, love and support.

To my supervisor, Professor Julia Sloth-Nielsen, the phrase ‘dynamite comes in small packages’ was coined with her in mind. Our relationship started as lecturer and student in 2006. Since then she has become my kindest and harshest critic, an excellent motivator, a guidance counsellor and currently my mentor. Her office is always open and her email response time is quicker than anyone I have ever met. Thank you for your endless dedication and selfless efforts in improving Children’s Rights globally and for taking a chance on me.

Finally to Benyam Mezmur and Jill Claassen from the Community Law Centre who so generously gave of their time whenever I needed a helping hand in moving forward with my research process.
ABSTRACT

The following thesis investigates the MACR in African Legal Systems. The MACR is the youngest age at which children in conflict with the law find themselves caught up in the harsh realities of the criminal justice system. Up until recently, debates around fixing a MACR had been successfully side-stepped since the adoption of the UNCRC in 1989. The UNCRC has provided for human rights for children on a global scale while the ACRWC provides for such rights regionally. Contracting States Parties to these treaties agree that there needs to be a MACR in place and have adopted a children’s rights-based framework for reviewing their current child laws, policies and practices in accordance with the minimum standards provided. They do not however, agree on what the fixed minimum age should be.

At international level, the debates around what the minimum age should be were laid to rest with the advent of the CROC’s General Comment No.10 in 2007. The international community fixed the MACR at the age of 12. The States Parties under study are both signatories to both the UNCRC and ACRWC. At regional level, the ACERWC has not introduced any concrete documentation concerning what the fixed minimum age should be. This has posed a problem for some contracting States Parties who have a fixed minimum age set lower than 12. These States Parties are encouraged through the system of State reporting to raise their minimums in accordance with international law.

This thesis looks at the domestication of international law, especially General Comment No. 10, and how it impacts on the States Parties national legal system and their MACR laws. It highlights the various legal reform processes undertaken in the
countries under study in determining their MACR, and some of the problems related to establishing a MACR as well as the arguments in favour of both lower and higher MACR’s.

A whole chapter of this work is devoted to South Africa’s juvenile justice reform as it is representative of some of the other African legal systems that used South Africa’s Child Justice Bill as a good practice model for their own process of legislative reform. It provides a critical analysis of the trenchant debates and case law that underpin the rationale for South Africa’s chosen MACR. Chapter 2 of this Bill provides all the necessary information pertaining to the criminal capacity of children under the age of 14 years and other matters relating to age. The Bill has undergone considerable changes since its first appearance in Parliament in 2002, especially with regard to chapter 2. The MACR for South Africa remains below the minimum age required at international law. The drafters of the Bill, however, have seen it fit to put mechanisms in place that will ensure that the MACR is reviewed regularly with a view to increasing the MACR in the next 5 years.

In conclusion I argue that countries under study have started their child law reform processes. Yet, more than half fall short of the minimum age requirement set by the CROC in General Comment No.10. The CROC must remain patient while these countries continue to review their MACR in an attempt to raise it in accordance with international principles.
KEYWORDS/PHRASES

International law

Juvenile justice

Children in conflict with the law

Child-centered criminal justice system

Human rights for children

Rights-based approach

Minimum age

Upper age

Criminal responsibility

Criminal capacity

*Doli incapax* rule
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<td>ACERWC</td>
<td>African Committee of Experts on the Rights and Welfare of the Child</td>
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<td>ACRWC</td>
<td>African Charter on the Rights and Welfare of the Child</td>
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<td>AU</td>
<td>African Union</td>
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<td>CLRC</td>
<td>Child Law Review Committee</td>
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<td>CRC</td>
<td>Convention on the Rights of the Child</td>
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<td>CROC</td>
<td>Committee on the Rights of the Child</td>
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<td>DCI</td>
<td>Defence for Children International</td>
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<td>ECHR</td>
<td>European Convention for the Protection of Human Rights and Fundamental Freedoms</td>
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<td>ECOSOC</td>
<td>United Nations Economic and Social Council</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
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<td>IPJJ</td>
<td>Interagency Panel on Juvenile Justice</td>
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<td>MACR</td>
<td>Minimum Age of Criminal Responsibility</td>
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<td>MICAS</td>
<td>Ministry for the Co-ordination of Social Action</td>
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<td>NGO</td>
<td>Non Governmental Organisation</td>
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<td>NICRO</td>
<td>National Institute for Crime Prevention and Reintegration of Offenders</td>
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<td>OHCHR</td>
<td>Office of the High Commissioner for Human Rights</td>
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<td>SALRC</td>
<td>South African Law Reform Commission</td>
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<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
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UNCRC  United Nations Convention on the Rights of the Child
UNICEF  United Nations Children’s Fund
UNODC  United Nations Office on Drugs and Crime
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CHAPTER 1

INTRODUCTION TO THE ADMINISTRATION OF JUVENILE JUSTICE
AND THE MINIMUM AGE OF CRIMINAL RESPONSIBILITY (MACR)

1. Aims and rationale of the research

This thesis seeks to investigate a specific aspect of juvenile justice, namely the MACR in the African legal systems that have been selected for the purpose of this study. The administration of juvenile justice has had many far reaching developments over the last decade, both internationally and nationally. There has been much debate and development in the area concerning children in conflict with the law and the MACR. In light of developing international law regarding the MACR, this investigation needs to be done within a children’s rights framework incorporating a rights-based approach. The work started by Godfrey Odongo¹ and the recent approach adopted by the Committee on the Rights of the Child (CROC) in General Comment No. 10² forms the basis of this thesis.

The aims of this thesis is to assess, compare and analyse the MACR in accordance with the harmonisation of national and international laws, as reflected against the backdrop of 1) recent international standards and 2) African realities. The writer proposes to carry out the aims of the research by furthering the work started by Godfrey Odongo in 2005 in conjunction with the groundbreaking General Comment No.10 and its views on the MACR. In 2005 Godfrey Odongo submitted his LLD thesis on ‘The domestication if international law standards on the rights of the child

with specific reference to juvenile justice in the African context’. His research concentrated on the following six African countries, Ghana, Kenya, Lesotho, Namibia, South Africa and Uganda. Chapter 4 of his thesis was dedicated to the issue of age and criminal responsibility and legal reform in this regard. Two years later, the Committee on the Rights of the Child (CROC) produced General Comment No.10 which has provided signatories with a chronological minimum age. My thesis recaps on the work of Odongo, in so far as the MACR is concerned and reviews a further six African countries, to illustrate the international developments that have occurred since 2005 and how it impacts on national legal systems and children in conflict with the law. Finally, it will provide a critique of the position adopted by the CROC which conflicts with the position held by the South African Law Reform Commission (SALRC) and the many African countries who practice the *doli incapax* rule.

The countries I selected to research are Gambia, Ethiopia, Malawi, Mozambique, Sierra Leone and Zambia. They were chosen on the following basis; firstly due to the availability of information and English texts at the time I started my research at the beginning of 2007, secondly because all six (as well as the six countries chosen by Odongo) are signatories of both the United Nations Convention on the Rights of the Child (UNCRC) and the African Charter on the Rights and Welfare of the Child (ACRWC) and finally as they are all developing countries that share similar problems culturally, economically, practically and socially. The legal reform taken by these countries and the implementation thereof will serve to illustrate the practical implications of the MACR pre and post General Comment No.10 and how the States Parties have attempted to implement suitable MACR’s into their respective legal

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There were many other countries that I could have selected but their documents were not in English. Thus the language barrier prevented me from choosing possible other countries.
systems. It will become clear in chapter 3 that a suitable MACR may sometimes fall short of international standards and that the States Parties are urged to continue to review their existing legislation in an attempt to raise their MACR in accordance with international standards.

South Africa is used as a case study to detail some of the arguments for and against a MACR in accordance with international standards and the retention of the controversial *doli incapax* rule. The rationale behind focusing on South Africa is firstly due to the writer being a South African and is thus far better acquainted with its legal system and secondly, as some of these African countries have relied on South Africa’s Child Justice Bill\(^4\) as a good practice model\(^5\) and thirdly on account of the MACR recently receiving much attention on the parliamentary agenda this year.

2. **The meaning and significance of the MACR**

The concept of an age of criminal responsibility relates to the age at which a child has the mental ability to distinguish between right and wrong and can understand or appreciate the consequences involved (cognitive mental function) and can act in accordance with such understanding or appreciation (conative mental function).\(^6\) It is the age at which children have the capacity to commit crimes and to accept responsibility for their actions, thus rendering them liable for prosecution and formal

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\(^4\) B 49 of 2002 (2008 Cabinet version as approved by the National Assembly).


sanctions. A MACR is indicative of the lowest age at which a State or international community is willing to hold children liable for their alleged criminal acts in a court of law. Children who commit criminal acts but are below the MACR should not be exempted from being held accountable. Their accountability should, however, be based on civil law measures of welfare, educational or non-punitive measures rather than criminal sanctions.

The significance of a MACR is based on the universal trend that children are slow in developing mental capacity. Secondly, they often find themselves amongst the marginalised and vulnerable groups in society which leads to all kinds of abuse. Research has shown that the criminal justice system is not the most appropriate place to deal with such children and it is imperative that legal systems have protection measures in place to protect these children who find themselves in this unfortunate position. Thus all children in conflict with law should be entitled to the MACR protections provided in the UNCRC, other UN standards and the ACRWC (discussed in chapter 2).

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3. Problem statement

Investigating the MACR may tender difficulties in light of the fact that many African countries are developing countries structured upon deep rooted rural and cultural differences. The actual determination of a child’s true age is, and remains to be, a pressing issue in developing African legal systems. Poor infrastructure in many of these countries results in birth records being inaccessible or virtually non-existent which in turn leads to a lack of proof of age and reliable age estimates. To further complicate matters, lenient treatment afforded to child offenders by the child justice system is used by many adults as a forum to misrepresent their true age and slip through the system. Another pressing problem is the absence of appropriate responses to children below the age of the MACR and where there are responses they tend to be of a punitive nature. Despite the CROC fixing a minimum age at 12, some countries still have a lower age minimum which leads to disarray and non-uniformity amongst States Parties in the criminal justice sphere.

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4. Delineation of chapters

4.1 Chapter 1
The introduction sets out the aims and rationale of the research, the meaning and significance of the MACR, identifying the problem and an overview of the chapters. It follows with a brief discussion on the work started by Odongo and developing international standards in light of the General Comment No. 10 and its views on the MACR. The writer then provides a rationale for the selection of the 12 countries under study and the focus on South Africa. It furthermore highlights some of the practical problems related to the MACR with regard to obtaining birth records, the consequences of deep rooted cultural differences and the African conception of age.

4.2 Chapter 2
An overview of the influences of international law: This chapter focuses on the influence of UNCRC and ACRWC in upgrading international norms on child justice in relation to the minimum age issue and reforming national law in accordance with those international standards. A large portion of this chapter is dedicated to General Comment No. 10 in general and specifically to the MACR and its findings. It highlights the roles of the CROC, the African Committee of Experts and Welfare of the Child (ACERWC) and looks at other relevant international instruments such as the European Convention on Human Rights, the International Convention on Civil and Political Rights and the United Nations non-binding instruments.

4.3 Chapter 3
This chapter outlines the method of incorporating international provisions into the States Parties’ national legal systems. It then discusses the process of law reform that
each country undertook in implementing a MACR. The African legal systems already dealt with by Odongo are discussed in brief while the Gambia, Ethiopia, Malawi, Mozambique, Sierra Leone and Zambia’s law reform processes are discussed more extensively. Finally these countries MACR’s are assessed and compared to each other.

4.4 Chapter 4
CROC holds the view that a ‘split age’ is confusing and leads to discriminatory practices while the SALRC advocates the *doli incapax* rule because it serves as a ‘protective mantle’ for children in conflict with the law. This chapter critically analyses the two views and determines which view prevails in the context of South Africa. The chapter begins with an explanation of criminal capacity and the *doli incapax* presumption and whether the presumption really works in practice by looking at case law illustrations. It then provides an overview of the drafting history of South Africa’s Child Justice Bill and an in depth discussion on the development of the relevant MACR provisions since 2002 and the cogent arguments in favour of raising the MACR and retaining the presumption.

4.5 Chapter 5
The final chapter briefly recaps the influence of and value attached to international law and the extent of harmonisation. Finally it discusses the conclusions drawn from the research and provides recommendations.
CHAPTER 2

1. Introduction

On an international level, the administration of juvenile justice has been described as ‘revolutionary’ since the adoption of the 1989 UNCRC.¹ The UNCRC contains two fundamental articles concerning children in conflict with the law.² Implementation of the UNCRC should not, however, be limited to these fundamental articles. The CROC has constantly advocated that the general principles enshrined in articles 2, 3, 6 and 12 form an integral part of the administration of juvenile justice.³ Thus, when implementing and interpreting its provisions, all the UNCRC articles affecting children in conflict with the law should be taken into account.⁴

In addition to the UNCRC, other applicable binding sources of international law in the sphere of juvenile justice are the Concluding Observations of the CROC, the 1966

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² Article 37 and Article 40. See 2.3.5 for full text and detailed discussion.
ICCPR, the 1950 ECHR and the 1990 ACRWC. These are further supplemented by three sets of non-binding rules or soft law known as the 1985 Beijing Rules for the Administration of Juvenile Justice, the 1990 Standard Minimum Rules for Juveniles Deprived of their Liberty (the Havana Rules) and the Riyadh Guidelines for the Prevention of Juvenile Delinquency. Finally regard should also be had for the 1997 UN Guidelines for Action on Children in the Criminal Justice System (the Vienna Guidelines) which recommend important criminal justice guidelines and penal policy aspects for children in conflict with the law.

5 The ICCPR was the first global treaty enshrining specific provisions in articles 6(5), 10(2)(b), 14(4) and 24 regulating the administration of juvenile justice. It is important to note that these articles were aimed at necessary improvements rather than a move towards a child-centred criminal justice system.

6 Neither articles 3 and 6 of the ECHR make any reference to children yet they find application in the sphere of juvenile justice. Article 3 prohibits torture, inhuman or degrading treatment or punishment while article 6 covers a range of due process rights relevant to juveniles within the jurisdiction of the Council of Europe.


8 The Beijing Rules (UN Standard Minimum Rules for the Administration of Juvenile Justice) were adopted by General Assembly Resolution 40/33 of 23 November 1985.


10 The UN Guidelines for Action on Children in the Criminal Justice System were recommended by Economic and Social Council (ECOSOC) Resolution 1997/30 of 21 July 1997. The Vienna Guidelines provide a framework for the implementation of international standards at national level. They do not add any new content to the already existing standards; rather they were designed to facilitate effective implementation of the UNCRC and other related instruments. The Guidelines emphasise the issues relating to age, for example, the importance around birth registrations and respect for all children’s rights regardless of the legal age limits. Guideline 8 recommends that, in implementing the Guidelines, consideration should be given to the following:

‘(a) Respect for human dignity, compatible with the four general principles underlying the
The United Nations developed the non-binding Beijing Rules, Havana Rules and the Riyadh Guidelines to assist States in realising children’s rights and in protecting those rights. Many of the basic principles reflected in the UNCRC are taken directly from the non-binding rules and guidelines. These rules and guidelines provided the backbone for many of the UNCRC’s basic principles during its drafting and aid in the interpretation and understanding of its provisions.\textsuperscript{11} It suffices to say that the non-binding principles incorporated into the UNCRC carry a much stronger weight than before, while the unincorporated principles remain interpretive tools. Together these binding and non-binding international standards are the subject of a comprehensive guidance for a rights-based juvenile justice which has no equal in the field of children’s rights.\textsuperscript{12} A more recent development that goes hand in hand with these Rules and Guidelines is the CROC’s General Comments. There are 10 Comments to date which have proved to be immensely helpful for States Parties when interpreting thematic issues.\textsuperscript{13} General Comment No.10 is of particular importance for States Parties’ understanding of the MACR which is the focal point of this thesis.

\textsuperscript{11} G Van Bueren (2006) ‘Article 40: Child Criminal Justice’, in Alen, A et al \textit{A Commentary on the United Nations Convention on the Rights of the Child} 4, 5. At the same time the Beijing Rules were being adopted, the UNCRC was being drafted.
\textsuperscript{12} UNICEF (1998) \textit{Innocenti Digest: Juvenile Justice} 2.
\textsuperscript{13} See later discussion at 3.2. General Comment No. 10.
The UNCRC and the ACRWC have been the most influential international and regional instruments in the children’s rights arena. The UNCRC entered into force on 2 September 1990 after the UN General Assembly adopted it in 1989.\(^\text{14}\) It spells out basic human rights for children and places their plight on the global map.\(^\text{15}\) The ACRWC followed a decade later entering into force on 29 November 1999,\(^\text{16}\) complementing both the UNCRC and African Charter on Human and People’s Rights and reaffirming the provisions of the Declaration of the Rights and Welfare of the African Child.\(^\text{17}\) The ACRWC represents the African concept of human rights for children by taking into account their historical background, cultural heritage and the


\(^{17}\) Academics often refer to the 1981 African Charter on Human and People’s Rights as the parent charter of the ACRWC. The Declaration recognized the need for the promotion and protection of children rights in Africa. It was adopted by the Assembly Heads of State and Government of the then OAU in 1979 at its Sixteenth Ordinary Session in Monrovia, Liberia.
values of African civilization. It further recognizes the unique realities facing many African children and thus the need for special safeguards and care.

By 1997, every country had ratified the UNCRC with the exception of Somalia and the United States of America. Currently, the ACRWC has been ratified by 43 of the 53 African Union states. Ratification means that States Parties to the UNCRC and the ACRWC have committed themselves to promoting and protecting children’s rights. They are therefore accountable before the international community and should ensure that their national laws are in accordance with the provisions of these treaties.

The ability to exercise and enjoy the rights and protections afforded to children is very much dependant on the definition of a child. The ideal situation would be for the respective juvenile systems to include all persons under the age of 18 who come into conflict with the law. Juvenile systems are instead faced with the total opposite of the

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20 To view list of countries which have signed, ratified/acceded to the African Union Convention on ACRWC, see http://www.africa-union.org/roots/au/Documents/Treaties/List/African%20Charter%20on%20the%20Rights%20and%20Welfare%20of%20the%20Child.pdf [accessed 03 June 2008].
‘ideal situation’. In some jurisdictions children are excluded from juvenile justice on the basis of age or the particular offence committed.\(^{21}\) This is also evidenced by countries that do not have an overarching definition of a child which leads to inconsistencies in minimum ages.\(^{22}\) Both instruments in their articles have defined a child as ‘every human being below the age of 18’ with the UNCRC further attaching a caveat ‘unless under the law applicable to the child, majority is attained earlier’.\(^{23}\) The age of 18 has been accepted as the upper age limit for juvenile justice statutes and is indicative of the transition from childhood into adulthood.\(^{24}\)

Article 40(3)(a) of the UNCRC requires States Parties to establish a MACR below which children will not be criminally responsible.\(^{25}\) The Beijing Rules guide this principle in so far as they state that the minimum age must not be fixed too low.\(^{26}\) Article 17(4) of the ACRWC provides that ‘there shall be a minimum age below which children shall be presumed not to have the capacity to infringe the penal law’ but has no guiding principles on what that age should be and how it should be determined. The CROC has expressed its concern with regard to the vast international differences in setting a minimum age and called for a comprehensive


\(^{24}\) This is a definite improvement of the Beijing Rules, Rule 2(2)(a) where the juvenile system could be diluted because young person could include persons older than 18 or the respective legal system could deal with children younger than 18 in the adult criminal justice system. Such young children would then not be protected by the juvenile justice rules.


\(^{26}\) See Rule 4 of the Beijing Rules.
juvenile justice policy reflecting a more unified approach to the question of minimum age (amongst other things) so as to lessen the disparities amongst the States Parties and to raise international standards.\footnote{General Comment No.10, CRC/C/GC/10, 2 February 2007.}

This chapter focuses on the influences of the UNCRC and the ACRWC in upgrading international norms on juvenile justice in relation to the issue of minimum age and reforming national law in accordance with those standards. It examines the substantive principles of these two international instruments and the relevant provisions relating to the administration of juvenile justice. Finally it highlights the role of the CROC, the ACERWC and the position of General Comment No.10 in light of changing minimum age standards.

2. The United Nations Convention on the Rights of the Child

2.1 The historical development of the UNCRC

The 1924 Declaration of Geneva, although limited in its scope, was the first step towards creating human rights for children.\footnote{Adopted by the General Assembly, Geneva, 26 September 1924; L Muthoga (1992) ‘Analysis of the international instruments for the protection of the rights of the child’ in \textit{International Conference on the Rights of the Child: ‘Putting Children First’} 123.} It consisted of five principles and placed a duty on ‘men and women of all nations’ to realise rights for children in accordance with its principles.\footnote{S Detrick (1992) \textit{The United Nations Convention on the Rights of the Child: A guide to the Travaux Préparatoires’} 641, 642. In 1948 a moderate expansion was made to the Declaration of Geneva but it did not contribute much to the development of children’s rights.} The next significant development was the unanimous adoption by the UN General Assembly of the 1959 Declaration on the
Rights of the Child. This Declaration was much more comprehensive than its 1924 predecessor and made substantive contributions to the development of the rights of the child, hence initiating the process of refining human rights for children. It ushered in a language of entitlement that children were no longer property but ‘subjects of international law capable of enjoying the benefits of specific rights, freedoms’ and special protections. These entitlements were to be implemented with reference to a newly introduced principle that ‘the best interest of the child shall be the paramount consideration’. The Declaration also contained a broad non-discrimination clause applying to all people and children. Although the Declaration was adopted unanimously, it was a non-binding resolution, which meant that the entitlements it granted served only as moral entitlements.

Twenty years later the Polish government mooted the idea that the principles of the 1959 Declaration be articulated in a legally binding treaty. Their aim was to adopt

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30 Adopted by the United Nations General Assembly, Resolution 1386 (XIV), 20 November 1959.


the treaty in 1979 to commemorate the International Year of the Child. Initially the idea met with little support from other countries. The UN Commission on Human Rights appointed an open-ended Working group to manage the drafting process. The group consisted of member States, international organisations, intergovernmental organisations and non-governmental organisations which all operated on the basis of consensus.\textsuperscript{36} The ten years of consulting, drafting and negotiation that followed ended in the adoption of the UNCRC comprising an elaborate 54 articles.\textsuperscript{37}

The UNCRC is the most authoritative and widely ratified international human rights instrument guiding the development of children’s rights.\textsuperscript{38} It covers an extensive range of fundamental rights which include civil, political, social, economic, cultural, recreational and humanitarian rights.\textsuperscript{39} Detrick, a well known authority and producer of extensive works on the UNCRC eloquently states in her Guide to the ‘Travaux Préparatoires’, ‘that despite the few disappointments and gaps, there is no doubt that


\textsuperscript{38} The UNCRC has 140 Signatories and 193 Parties.


the content of the UNCRC constitutes a major leap forward in standard setting on children’s issues’.  

2.2 The General Aims and Scope of Application

The general aims of the UNCRC have been described as the four ‘P’s: participation of children in their respective communities and in decisions that affect them; protection against discrimination, and all forms of torture and inhuman treatment; prevention of abduction and harm against children, the development of preventative health care; and the provision of assistance ensuring children’s basic needs are being met. These four P’s complement each other and need to be equally applied in the domain of children’s rights. States Parties to the UNCRC must ensure that these aims are extended to all children in their jurisdiction when making laws, policies or implementing practices concerning the rights of the child.

Article 1 outlines the scope of the UNCRC when it defines the child as every human being under the age of 18. The definition is restricted by the proviso ‘unless, under

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43 S Detrick (1999) ‘A commentary on the United Nations Convention on the Rights of the Child’ 51, 52. Other international human rights instruments providing rights and protection for children lack a clearly defined scope as to whom or what qualifies as a child. For example, the ICCPR includes five different references pertaining to ‘child’, ‘children’, ‘young person’, ‘juvenile’ and ‘minor’ but does not define any of the terms nor the age at which majority can be attained. The Human Rights Council observes in article 24 of the ICCPR that the age must not be set too low and that States are not absolved
the law applicable to the child, majority is attained earlier’. \textsuperscript{44} It has been argued that the rationale behind the proviso is to accommodate communities who view durations of childhood differently.\textsuperscript{45} As a counter-argument, accommodating such communities where adulthood may be attained earlier than 18, excludes certain children from enjoying the rights under the UNCRC thus operating against them instead of for them. I submit that the proviso, although accommodating, could in fact weaken the scope of the UNCRC and act as a stumbling block for children who have attained majority before the age of 18.

2.3 The Key Principles

As a starting point to understanding the content of this comprehensive and elaborate document, the CROC has identified four key principles, enshrined in articles 2, 3, 6 and 12.\textsuperscript{46} These articles form the four ‘pillars’ or the value system upon which the UNCRC is based. In addition to these key principles that need to be applied by States Parties to all children in their jurisdiction and without discrimination, are the two from their duties if a person is younger than 18 even if he or she attained majority in their respective legal systems. The Beijing Rules 2.2(a) uses the term ‘juvenile’ for a child or young person who, under their respective legal systems, are dealt with differently to adults after the commission of an offence. The International Covenant on Economic, Social and Cultural Rights (ICESCR) includes the term ‘everyone’ in its text, thus it impliedly deals with the rights of children as children are included under the term ‘everyone’.


fundamental articles 37 and 40 which deal with the specifics for the administration of juvenile justice. These articles are discussed next and their significance for the discussion of a MACR highlighted. The MACR cannot be understood in a vacuum. Thus the practical implications for the rights of children both younger and older are crucial for our understanding of MACR.47

2.3.1 Non-discrimination

Article 2 deals with the principle of ‘non-discrimination’ as an effective measure to prevent discrimination between adults and children and between groups of children.48 This principle is very broad and regarded as central to the other rights in the UNCRC. Many children in conflict with the law often fall victim to discriminatory practices resulting from a lack of comprehensive policy and procedures. States Parties should ensure that children in conflict with the law are treated equally, regardless of the child’s race, gender, disability, ethnicity, religion and other status.49 In so doing States Parties must take necessary measures to promote comprehensive policy and procedures so as to reintegrate these children back into their communities and to assume constructive roles in society.50

49 Article 2 of the UNCRC contains a wide variety of grounds; Rule 2.1 of the Beijing Rules.
50 Article 40(1) of the UNCRC.
The non-discrimination principle was addressed in 1995, Day of General Discussion on the ‘Administration of Juvenile Justice’,\(^{51}\) in light of the subjective and arbitrary criteria in place for assessing the criminal responsibility of children and the measures applicable to them. Children’s criminal responsibility was often based on the child’s attainment of puberty, the age of discernment or the personality of the child. In light of the CROC’s call for a comprehensive juvenile justice policy, States Parties are now obligated to have a fixed MACR in place which takes into account the child’s emotional, mental and intellectual maturity rather than the subjective and arbitrary criteria above.\(^{52}\)

### 2.3.2 Best interests of the child

Article 3 is one of the core values underpinning the UNCRC. It provides that ‘in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration’.\(^{53}\) The wording indicates that it shall be ‘a primary consideration’ which implies that it is not the overriding principle in all matters and decisions affecting children. Todres has suggested that such an implication has resulted in our earlier court decisions interpreting article 3 as a procedural fairness requirement. He asserts that the effect of such an interpretation weakens the principle in that judges and others are only obligated to consider the ‘best interest of the child’ but need not reflect it in their decision.\(^{54}\) I agree with the

\(^{51}\) See later discussion at 3.1. General Day of Discussion.

\(^{52}\) General Comment No.10, CRC/C/GC10 par 32.

\(^{53}\) Article 3(1) of the UNCRC.

assertion made by Todres. I further submit that judges should be aware of this loophole and thus take due care in ensuring that the ‘best interests of the child’ principle is not only considered but also reflected in their final decisions in all matters concerning children.

Attention must be drawn to the fact that article 3 is not only concerned with the ‘best interests of the child’ but State obligations as well.\(^{55}\) In addition to the primary responsibilities of the family there is an obligation on the State to support the primary role of parents.\(^{56}\) However, the interests of the State and parents should no longer be seen as the all important or only consideration and that due weight is granted to the interests of children in all matters and decisions affecting them.\(^{57}\) Where the UNCRC has neglected a certain category (of children) the State has the obligation to fill the gap by virtue of article 3(2).\(^{58}\) The ‘best interests’ principle has been transformed beyond its original concept of discretionary welfarism\(^{59}\) and is used as an

\(^{55}\) Article 3(2) and (3) of the UNCRC.


\(^{59}\) G Van Bueren (2000) ‘The United Nations Convention on the Rights of the Child: An Evolutionary Revolution’ in Davel, CJ (Ed) Introduction to Child Law in South Africa 204; The Beijing Rules emphasises the well-being of the child in Rule 1.1 and 5.1 which includes the well-being of the family and the juvenile. Rule 14.2 provides that proceedings must be conducive to the best interests of the child while Rule 17.1(d) provides that the well-being of child should always be a guiding factor in the case against a juvenile. All these rules are consistent with the ‘best interests of the child’ principle and assist in interpreting the principle when the need arises.
interpretation tool.\textsuperscript{60} Thus it is incumbent upon judges and other role-players to consider the ‘best interest of the child’ principle in all actions concerning children.\textsuperscript{61}

The development and needs of children differ from those of adults physically, psychologically, emotionally and educationally.\textsuperscript{62} It is these differences that dictate a lesser culpability for children in conflict with the law, different treatment and separate juvenile justice systems.\textsuperscript{63} I submit that when States Parties determine an appropriate MACR they should apply their minds with insight to the above considerations, in order to ensure that such a determination is reflective of the ‘best interests’ principle.

\textbf{2.3.3 The right to life, survival and development}

Article 6 deals with the right to survival and development. It encompasses the child’s right to life, health, wellbeing, welfare and social services, protection from violence and harm, to mention a few.\textsuperscript{64} Every child has this right and ‘States Parties shall ensure to the maximum extent possible the survival and development of the child’.\textsuperscript{65} Both survival and development are dynamic concepts. Survival is a precondition for all the other rights to be enjoyed and prolonged, while development is the right of

\textsuperscript{60} Article 3(1) of the UNCRC.


\textsuperscript{62} CRC/C/GC/10 para 10; N Ferreira ‘Putting the age of criminal and tort liability into context: A dialogue between law and psychology’ (2008) 16(1) \textit{The International Journal of Children’s Rights} 29.

\textsuperscript{63} CRC/C/GC/10 para 10.


\textsuperscript{65} Article 6(2) of the UNCRC.
individuals and groups to contribute to, and appreciate, continuous socio-economic, political and cultural development in an environment that realises all human rights. Thus without these basic rights, the other rights would be meaningless.

Juvenile delinquency hampers the development of children’s enjoyment of their full rights. States Parties should set up national policies and effective programmes to prevent juvenile delinquency from eroding the inherent rights of children. The rights provided for in article 37(a) and (b) ensure that the child’s right to life and development are being fully respected.

2.3.4 Child participation

The right entrenched in article 12 is a noteworthy inclusion in the UNCRC. It is a new right which has never before been incorporated into a child-centered international document. Van Bueren argues that the UNCRC has the ability to achieve an evolutionary revolution as it seeks to change child and adult cultures into child-centered and child-friendly cultures. It would require state and society to view children as ‘evolving autonomous individuals’ who are bearers of rights and not

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67 CRC/C/GC/10 par 11.
recipients of welfare. Adults would have to be willing to give up some of their powers in order to start developing a culture of listening to children.

Article 12 of the UNCRC obliges States Parties to actively involve children who have the capacity to form their own views. The provision allows them the freedom to express such views in all matters affecting them and due weight will be given according to the child’s age and maturity. This right is not limited to trial proceedings; rather it is extended to all matters (meaning before and after trial). It further provides children with the opportunity to be heard in judicial or administrative proceedings affecting them, either directly or through a representative. Article 12(1) is quite broad in that it extends to all children who are capable of formulating opinions but are unable to articulate those opinions either verbally or in writing.

The Ridayadh Guidelines highlight the importance of participation not only for

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72 Article 12(1) of the UNCRC.


75 Article 12(2) of the UNCRC and reiterated in Article 37 right to legal assistance, Article 40 the procedural guidelines and the Beijing Rules 14.2.

planning and implementation but for also the prevention of juvenile delinquency.\textsuperscript{77} States Parties should involve children in the planning and implementation of policies and procedures that affect them.\textsuperscript{78}

The relevance of participation for the MACR relates to whether children are old enough to participate in proceedings. Articles 37(d) and 40(2)(b)(ii) and (iii) provide rights for children to participate in juvenile justice proceedings. These rights are, however, meaningless if children are too young to participate in formal proceedings or to brief a legal representative. If children are to be held criminally responsible such children must be given the full benefit of participating in the relevant proceedings.\textsuperscript{79}

As noted above articles 2, 3, 6 and 12 are not only the key principles in understanding the UNCRC, but are also relevant in the sphere of juvenile justice and, for this thesis, the MACR in particular. The principle of non-discrimination strengthens or supports the approaches used by all the other rights enshrined in the UNCRC. The ‘best interests’ principle is the overarching principle for all other rights in the UNCRC

\textsuperscript{77} See para 9(h), 37 and 50.


\textsuperscript{79} The cases of \textit{T v United Kingdom} and \textit{V v United Kingdom} (better known as the famous James Bulger case where a 2 year old toddler was murdered by two 10 year old boys) came under review in the European Court on Human Rights. Despite their tender age, T and V were subject to a public trial in a Crown court. At the time of the trial the boys were 11 years old. The review court found that in having a public trial in an adult court was unfair to the applicants given that they were suffering from post traumatic stress syndrome and it was questionable whether they able to effectively brief their lawyers and participate in the proceedings. Thus the court held that a public trial in an adult court was in contravention of article 6(1) of the European Convention for the Protection of Human Rights; J Sloth-Nielsen (2000) ‘Child Justice and Law Reform’ in Davel, CJ (Ed) \textit{Introduction to Child Law in South Africa} 383.
including those relevant to juvenile justice. Application of this principle is by no means limited to the decisions made by courts of law. Article 6 and 12 find obvious application in the field of juvenile justice where children have been deprived of their liberty or when children are afforded the chance to participate in judicial proceedings or matters affecting them. These fundamental rights and protections are available to all children in conflict with the law and must be applied when invoking the juvenile justice provisions and discussing the MACR.

2.3.5 The juvenile justice provisions: Article 37 and Article 40

The UNCRC contains two substantive articles on juvenile justice that are closely related, namely, article 37 and article 40. Article 37 deals with the provisions prohibiting torture and cruel, inhuman or degrading punishment and the deprivation of liberty while article 40 includes the provisions promoting the child’s sense of dignity and worth, the minimum age requirement, the promotion of diversion and the alternatives to custodial sentencing options as fundamental principles in the child criminal justice system. Together with article 39, they provide justification for a comprehensive juvenile justice policy.

The ICCPR laid the foundation for the juvenile justice articles. Articles 37 and 40 are far more comprehensive and child-centered than the ICCPR which provides for a juvenile procedure that only ‘takes into account age and desirability of promoting

81 This article provides for the rehabilitation and reintegration of children who have been victims of torture, cruel and inhuman punishment.
rehabilitation’. The Beijing Rules, Havana Rules and Riyadh Guidelines have had a noteworthy influence on the drafting of the juvenile justice provisions and provide invaluable assistance when interpreting them. The Beijing Rules apply equally to articles 37 and 40 while the Havana Rules and the Riyadh Guidelines were adopted to assist articles 37 and 40 respectively.84

Article 37 and 40 follow each other numerically and are discussed in that sequence. However, I am of the opinion that it would make more logical sense to examine article 40 prior to an examination of article 37. The rationale is simple. Article 40 concerns children ‘alleged as, accused of, or recognised as having infringed the penal law’ and all the legal safeguards available to them. Some of these safeguards are relevant when trying to understand the underpinnings of article 37 which deals with children who are already deprived of their liberty and their procedural rights. Thus article 37 will follow on from the discussion of article 40.

Article 40

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child’s sense of dignity and worth, which reinforces the child’s respect for the human rights and fundamental freedoms of others and which takes into account the child’s age and the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

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(i) To be presumed innocent until proven guilty according to law;

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(iv) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

(v) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

(v) To have his or her privacy fully respected at all stages of the proceedings.

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

Article 40 is the longest and most detailed of all the articles in the UNCRC. It sets out the provisions detailing the rights and protections of the child in conflict with the law from the moment of the allegation right up until and including the sentence.  

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is originally based on articles 14 and 15 of the ICCPR. Much of its interpretation is dependent on the Beijing Rules such as the rules relating to the MACR, the objectives of juvenile justice, the human rights standards to be applied and the Riyadh Guidelines setting out the standards for juvenile delinquency. The main essence of article 40 is to establish a child-centered criminal justice system encouraging the wellbeing of children.

Article 40(1) introduces the directives that States Parties should endeavour to achieve when dealing with children in conflict with the law. States Parties should treat accused children in a manner consistent with promoting their sense of dignity and worth. This right finds application from the moment children come into contact with the justice system right up until a decision is made on what to do with them. From the moment of contact, children’s dignity must be protected and respected in such a manner that it reinforces their respect for human rights and the freedoms of others. This indicates that children have a responsibility to respect the rights of others (by not infringing on their rights) while the State has a duty to cultivate their ability to do so. The State should lead by example and ensure that actors within the criminal justice system fully protect and respect the guarantees afforded to children and, in so

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89 Article 40(1) of the UNCRC.
doing, children will fulfil their responsibility of respecting the rights of others.\textsuperscript{90} The treatment of children, in terms of this article, must be appropriate to their age so as to reintegrate them into society to assume a constructive role.

Subsection 2 highlights the procedural guarantees (also referred to as due process rights) available to child offenders who are ‘alleged as or accused of having infringed penal law’.\textsuperscript{91} In terms of article 40(2)(a) the offence committed by the child described above must be a penal offence defined by law at the time the alleged offence took place. The first guarantee under subsection 2(b)(i) is the presumption of innocence afforded to children and adults alike. The guarantees in subsection (2)(b)(ii), (iii) and (iv) reflect the due process rights decided upon in the US Supreme court decision of \textit{In re Gault}.\textsuperscript{92} In this decision the court dealt with juvenile court procedures resulting in the loss of liberty. The court held that where a juvenile has been ‘alleged as or accused of infringing penal law’ he or she must be given adequate and timely written notice of the allegation or charge.\textsuperscript{93} If the juvenile faces the prospect of losing his or her liberty such juvenile must be afforded the right to legal counsel, a formal hearing, the right against self-incrimination and the opportunity to confront and cross-examine opposing witnesses.\textsuperscript{94} The same guarantees stipulated in the \textit{Gault} decision were incorporated into article 40(2)(b)(ii), (iii) and (iv). Subsection (2)(b)(iii) is, however, qualified by the phrase ‘unless considered not in the best interest of the child’, taking into account the child’s age, situation and parents or guardians. This additional

\textsuperscript{90} CRC/C/GC/10 para 13.
\textsuperscript{91} Article 40(2)(b) of the UNCRC; Rule 7.1 of the Beijing Rules; UNICEF (1998) \textit{Innocenti Digest: Juvenile Justice 5}.
\textsuperscript{92} 387 U.S. 1 (1967).
qualification allows for more informal procedures to be adopted and an atmosphere of understanding where the child can participate and freely express him or herself.\textsuperscript{95} Subsection (2)(b)(v) consists of a similar provision to that of article 37(d) which provides for appeal and review procedures and, where the child cannot understand the language used, he or she is entitled to an interpreter. Finally, the child has a right to privacy and that right must be fully respected at all stages of the proceedings. This serves as protection to prevent children from being scrutinized by the public and being labelled as delinquents.\textsuperscript{96} Research has indicated that such labelling has very traumatic and detrimental effects on children.\textsuperscript{97}

Article 40(3) of the UNCRC requires specialised legislation and procedures for children in conflict with the law. This article has been subdivided into three subsections. The first subsection details making separate laws, procedures, authorities and institutions applicable to juveniles within the spirit of article 40. Rule 2.3(a) - (c) of the Beijing Rules affirms article 40(3). These laws, procedures and authorities must meet the needs and protect the rights of the juvenile offender, meet the needs of society and ensure that the implementation of such rules and procedures are both fair and efficient.\textsuperscript{98}

\textsuperscript{95} Rule 14.2 of the Beijing Rules; Article 12 of the UNCRC.
\textsuperscript{98} Rules 2.3(a) – (c) of the Beijing Rules.
At international law, criminal responsibility relates to an age where the child is capable of understanding the consequences of his or her actions. The second subsection of this article seeks to promote a MACR. In doing so, it calls upon ratifying States to set a minimum age for children in conflict with the law. Such children below the set minimum age are deemed to lack criminal capacity. This means that they will not be held accountable for their unlawful actions under criminal law because of their young age. Rule 4.1 of the Beijing Rules provides further guidelines for interpreting the above provisions by stating that the ‘minimum age must not be fixed too low bearing in mind the emotional, mental and intellectual maturity of the child’. These guidelines are somewhat problematic as children mature differently depending on the environment in which they live. The language used in both documents is merely suggestive rather than mandatory upon states.

Data collection for the determination of minimum age has not proved an easy task especially when the determined minimum age is not the lowest age for criminal responsibility because of the seriousness of the offence. States Parties reports show

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100 Article 40(3)(a) of the UNCRC.

101 The commentary on Rule 4.1 suggests that an effort should be made to agree on a ‘reasonable’ minimum age that can apply internationally. There is no explanation on what reasonable may mean in this context; G Van Bueren (1993) ‘International Documents on Children’ 201, 202.

a wide variety of MACR ranging from 7 to 16 years of age.\textsuperscript{103} The CROC has been very critical of States that have set their MACR’s at less than 10 years old.\textsuperscript{104} For example, South Africa in its original Child Justice Bill\textsuperscript{105} raised its minimum age of criminal capacity from 7 to 10 years old and the CROC was still concerned that the legal minimum age of 10 years was too low.\textsuperscript{106} Similarly, where the minimum age is too high, the problem that arises is the lack of due process rights because children under that high minimum age have no interaction with the criminal justice system.\textsuperscript{107} They may find themselves in the social welfare system receiving social protections aimed at children in need of care rather than children in conflict with the law. It is submitted that this results in the due process rights contained in subsection (2)(b) being protected and upheld in theory only. Thus, the availability and implementation of the juvenile justice provisions are dependent on a clearly defined minimum age.

Article 40(3)(b) is aimed at encouraging States Parties to implement diversionary mechanisms away from judicial proceedings for children in conflict with the law.

\textsuperscript{105} No. 49 of 2002.
\textsuperscript{106} Concluding Observations of the Committee on the Rights of the Child: South Africa. 23/02/2000. CRC/C/15/add.122 para 17.
\textsuperscript{107} Concluding Observations of the Committee on the Rights of the Child: Mozambique. 03/14/2002. CRC/C/15/add.172 para23, 24. The CROC has applauded Mozambique for its high minimum age at 16 years old which is seen both excellent and progressive for many children in conflict with the law but the question is then asked what do we do with children below this age? They are in danger of being placed in the welfare system which caters for children in need of care not children in conflict with the law.
(those below and above the MACR) while article 40(4) provides alternative measures to institutionalised care. The availability of these measures complements the safeguards set out for children in article 37(a) and (b).

Article 37

‘States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.’

The provisions of article 37 are reflected in many other international human rights instruments which help interpret its provisions. States Parties should take cognizance of these instruments for the effective implementation of this article.


110 Detrick has noted in her commentary on Article 37 that provisions (a), (b), (c) and (d) are founded on articles 7, 9, 10 of the ICCPR.

111 The provisions of the Universal Declaration of Human Rights (UDHR), the ICCPR and the ECHR apply to ‘everyone’ which is a generic term that equally applies to children. The UN rules for juvenile
Subsection (a) instructs States Parties to protect persons under the age of 18 from torture and other cruel, inhuman or degrading punishment, the death penalty and life imprisonment without the possibility of parole. This is an absolute right for children in conflict with the law, which means that States Parties have a duty to protect them against such torture and punishment wherever they are.\textsuperscript{112} Article 37(a) has found successful application in many African countries with regard to abolition of judicially imposed corporal punishment and whipping.\textsuperscript{113}

Article 37(b) provides that the arrest, detention or imprisonment of a child should be a last resort and for the shortest appropriate time. Rule 11 of the Havana Rules stipulates that States Parties must have a minimum age in place, below which children may not be deprived of their liberty and defines deprivation of liberty to mean ‘any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority’.\textsuperscript{114} The result of this Rule is that a child below the stipulated minimum age cannot be deprived of their liberty for any reason. Rule 13 and 17 of the Beijing Rules set out guiding principles to help States Parties to interpret what is ‘a measure of last resort’ and ‘for the shortest appropriate


The commentary on Rule 13 warns against the dangers of ‘criminal contamination’ and the stresses the placement of juveniles in alternative institutions or alternative measures while awaiting trial. Guidelines in relation to adjudication and alternative measures are considered under Rule 17. In accordance with Article 40(4) of the UNCRC, Rule 17 encourages alternative measures other than incarceration to be used to the ‘maximum extent possible’. The only time that incarceration of a juvenile cannot be avoided is when the public safety is at stake.

The treatment of children deprived of their liberty is the crux of article 37(c). Great emphasis is placed on the fact that their treatment must be in accordance with their age and development. This subsection is guided by Rule 13 of the Havana Rules which states that juveniles deprived of their liberty will not lose their fundamental rights and freedoms afforded to them at national and international law by reason of their status. The CROC, however, has expressed its concern regarding the conditions of detention facilities and recommends that the applicable UN Rules and Guidelines be applied to all situations, coupled with effective monitoring, inspections and complaints procedure and appropriate training for all personnel as required by the UNCRC. The provision further holds that children deprived of their liberty must be separated from adults unless the best interests of the child suggests otherwise.

117 Beijing Rules 17.1(b).
Allowing the child to maintain contact with adults will have to be justified in terms of article 3, being the ‘best interests’ standard of the UNCRC.¹²⁰

Finally article 37(d) allows children deprived of their liberty access to legal and other appropriate assistance. Included in this subsection is their right to challenge such deprivation before a court or other competent or impartial authority.

3. The Committee on the Rights of the Child

Article 43 provides for the establishment of a supervisory body known as the CROC which consists of ‘18 experts of high moral standing and recognised competence’ in the domain of children’s rights.¹²¹ These members serve in their personal capacities and are elected by States Parties for a term of 4 years after which they may be re-elected if nominated.¹²² The supervisory body for CROC is the UN General Assembly. Every two years, the CROC has a duty submit to the General Assembly, through the Economic and Social Council, a report on its activities as the monitoring body for States Parties.¹²³ The CROC places great significance on the general

¹²¹ Article 43(2) of the UNCRC states that the Committee will consist of 10 experts, however, a heavy workload has led to an increase in membership. The Committee currently consists of 18 experts. See http://www.ohchr.org/english/bodies/crc/members.htm [accessed 01 May 2008].
¹²² Article 43(6) of the UNCRC; http://www.ohchr.org/english/bodies/crc/members.htm [accessed 01 May 2008].
¹²³ Article 44(5) of the UNCRC.
principles outlined above in articles 2, 3, 6 and 12 and advocates a move towards a rights-based approach when implementing the UNCRC.124

The CROC meets for three sessions per year in Geneva during which time it considers reports, organises days of general discussion and publishes general comments on thematic debates.125 The main functions of the CROC are to monitor and review the progress of States Parties in implementing the provisions of the UNCRC, to examine reports and to produce concluding observations for better implementation.126 More recently, the CROC coordinates Regional Follow-up Workshops educating States Parties on implementation in a particular area. The CROC also supports the work done by NGO’s who played a vital role in the drafting process and considers their independent reports.127

The CROC examines each State Party’s report, addresses concerns and makes recommendations. The examination of States Parties reports by CROC takes the form of a dialogue between State representatives and the CROC.128 Thereafter the CROC provides States Parties with its concluding observations. These observations usually

consist of an introduction, the progress made by the particular States Party, the impediments obstructing effective implementation, main areas of concern, suggestions and recommendations on how to improve State efforts when implementing their national laws in accordance with the UNCRC.\textsuperscript{129} If no further information is requested by the CROC the concluding observations are made public and are meant to be widely publicized so as to provide for a national debate to improve enforcement of the UNCRC provisions.\textsuperscript{130} The CROC does not provide for an individual complaint mechanism, but there is an ongoing debate whether such a mechanism should be catered for.

3.1 The Day of General Discussion

Each year since 1992 and during its regular sessions, the CROC has set aside a special day to engage in active debate on a particular theme or article in the UNCRC. This day is referred to as the Day of General Discussion\textsuperscript{131} which is open to any person or recognized body interested in the global plight of child.\textsuperscript{132} The main objective of these debates is to cultivate a greater appreciation of the content and meaning of a particular theme or article\textsuperscript{133} and to guide States Parties in implementing the UNCRC principles into their national legal systems.\textsuperscript{134} At the close of the session, the CROC adopts recommendations taking into account what was raised and discussed amongst the participants.

\textsuperscript{129} CRC/C/33, 7\textsuperscript{th} Session, 24 October 1994 para 19.

\textsuperscript{130} CRC/C/33, 7\textsuperscript{th} Session, 24 October 1994 para 20-22.

\textsuperscript{131} To view full texts of past themes since 1992 see \url{http://www.ohchr.org/EN/HRBodies/CRC/Pages/DiscussionThemes.aspx} [accessed 06 May 2008].

\textsuperscript{132} Article 45 of the UNCRC.

\textsuperscript{133} CRC/C/14/Rev. 1 These discussions are in accordance with rule 75 of the Committee’s provisional rules of procedure.

\textsuperscript{134} CRC/C/46 para 204.
On 13 November 1995, the topic the ‘Administration of Juvenile Justice’ received trenchant attention from the CROC and the participating parties. This was the date set aside for general discussion and an opportunity for the CROC to evaluate its activities as a treaty monitoring body in relation to the topic. Articles 37, 39 and 40 were the main topics of debate. The day, however, was reflective of a unified approach because the general principles (articles 2, 3, 6 and 12) are invaluable when considering the broader theme on the administration of juvenile justice. The two areas of concern were the ‘effective implementation of existing standards and the value of international cooperation…emphasizing the importance of accountability for the protection of, and respect for, the human rights of children, while stressing the need to foster international solidarity for the realization of those same rights.’

The evaluation of the CROC’s experience manifested the following considerations. Firstly, in relation to States Parties reports, there was a serious lack of information and data in the field of juvenile justice. Secondly, the reports consisted mainly of general legal provisions and very vague descriptions of processes in place for the effective realisation of children’s rights.

136 CRC/C/46 para 208.
The CROC was concerned that the general principles of the UNCRC were not being adequately reflected in States Parties domestic laws and practices.\textsuperscript{138} Article 2 came under the spotlight because of the subjective and arbitrary criteria used to assess the criminal responsibility of children and the measures applicable to them. Article 3, on the other hand, was reaffirmed in light of article 40(1), but States Parties reports provided evidence that separate juvenile justice systems were virtually non-existent, justice personnel lacked training and information on fundamental rights and legal safeguards were not explained or provided for. The right of children to participate in matters affecting them was often disregarded along with the protections afforded under articles 37(b) and 40(2)(b).\textsuperscript{139} This unfortunate situation was contrary to international standards and opened the door to frequent abuse of the juvenile justice system as there were no proper monitors in place to determine abuses and hand out sanctions.\textsuperscript{140} It was against this backdrop that the Day of General Discussion was meant to set in motion the wheels of change.

The CROC stressed that the realisation and success of a child-orientated system is dependent on States Parties implementing the provisions of the UNCRC in accordance with article 4.\textsuperscript{141} Children should never be deprived of their liberty until


\textsuperscript{139} Article 12 of the UNCRC.

\textsuperscript{140} CRC/C/46 para 218, 219.

\textsuperscript{141} Article 4 provides ‘States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised 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’. Guidelines 8(b) and (c) of the Vienna Guidelines provide for the same ‘maximization of resources and efforts’ as in article 4 of the UNCRC.
all the available alternatives have been exhausted. If there are no suitable alternatives and a child is deprived of his or her liberty, as a last resort, the rights in article 37(d) and 40(2)(b) should apply with immediate effect. It was further unequivocally stated in relation to institutional care that due regard be given to the ‘best interest of the child’. States Parties were urged to seek alternatives to institutional care and adopt measures that ensure transparency and the effective monitoring for these institutions. The role of the family came up in the discussions as one of the most important tools for ensuring the effective enjoyment of children’s rights and their reintegration into an environment that promotes their self-respect and dignity. These measures contribute to the goal of realising effective children’s rights and promoting the adherence of States Parties domestic laws with that of international standards in the field of juvenile justice.

State reporting and the CROC’s concluding observations are acknowledged as the frame of reference for programmes of technical assistance, the basis of understanding the situation in any country, promoting international cooperation and strengthening national capacities and infrastructures. The effect of the Day of General Discussion was to highlight the issues and difficulties surrounding the administration of juvenile justice. An enormous amount of importance was placed on international cooperation as a ‘way of rationalizing the use of resources, streamlining activities, enhancing the efficiency of programmes while reaffirming the link between criminal justice and human rights’.

142 CRC/C/46 para 230.
143 CRC/C/46 para 235.
144 CRC/C/46 para 234.
3.2 General Comment No. 10

The CROC has developed several General Comments since 2001. These comments serve as the CROC’s interpretation of the content of human rights provisions on thematic issues. To date there are currently 10 General Comments which cover issues such the aims of education, the role of independent human rights institutions, HIV/AIDS and the rights of the child, adolescent health, general measures of implementation for the Convention on the Rights of the Child, the treatment of unaccompanied and separated children outside their country of origin, implementation of child rights in early childhood, the right to protection from corporal punishment and other cruel and degrading forms of punishment, the rights of children with disabilities and children’s rights in juvenile justice. These comments provide detailed guidelines for States Parties and other duty bearers on matters not necessarily covered in the UNCRC. They raise awareness and act as a persuasive force in interpreting States Parties duties under domestic law, the UNCRC and international law generally.

146 General Comment No. 1, CRC/GC/2001/1, 17 April 2001.
149 General Comment No. 4, CRC/GC/2003/4, 6 June 2003.
150 General Comment No. 5, CRC/GC/2003/5, 3 October 2003.
151 General Comment No. 6, CRC/GC/2005/6, 3 June 2005.
152 General Comment No. 7, CRC/C/GC/7/Rev.1, 30 September 2006.
153 General Comment No. 8, CRC/C/GC/8, 2 June 2006.
154 General Comment No. 9, CRC/C/GC/9, 29 September 2006.
155 General Comment No. 10, CRC/C/GC/10, 2 February 2007.
General Comment No. 10 is the focal point of this thesis and the most substantial comment to date. It serves as an historic juncture of the present state of affairs in juvenile justice systems all over the world, representing the intersection between children’s rights and criminal justice. Since the inception of the UNCRC, States Parties have come a long way in complying with its provisions, as evidenced by States Parties reports. The CROC has commended these States Parties on their efforts in implementing the juvenile justice articles enshrined in the UNCRC into their national systems. The reports not only reflect the progress being made by signatories but their failures as well. Despite the progress of some States Parties there are many who fall short of achieving their UNCRC obligations. Thus, there is still much to be desired on the juvenile justice front in the area of due process rights, the development and implementation of measures for dealing with children in conflict with the law without resorting to legal proceedings, and the use of deprivation of liberty as a last resort.\textsuperscript{157}

The CROC has gained much of its insight on the problematic areas in juvenile justice from reviewing the periodic reports submitted by the States Parties. Areas of concern which emphasise the need for a comprehensive juvenile justice policy include the lack of facts and figures on preventative and treatment measures taken by States Parties in preventing children from coming into conflict with the law.\textsuperscript{158} The experience of lack of measures and poor statistical data on the treatment of children in conflict with the

\textsuperscript{157} CRC/C/GC/10 para 1.

\textsuperscript{158} CRC/C/GC/10 para 2.
law is shared by most States Parties.\textsuperscript{159} It is in the midst of this scarcity of necessary information and statistical data on children in conflict with the law that the General Comment attempts to alleviate these pressures by providing States Parties with improved guidelines and more detailed recommendations for the interpretation and implementation of articles 37 and 40.\textsuperscript{160}

At the outset, the General Comment elaborates on its vision for a comprehensive juvenile justice policy. It reiterates the four key principles enshrined in articles 2, 3, 6 and 12 of the UNCRC.\textsuperscript{161} These articles together with articles 4, 37, 39 and 40 are the starting point for States Parties to develop and implement a comprehensive juvenile justice policy. In so doing States Parties are to seek technical advice and assistance from the Interagency Panel on Juvenile Justice (IPJJ) represented by representatives from the Office of the High Commissioner for Human Rights (OHCHR), UNICEF, the UNODC and supporting NGO’s.\textsuperscript{162} The IPJJ are also tasked with promoting and integrating international standards through a national prevention strategy.\textsuperscript{163}


\textsuperscript{161} CRC/C/GC/10 para 6-12.


\textsuperscript{163} Such as the Beijing Rules, Havana Rules and Riyadh Guidelines.
The key principles which form the pillars of the UNCRC and upon which all the other provisions rest have been discussed in some detail above.\textsuperscript{164} In addition to these leading principles, the General Comment gives special attention to the child’s right to dignity discussed under article 40(1).\textsuperscript{165} The rest of the General Comment is devoted to delineating the core elements that are necessary for States Parties to put a comprehensive juvenile justice policy in place: ‘the prevention of a juvenile delinquency; interventions without resorting to judicial proceedings and interventions in the context of judicial proceedings; the MACR and the upper age limits for juvenile justice; the guarantees for a fair trial; and deprivation of liberty including pre-trial detention and post-trial incarceration’.\textsuperscript{166}

3.2.1 The prevention of juvenile delinquency

The General Comment places extensive emphasis on the prevention of juvenile delinquency. The CROC warns that a juvenile justice policy without a comprehensive prevention strategy is in danger of suffering serious drawbacks. At the very least, States Parties are encouraged to incorporate the Riyadh Guidelines into their national prevention polices.\textsuperscript{167} According to Guideline 2 ‘the successful prevention of juvenile delinquency requires the efforts on the part of the entire society to ensure the harmonious development of adolescents, with respect for and promotion of their personality from early childhood’. Parents bear the primary responsibility for their children but the State should be responsible for fostering a support system for parents and caretakers through family-based prevention programmes aimed at parent

\textsuperscript{164} See discussion 2.3.1 Non-discrimination (article 2), 2.3.2 Best interest of the child (article 3), 2.3.3 The right to life, survival and development (article 6) and 2.3.4 Child participation (article 12).

\textsuperscript{165} See discussion 2.3.5 article 40(1).

\textsuperscript{166} CRC/C/GC/10 para 15.

\textsuperscript{167} CRC/C/GC/10 para 17.
training enhancing parent-child interaction and home visitation programmes. States Parties must access assistance and guidance from the IPJJ while effecting useful prevention programmes.

3.2.2 Interventions in the context of judicial proceedings and interventions without resorting to judicial proceedings (Diversion)

There are two kinds of interventions available when dealing with children in the context of article 40, that is, ‘children alleged as, accused of, or recognised as having infringed penal law’. State authorities may either resort to measures that will result in judicial proceedings or measures that divert children away from judicial proceedings. It is submitted that the latter intervention of diverting or redirecting children toward community-based services rather than a courtroom setting is far more desirable. If the authorities resort to judicial methods of intervention they are reminded to deal with the child in a manner that promotes their reintegration as a full member of society. Thus, State authorities should first make use of social and or educational measures as the deprivation of liberty should be only be used as ‘a last resort’ and ‘for the shortest possible period’ in accordance with the provisions set out in article 37(b).

When redirecting children in conflict with the law away from judicial proceedings, States Parties must follow the safeguards discussed earlier under article 40(3)(b). The

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168 Article 18 and Article 27 of the UNCRC; CRC/C/GC/10 para 19.
171 Article 40(1) of the UNCRC.
advantages of implementing diversionary methods into a juvenile justice system are multi-faceted in that they allow for children’s rights to be respected, the stigma attached to diversion is far less than that attached to judicial proceedings, diversion allows children to be accountable for their actions and it saves the State time, money and resources. For diversion to be effective within the limits of article 40(3)(b), the General Comment requires that (a) children be afforded the opportunity of acquiring legal or other assistance prior to consenting to diversion; (b) upon consent to diversion the matter will be closed; (c) diversion will not count as a previous conviction and finally; (d) a record of the diversionary measure may only be kept for a period of one year.  

3.2.3 The MACR

In chapter 1 we discussed the MACR in terms of its meaning, significance and the problematic factors affecting it. The MACR denotes the lowest age at which a child is deemed to have the mental capacity to commit a crime and the State or international community is willing to prosecute or declare the child a delinquent in a juvenile or adult court. Articulated differently, the MACR is the age below which children are presumed not to have the mental capacity to infringe penal law. To create a MACR

172 CRC/C/GC/10 para 27.
174 Fact Sheet # 4: Ensuring Appropriate Age Limits of Criminal Responsibility. Available at http://www.dci-
means that if a child below such minimum age infringes penal law, he or she cannot be held criminally responsible. Thus, juvenile justice policy should integrate suitable alternatives to prosecution such as social welfare procedures which avoid criminal responsibility for children below the MACR.\textsuperscript{175}

Article 40(3)(a) of the UNCRC directs States Parties to create a MACR below which children shall be presumed to lack the capacity to infringe penal law. The determination of what this minimum age should be has been left for States to decide, resulting in wide disparities in the minimum age of criminal capacity. The ages ‘range from the very low age level of 7 or 8 to a commendable high level age 14 to 16’.\textsuperscript{176} For example, Hong Kong has a minimum age of 10,\textsuperscript{177} Australia’s minimum age was set at 8 years old but upon review of its legislation the age was raised to 10,\textsuperscript{178} Ethiopia’s minimum age is set at 9\textsuperscript{179} and the United Kingdom and Scotland


\textsuperscript{176} CRC/C/GC/10 para 30.


\textsuperscript{179} Concluding Observations of the Committee on the Rights of the Child: Ethiopia. 01/11/06. CRC/C/ETH/CO/3 para 77. Ethiopia has submitted its third periodic report but has not as yet raised its minimum age despite recommendations from CROC to do so.
have their minimum ages set at 10 and 8 respectively.\textsuperscript{180} Canada and the Netherlands have their minimum age at 12 while Germany, Sweden and Mozambique have their minimum set at the commendable ages of 14, 15 and 16 respectively.\textsuperscript{181}

Over the past 18 years that the CROC has been deliberating on human rights for children, yet, it has managed to evade the issue of establishing a firm standpoint around the MACR debate. Finally, with the release of General Comment No. 10, an important milestone was reached which put an end to the issue as to what an appropriate MACR should be.\textsuperscript{182} The CROC took a concrete approach in establishing a fixed MACR at not lower than 12 years old and made many recommendations to States Parties in this regard.\textsuperscript{183} This approach forms the basis of my entire thesis as it affects the way in which MACR is viewed in the African countries under study.


\textsuperscript{183} CRC/C/GC/10 para 32.
At the very least, ratifying States are required to review their minimum age of criminal capacity and raise it if it is too low.\textsuperscript{184} In common law jurisdictions, the rules for criminal capacity which were derived from Roman law stated that there is an irrebuttable presumption that a child below the age of 7 lacked criminal capacity.\textsuperscript{185} This meant that a child below the age 7 could not be held criminally liable even if he or she infringed penal law. The rule went further and held that a rebuttable presumption of criminal incapacity (\textit{doli incapax}) existed for children between the ages of 7 and 14 who infringed penal law.\textsuperscript{186} The burden of proof was on the prosecution to rebut the presumption that the child lacked criminal capacity, beyond a reasonable doubt.\textsuperscript{187} In other words, the prosecution had to prove that the child had the ability to distinguish between right and wrong (the cognitive function) and that the child was capable of controlling his or her actions by acting in accordance with such knowledge and appreciation (the conative function).\textsuperscript{188} From the age of 14 a child is treated as the equivalent of an adult and presumed to have full capacity unless there is evidence to the contrary.

In its concluding observations of States Parties reports the CROC has increasingly criticised countries if their minimum age was fixed below 10.\textsuperscript{189} The CROC has urged states not to set their minimum age of criminal capacity at less than 12 years.

\begin{itemize}
  \item \textsuperscript{184} CRC/C/GC/10 para 16.
  \item \textsuperscript{187} J Sloth-Nielsen (2000) ‘Child Justice and Law Reform’ in Davel, CJ (Ed) \textit{Introduction to Child Law in South Africa} 393; LAWSA vol 6, 76.
  \item \textsuperscript{188} CR Snyman (2002) ‘Criminal law’ 177.
\end{itemize}
old, although the ideal minimum age recommended by CROC would be 14 or 16 years old.\textsuperscript{190} It has been recommended in General Comment No. 10 by the CROC that a MACR below 12 is directly contrary to international standards.\textsuperscript{191} Countries that have a MACR lower than 12 are in danger of violating international law and are urged to raise the age in accordance with international standards, while countries that enjoy a higher MACR than 12 are implored to keep it and raise it progressively.\textsuperscript{192}

The CROC further expressed its disapproval of countries who allow a lower MACR in exceptional cases and those practicing two minimum ages or a so called ‘split age’. An example of the former is where a child commits a serious offence or is found to be mature enough to be held criminally responsible.\textsuperscript{193} The latter ‘split age’ is where the rebuttable presumption of incapacity is applicable to children between the ages of 10 and 14 years old.\textsuperscript{194} ‘The system of two minimum ages is often not only confusing, but leaves much to the discretion of the court and may result in discriminatory practices’.\textsuperscript{195} The problem with giving the courts too much discretion in assessing the child's maturity is that such an assessment often lacks the necessary psychological expert opinion.\textsuperscript{196} The ‘split age’ system allows the lower minimum age of criminal capacity to be used which means that the young child will be criminally liable because

\textsuperscript{190} CRC/C/GC/10 para 33.
\textsuperscript{192} CRC/C/GC/10 para 32, 33.
\textsuperscript{194} CRC/C/GC/10 para 30.
\textsuperscript{195} CRC/C/GC/10 para 30
\textsuperscript{196} CRC/C/GC/10 para 16.
he or she satisfies the maturity requirement in the opinion of the court. The CROC adopts the position that a ‘split age’ often leads to confusion and discriminatory practices and should be avoided by States at all cost.

Another area of concern raised by the CROC in the Comment relates to the treatment of children committing offences who are below the MACR, and children age 16 and 17 who are treated and sentenced as adults. Children below the MACR are often dealt with in an informal setting without the necessary care for their due process rights and freedoms. Moreover, if juvenile justice systems cater for all children under the age of 18 then why is it that 16 and 17 year olds are treated as adults? It is my submission that this goes against the international principles established by the CROC. Children are defined as persons under the age of 18, so that adult standards should not apply to them simply because a court considers them to be adults. Thus, States Parties should strive to treat all children in conflict with the law who are under the age of 18 as children when implementing laws and procedures applicable to them.

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198 CRC/C/GC/10 para 30.
201 Article 1 of the UNCRC and Article 2 of the ACRWC.
Finally, the CROC highlights the importance of article 7 of the UNCRC which requires every child to be registered after birth so that States Parties are able to set suitable age minimums. All children should be provided with a birth certificate so that they are able to prove their age if need be. Where there is doubt around proving a child’s age such child must be given the benefit of the doubt.

### 3.2.4 The guarantees for a fair trial

The right to a fair trial is a fundamental human right which was first expressed in the 1948 UDHR and later in the ICCPR. Article 40(2) of the UNCRC outlines the fundamental rights and guarantees available to ‘children alleged as, accused of, or recognised as infringing penal law’. These minimum guarantees are essential for ensuring that children in conflict with the law are afforded their rights and liberties and are not dealt with an arbitrary manner. The CROC recommended in the General Comment that proper implementation of these guarantees is dependant on fostering quality personnel for the effective administration of such rights. Thus, training of professionals in the fields is invaluable and it must take place in an organised and regular fashion.

A few noteworthy guarantees available to children in conflict with the law are the presumption of innocence, the right to be heard and to be afforded the opportunity for effective participation in the proceedings, to prompt and direct information of

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202 CRC/C/GC/10 para 39.
203 Article 14 of the ICCPR.
204 CRC/C/GC/10 para 40.
205 Article 40(2)(b)(i).
206 Article 12 and Article 40(2)(b)(iv).
the charge(s), the right to legal or other appropriate assistance,\textsuperscript{207} the right to speedy trial,\textsuperscript{208} the freedom from self-incrimination,\textsuperscript{209} the right to appeal\textsuperscript{210} and right to privacy and expungement of records.\textsuperscript{211} I submit that the MACR has become part of substantive law and is yet another ‘guarantee’ that must be afforded to children in conflict with the law which must be considered along with all the other guarantees listed above as it.

3.2.5 The deprivation of liberty including pre-trial detention and post-trial incarceration

The General Comment reiterates that deprivation of liberty may only be used as ‘a last resort’ and ‘for the shortest possible period’ and that no child may be unlawfully or arbitrarily deprived of their liberty.\textsuperscript{212} States Parties are urged not to use detention and institutionalisation as quick and easy solutions because it conflicts with the social reintegration and rehabilitation of children.\textsuperscript{213} Children who have been deprived of their liberty or placed in pre-trial detention are often not afforded the procedural rights

\begin{itemize}
  \item \textsuperscript{207} Article 40(2)(b)(ii).
  \item \textsuperscript{208} Article 40(b)(iii).
  \item \textsuperscript{209} Article 40(2)(b)(iii).
  \item \textsuperscript{210} Article 49(2)(b)(v).
  \item \textsuperscript{211} Article 16 and Article 40(2)(b)(vii).
  \item \textsuperscript{212} Article 37(a) and (b).
  \item \textsuperscript{213} Fact Sheet # 7: Deprivation of Liberty as a Last Resort. Available at http://www.dci-is.org/db/nl/up_files/GC_10_FactSheet7_Deprivation_of_Liberty_as_a_Last_Resort_EN.pdf [accessed 10 May 2008].
\end{itemize}
available to them.\textsuperscript{214} Thus, the CROC encourages States Parties to look for alternatives and use them wherever possible.\textsuperscript{215}

4. Evaluating the status of UNCRC and the General Comment

The UNCRC brought with it a new philosophy for children rights as bearers of rights and active participants in matters that affect them. It is the first and only treaty to have such a rapid following after its adoption. The supervisory body strives for effective implementation of its provisions through a system of State reporting which provides necessary information and interpretations for a comprehensive treaty. Since its inception, it has gained significant status at both international and national level, through the process of domestication, and has been cited in a number of cases around the globe as the legal basis for respecting the rights of the child.\textsuperscript{216} The UNCRC now serves as the ‘international benchmark against which legislation and policies can be measured’.\textsuperscript{217}

General Comment No. 10 is an invaluable document for understanding the administration of juvenile justice. Nigel Cantwell, an expert in the field of children’s

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\textsuperscript{214} Article 40(2)(b)(i) and Article 37(d).

\textsuperscript{215} The possible alternatives that could be implemented by States Parties instead of the deprivation of liberty are community service, counselling, mediation, open-ended sentences, reparation to victims, a note to parents, probation, police warning or referral to social services.

\textsuperscript{216} The UNCRC has been cited in legal opinions and or cases in the following countries which is by no means an exhaustive list: Australia, Canada, England and Wales, Federal Republic of Germany, France, India, Ireland, Italy, New Zealand, Northern Ireland, Scotland, South Africa (See \textit{S v Kwalase} 2000 (2) SACR 135 (CPD) at 138g – 139h; \textit{Brandt v S} 2005 (2) SA 1 (SCA) at 7 para16 and 17; \textit{Director of Public Prosecutions of KwaZulu-Natal v P} 2006 (1) SACR 243 (SCA) at 251 para 15 and 16), and the United States of America; J Todres (2004) ‘Emerging limitations on the rights of the child: The U.N. Convention on the Rights of the Child and its early case law’ in \textit{The International Library of Essays on Rights: Children’s Rights Volume II} 173 fn 147.

\textsuperscript{217} \textit{Brandt v S} 2005 (2) SA 1 (SCA) at 7 para17.
rights and the founder of Defence for Children International (DCI), noted in his opening address on the ‘Follow-up to General Comment No.10’, that 30 years ago there were no international standards in the area of juvenile justice. However, 30 years later, standards for children in conflict with the law have come a long way in the international arena. The General Comment serves as a reference document, combining all the existing issues and standards on juvenile justice and making recommendations, for example, developing an appropriate MACR not lower than 12.

One of the leading challenges in juvenile justice recognised by CROC is that of implementation. The General Comment acts as a guide for States Parties when developing an implementation policy for a child-centered and coordinated juvenile justice system. It is also a very useful tool when dealing with provisions of technical advice and assistance.

Unsurprisingly, at present, there is still a variety of MACR’s at international law. Prior to the General Comment, States Parties relied on vague guidelines in determining and setting what they may have found to be an appropriate MACR. With the advent of General Comment No. 10 advocating that the MACR should not be set at less than 12 years old, many States Parties have found themselves in danger of violating international law. States Parties will have to review their MACR provisions in an attempt to meet its international obligations. The CROC will have to be patient with States Parties as many of them have in the last decade reviewed their MACR

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provisions and raised them. However, the raised MACR’s still fall short of the international standards set by the CROC. Chapter 3 investigates how the African countries under study have attempted to domesticate the MACR provisions advocated in General Comment No. 10 into their national legal systems.


5.1 Background and Scope of Application

The ACRWC was created and adopted by the AU to promote and protect human rights for children in Africa. As the first regional document recognising children as bearers of rights and representing an African concept of human rights, the AU was of the opinion that its members would gain significantly in the area of children’s rights. While many of the ACRWC provisions were fashioned to complement those of the UNCRC, it includes certain provisions thought to be relevant more to children in an African context. Some of its provisions are also of a higher standard


Africa was underrepresented during the drafting process of the UNCRC and many AU member states felt that a separate treaty dealing with the specific realities of African children was necessary. See http://www.crin.org/RM/acrwc.asp [accessed 20 June 2008].


and more advanced than those in its CRC counterpart. These provisions are aimed at addressing particular concerns relevant in Africa and at the same time fulfilling the objective of supplementing the UNCRC with regional specificities. When States are party to both instruments, and the national laws or the ACRWC provides for a higher level of protection with regard to children’s rights, then the latter supersedes the protection offered by the UNCRC. Thus the ACRWC serves as ‘a potent weapon for children’s rights activism at domestic levels’.

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Article 2 defines a child as every human being below the age of 18 years. The drafters undertook the task of drafting a strict and unambiguous definition of child. In so doing, the ambit of the ACRWC has been clearly defined to include all persons under the age of 18, without exception. The ACRWC has a wider scope of application than the UNCRC as no proviso or limitation exists under the ACRWC. Thus it applies to and protects any person under the age of 18 regardless of their majority status.

Even though the approach taken by the ACRWC is more advanced and inclusive when defining a child, it clashes with the traditional African culture of understanding childhood. In an African context, the rules relating to age, criminal and other capacities were inherited from pre-colonial traditions. The concept of childhood with respect to physical age is uninvestigated in African cultural traditions. The

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traditional African conception of age and criminal responsibility is understood as comprising the distinction between maturing children and adults which is marked by phases (rites of passage) such as initiation ceremonies, marriage and forming a separate household, rather than by a physical threshold of 18 years of age.\textsuperscript{231} To complicate matters further, other difficulties associated with defining children by chronological age relate to lack of birth registration and children assuming roles and responsibilities allocated to adults.\textsuperscript{232} The ACRWC has been criticized for its silence with regard to implementing effective birth registration in Africa.\textsuperscript{233} Articles 6(2) and (4) provides for children to be registered immediately after birth in order to attain a name and nationality but fails dismally in indicating the importance of birth registration for the purposes of recording chronological age.\textsuperscript{234}


As noted above, the actual determination of a child’s true age is, and remains to be, a pressing issue in developing African legal systems. Poor infrastructure in many of these countries results in birth records being inaccessible or virtually non-existent. The child justice system is open to all sorts of abuse without effective implementation of birth registration offices and proper record keeping. Offending adults could easily misrepresent their true age and slip through the system so that they can be afforded the lenient treatment available to child offenders under the age of 18. On the other hand, because of the lenient treatment afforded to child offenders, adults could use children as pawns to commit crime on their behalf. In the same way adults can misrepresent their age, child offenders could be mistaken as adults and diverted into the adult criminal justice system. If chronological age cannot be adequately determined, child offenders may face the very real risk of being dealt with in the adult criminal justice system.

5.2 The Substantive Principles

The ACRWC displays the same substantive principles as the UNCRC, namely, non-discrimination (article 3), the best interests of the child (article 4), right to life, survival and development (article 5) and child participation (article 4(2)). In addition to these anchoring principles that need to be extended to all children by States Parties are the juvenile justice provisions found in article 17.


5.2.1 Non-discrimination

The principle of non-discrimination is a golden thread present in all human rights documents. Under the ACRWC it is an overriding principle which entitles every child equal enjoyment of the guaranteed rights and freedoms, regardless of the child’s or his or her parents’ or legal guardians race, ethnic group, colour, sex, language, religion, political belief or other opinions, social origins, fortune, birth and any other status. A weakness of the principle is its silence on children belonging to minority or indigenous groups despite mounting evidence of their oppression. The MACR is a guaranteed right that must be afforded to all children in conflict with the law. No matter the status of the child or how age is determined an African setting, as an absolute minimum each child is entitled to enjoy every right under the ACRWC without discrimination.

5.2.2 Best interests of the child

The ‘best interests of the child’ is the standard by which States Parties measure all actions, laws and policies affecting children within their jurisdiction. It can be located in article 4 of the ACRWC as ‘the primary consideration’ in all matters concerning the child as opposed to ‘a primary consideration’ in the UNCRC. Using the definite article of ‘the’ rather than the indefinite article ‘a’ may prove overly fastidious but the

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usage of these articles has noteworthy consequences. Unlike its CRC counterpart, the provision relating to the ‘best interests of the child’ is maximised in its influence in that it is supreme over all other considerations, which offers better protection for children. The UNCRC, however, has been interpreted as having a broader scope because it includes all matters ‘concerning children’ whereas the ACRWC only concerns all matters ‘concerning the child’. Thus the wording in the UNCRC denotes a higher protection by including all children rather referring to a specific child.

It is common practice in African rural societies that traditional customs will sometimes take precedence over formal law. The ACRWC asserts its primacy over cultural practices that prove harmful or contravene any of its provisions by employing the fundamental ‘best interests’ principle. A further important consideration when dealing with this principle is that it serves as an interpretive tool for all the other rights


in the Charter. It is the duty of the Member States to implement legislation that ensures that the principle is upheld within their domestic systems.

5.2.3 Right to life, survival and development

The right to life, survival and development are encompassed in article 5 of the ACRWC. It is dealt with very similarly to the UNCRC’s survival right in article 6. It protects children who have committed serious criminal acts from the death penalty in countries where the death penalty is still rife.\(^{243}\) It is unfortunate that the death penalty is part and parcel of criminal justice systems in 32 of the 53 African States.\(^{244}\) Life imprisonment could serve as a substitute for the death penalty but it would be contrary to the aims of article 17(3) which will be discussed under the next section.

5.2.4 Child participation

For the first time at regional level there is a move away from the philosophy of children being seen and not heard. The substantive principle of child participation which is one of the new rights afforded to children which allows them the opportunity to actively participate as a party to any proceedings. No other human rights document prior to the UNCRC and the ACRWC catered for children to be heard and to participate in any matters affecting them. Article 4(2) of the ACRWC allows children who are capable of communicating their views, to do so, in all judicial or administrative proceedings that affect them. The child’s right to participate is further


reinforced by the guarantees provided for in articles 7, 8 and 9.\(^{245}\) The scope of article 4(2) is limited in the sense that some children are not capable of effectively communicating their views. A child’s capability would depend on factors such as age, education levels and the child’s level of articulateness. In other words, a child who is capable of having an opinion but is unable to express it will not be heard.\(^{246}\)

5.2.5 The juvenile justice provision: Article 17

The ACRWC has its child justice provisions encompassed in article 17 and article 30.\(^{247}\) Article 17 is largely based on the blueprint on the administration of juvenile justice in its CRC counterpart. The scope of the rights and protection offered by this article, however, is more limited due to the drafters omitting some of the most important guarantees.\(^{248}\) Despite its limited scope, article 17 has nonetheless considerably added to the positive development in the protection of children’s rights in juvenile justice in Africa.

\(^{245}\) The right to freedom of expression, freedom of association and freedom of thought, conscience and religion. These participation rights are however qualified with claw-back clauses, for example, the right to freedom of expressions is subject to restrictions as prescribed by laws. The claw-back clauses often have the effect of rendering the right meaningless. See DM Chirwa ‘The merits and demerits of the African Charter on the Rights and Welfare of the Child’ (2002) 10 The International Journal on Children’s Rights 161 fn 34.


Article 17 states the following:

1. Every child accused or found guilty of having infringed penal law shall have the right to special treatment in a manner consistent with the child’s sense of dignity which reinforces the child’s respect for human rights and fundamental freedoms of others.

2. States Parties to the present Charter shall in particular:

(a) ensure that no child who is detained or imprisoned or otherwise deprived of his/her liberty is subjected to torture, inhuman or degrading treatment or punishment;

(b) ensure that children are separated from adults in their place of detention or imprisonment;

(c) ensure that every child accused of infringing the penal law:

(i) shall be presumed innocent until duly recognized guilty;

(ii) shall be informed promptly in a language that he understands and in detail of the charge against him, and shall be entitled to the assistance of an interpreter if he or she cannot understand the language used;

(iii) shall be afforded legal and other appropriate assistance in the preparation and presentation of his presentation of his defence;

(iv) shall have the matters determined as speedily as possible by an impartial tribunal and if found guilty, be entitled to an appeal by a higher tribunal;

(v) shall not be compelled to give testimony or confess guilt.

(d) Prohibit the press and the public from trial.

3. The essential aim of treatment of every child during the trial and also if found guilty of infringing the penal law shall be his or her reformation, re-integration into his or her family and social rehabilitation.

4. There shall be a minimum age below which children shall be presumed not to have capacity to infringe the penal law."

The first part of Article 17(1) provides for children ‘accused or found guilty of having infringed penal law’. On a literal interpretation, children detained in prison without trial are excluded from the protection offered under this article. To allow children detained in prison without trial recourse to the protection of article 17, the provision needs to be broadly interpreted in accordance with article 37(c) of the UNCRC. A broad interpretation means that article 17(1) applies to ‘all children deprived of their liberty’ not only those ‘accused of or found guilty of infringing penal law’. Such an

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A child deprived of his or her liberty ‘shall have the right to special treatment in a manner consistent with the child’s sense of dignity and worth and which reinforces the child’s respect for human rights and fundamental freedoms of others’.\footnote{251}{Article 17(1) of ACRWC.} The wording of this portion of article 17(1) is highly problematic and ambiguous. Michael Gose points out that in past dictatorial regimes ‘special treatment’ was used as a euphemism for torture.\footnote{252}{M Gose (2002) ‘The African Charter on the Rights and Welfare of the Child’ 69.} Article 17(3), on the other hand, refers to this ‘special treatment’ as the achievement of the child’s reformation, reintegration and rehabilitation back into the family and society.\footnote{253}{J Sloth-Nielsen (2004) ‘The International Framework’ in Sloth-Nielsen, J and Gallinetti, J (Eds.) ‘Child Justice in Africa: A guide to good practice’ 29.} This portion of Article 17(1) compared to the similarly worded articles 37(c) and 40(1)\footnote{254}{The UNCRC.} seems to be less preferable. Article 37(c) reads ‘treatment with humanity and respect for the inherent dignity of the human person’,\footnote{255}{Article 37(c) and Article 40(1).} while article 40(1) uses the same wording as article 17(1) but the words ‘special treatment’ are absent in its provision. The UNCRC articles\footnote{256}{M Gose (2002) ‘The African Charter on the Rights and Welfare of the Child’ 70.} indicate a more neutral approach as opposed to article 17(1)’s very narrow approach to the African child’s sense of dignity and worth. It assumes that the child has the ability to know what his or her sense of dignity and self worth is. One of the problems arising from this portion of Article 17(1) is that many children are oblivious to their sense of dignity and worth as it is still to be developed and nurtured.
Adults and criminal justice officials may fall into the trap of treating child offenders in accordance with their underdeveloped sense of dignity and worth. The loopholes left by the drafters can be sufficiently remedied by a broader interpretation taking into account Articles 37(c) and 40(1) of the UNCRC.\footnote{M Gose (2002) ‘The African Charter on the Rights and Welfare of the Child’ 71.}

Article 17(2) sets out the minimum standards that States Parties must ensure when dealing with the administration of juvenile justice. Subsection (2)(a) reiterates article 16(1) of the ACRWC and the first part of article 37(a) of UNCRC. It includes ‘or punishment’ but omits ‘or other cruel punishment’ which effectively means it affords better protection for juveniles than article 16 but less than article 37(a).\footnote{M Gose (2002) ‘The African Charter on the Rights and Welfare of the Child’ 56.} States Parties should ensure that children who are detained or imprisoned are kept separately from adults without any exceptions.\footnote{Article 17(2)(b) of the ACRWC.} This has adverse consequences for children and adults from the same family housed in the same prison. A possible remedy for this adverse situation is applying article 19 in conjunction with article 17(2)(b). Article 19 provides that children have the right to the enjoyment of parental care, guidance and protection. Thus wherever possible the child should reside with his or her parents. Article 37(c) of the UNCRC contains a similar provision but is far more flexible in its wording and allows for exceptions if it is in the child’s best interest not be separated from the adults.\footnote{M Gose (2002) ‘The African Charter on the Rights and Welfare of the Child’ 71, 72.} Article 17(2)(c) contains the procedural guarantees for children in conflict with the law. Article 40(2)(b) of the UNCRC is much more elaborate than the ACRWC procedural guarantees but one should keep in mind that...
both instruments only provide States Parties with the minimum standards that they need to follow.261

There are three instances where the ACRWC advances a huge development in the protection of children’s rights. Firstly, it provides that a criminal trial must be arbitrated as expeditiously as possible.262 Secondly, one of it main objectives is that rehabilitation is achieved both during the trial stage and after the conviction of the child.263 Thirdly, the ACRWC ensures that every child is guaranteed the right to legal assistance and to be assisted with the groundwork and presentation of his or her defence.264 There are no qualifications attached to this guarantee and is far beyond comparison with any other human rights instrument.265

Despite the forward looking developments detailed above the ACRWC suffers from a number of disadvantages. The ACRWC dictates that States Parties must ensure that the press and the public are barred from the trial of a child.266 Despite this warranted necessity, an open trial is often welcomed because of the serious consequences a

262 Article 17(2)(c)(iv) of the ACRWC.
264 Article 17(2)(c)(iii) of the ACRWC.
266 Article 17(2)(d) of the ACRWC.
decision may have on a child and his or her respective family.\textsuperscript{267} The advantage of an open trial is that it provides safeguards against any human rights violation that may occur behind closed doors.\textsuperscript{268} Thus instead of \textit{in camera} proceedings being the standard, it should only be applied if it promotes the ‘best interests of the child’.

Other shortfalls present in the ACRWC’s justice provisions and pertinent to this discussion is the failure to propose any alternative methods for dealing with children exposed to criminal proceedings,\textsuperscript{269} the lack of corresponding provisions for article 40(2)(a), 40(3)(b) and 40(4) of the UNCRC and finally the very weak standalone provision in article 17(4). Unlike its CRC counterpart,\textsuperscript{270} article 17(4) does not explicitly require States Parties to promote the establishment of a MACR below which children are presumed not to have the capacity to infringe penal law. The ACRWC makes reference to a minimum age in the latter article but provides no further discussion or guidelines on what the age should be or how it should be dealt with. I submit that subsection 4 is poorly drafted and weak in comparison to the rest of the article 17 and article 40(3)(a) of the UNCRC. The best solution at present is for States Parties of the ACRWC to rely on its CRC counterpart, namely, article 40(3)(a) and its supporting international documents, the Beijing Rules and General Comment No. 10 for some explanation on how to implement its minimum age provision.

\textsuperscript{269} For example, there is no equivalent provision for Article 37(b) of the UNCRC stating imprisonment should be a last resort and for the shortest possible period.
\textsuperscript{270} Article 40(3)(a).

Articles 33 to 36 of the ACRWC provide for a monitoring body known as the ACERWC. Chapter 3 of the ACRWC sets out the main functions of the ACERWC in terms of its mandate and procedures.\(^{271}\) It is given a much wider and more detailed mandate than that of the CROC.\(^{272}\) The ACERWC must promote and protect the rights under the ACRWC,\(^{273}\) examine state reports under article 43, consider communications in confidence,\(^{274}\) undertake investigations and issue general comments.\(^{275}\) States Parties reports need to be submitted periodically to the ACERWC for examination and ACERWC has to report to the AU Assembly of

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\(^{271}\) Chapter 3 of Part II of the ACRWC includes Articles 42 – 45.


\(^{273}\) In terms of the ACRWC, Article 42(a) commissions the Committee to collect and document information, to authorize interdisciplinary assessments of situations on African problems in the children’s rights sphere, to organize meeting, to encourage national and local institutions concerned with the rights and welfare of the child, and to give its views and make recommendations to governments where necessary. The Committee is further mandated to formulate and lay down principles and rules aimed at protecting children’s rights in Africa. Subsection (b) and (c) charges the Committee with a monitoring function and that of interpretation of its provisions at the request of any States Party, an Institute of the AU or any person or Institution recognised by the AU. See http://www.crin.org/RM/acrwc.asp [accessed 25 June 2008].

\(^{274}\) Article 44 of the ACRWC.

Heads of State and Government twice a year. Dejo Olowu comments that ‘perhaps the most remarkable landmark in the Charter is in the framework of its implementation mechanism’. This comment has been affirmed by Amanda Lloyd who commends the Charter for providing a progressive and action-orientated enforcement mechanism.

The ACERWC is made up of 11 members who are nominated by the States Parties and elected by the AU Assembly of Heads of State and Government. The ACERWC and the CROC share similar requirements with regard to having competence in matters in the domain of rights and welfare of the child and that they serve in their personal capacities. The members of the ACERWC ‘serve as independent, un instructed experts rather than government functionaries’. The inauguration of the ACERWC took place at the first meeting held at the AU Headquarters in Addis Ababa, Ethiopia in May 2002. The date the ACERWC has

280 Article 43(2) of the UNCRC.
281 Article 33 of the ACRWC.
received only a handful of reports and has thus far only considered Egypt and Nigeria’s report at their 12th meeting in November 2008.\textsuperscript{284} Therefore, there are no concluding observations to indicate the normative principles.

7. Evaluating the status of ACRWC

As a regional treaty and the first of its kind, it has been described as ‘the most progressive of the treaties and rights of the child’.\textsuperscript{285} The provisions of the ACRWC were drafted around those in the UNCRC while bearing in mind prevailing African realities. Acting as the foundation for the ACRWC to build upon, the UNCRC has been remarkably beneficial on improving the standards of promoting, protecting and monitoring children’s rights at regional level. If one compares to ACRWC and the UNCRC in its entirety, it is clear that the Charter is less ambiguous and, generally, with the exception of juvenile justice and a few other provisions, has higher normative standards than the Convention.\textsuperscript{286} Yet, despite all its sensitivity for African children and unambiguous wording, it is far behind the UNCRC in attaining universal

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\textsuperscript{284} Article 43 of the ACRWC provides that States Parties should submit their initial reports two years after ratifying the Charter. Parties to the Charter have far exceeded this time frame. The Committee began its work in 2001 and as from December 2006 only Egypt, Mauritius, Rwanda and Nigeria have submitted their initial reports. See BD Mezmur ‘Still and infant or a toddler? The work of the African Committee of Experts on the Rights and Welfare of the Child and its 8th Ordinary Session’ (2007) Vol 7(1) African Human Rights Law Journal.


ratification in respect of the AU members.287 The unwillingness on the part of AU member states to ratify the Charter is based on its elevated normative standards which may be too onerous on ratifying parties.288 It is unfortunate that the ACRWC has not received as much attention at regional level as there are only a few academic texts detailing the ACRWC compared to that of the UNCRC.

8. Conclusion

The international instruments discussed in this chapter have had significant impact in the field of children rights and juvenile justice. The UNCRC, being the most authoritative, views children as bearers of rights globally, while the ACRWC recognises children as bearers of rights on a regional scale. It represents the African concept of human rights while confirming and strengthening the global standards contained in the UNCRC.289 The success of the international standards provided for in these instruments into national legal systems lie in the hands of the chosen Committees, namely the CROC and the ACERWC, that monitor the implementation of the provisions by States Parties.

289 These standards are the general principles enshrined in articles 2, 3, 6, 12 and the juvenile justice provisions contained in articles 37 and 40 of the UNCRC. It is submitted that without the basic minimum rights and protections enshrined in both UNCRC and ACRWC, the juvenile justice provisions would have very meaning.
The question of minimum age arises in article 40(3)(a) of the UNCRC and article 17(4) of the ACRWC. The availability of the rights and protections afforded by the juvenile justice provisions to children in conflict with the law, and the effective implementation of them are dependent on a clearly defined minimum age. The lack of effective birth registrations, scattered data collection, the subjective and arbitrary manner in which criminal responsibility has been assessed and the wide disparities amongst countries with regard to the minimum age hampers a uniformed approach in fixing a minimum age in Africa.

Neither instrument provides a definition for their provision outlining a MACR. The Beijing Rules provide some guidance on how to interpret or define article 40(3)(a) of which the ACRWC has no equivalent. The Beijing Rules prove to be somewhat limited in their guidance. Firstly, the language used is suggestive rather than mandatory and secondly, children mature differently depending on the environment in which they live in. This problematic guideline has been alleviated in light of the recent position adopted by the CROC in General Comment No. 10 that a MACR should not be set below the age of 12 years. Countries that practice a ‘split age’ or have lower minimums than 12 in place are urged by the CROC to raise their minimum age in accordance with international standards.

The following chapter outlines the method of incorporating these international provisions (discussed in this chapter) into States Parties national legal systems. It discusses the process of law reform that each country undertook in implementing a MACR. The African legal systems under study in the next chapter have been set out in chapter 1. Finally these countries MACR’s are assessed and compared to each other.
CHAPTER 3:
ASSESSING AND COMPARING MINIMUM AGE PROVISIONS IN THE COUNTRIES UNDER STUDY

1. Introduction

The last decade has ushered in a remarkable wealth of children’s rights and law reform. It was submitted in the previous chapter that the international and regional instruments have taken the field of children’s rights by storm, placing minimum obligations upon ratifying States Parties to protect and promote the rights of children while at the same time making them accountable to the international community. Under the umbrella of a right-based approach\(^1\) for children and in the context of advancing the field of juvenile justice, the first step in the process is for States parties to review their existing legislation and to enact laws that reflect the key principles underlying the UNCRC and the ACRWC and implement them into their domestic legal systems.\(^2\)


\(^2\) See Chapter 2.2.3 and 5.2 which outlines the four key principles of the UNCRC (articles 2, 3, 6 and 12) and the anchoring principles in the ACRWC (articles 3, 4 and 5); CROC (2003) General Comment No. 5 ‘General Measures of Implementation of the Convention on the Rights of the Child’ CRC/GC/2003/5 para1 CROC identifies a whole range of measures for effective implementation. Two tiers 1) An international norm enforcement mechanism where States Parties are required by Article 44 of the UNCRC to submit reports detailing their progress in incorporating international law into their domestic legal systems and 2) obligations at domestic level which are prescribed in article 4 of the UNCRC requiring States Parties to take all appropriate legislative, administrative and any other measures ensuring the implementation of this Convention. Legislative measures include a review of all their national laws while administrative measures include any programmes or policies that guide the legislative process such as setting up National Plan for Action on Children, a child’s ombudsperson,
Article 40(3) of UNCRC specifically calls for separate legislation, procedures, authorities and institutions in juvenile justice systems. Many countries do not have a separate piece of legislation for juvenile justice as they have incorporated it in their child protection laws – such as a Children’s Act – while others have produced a separate piece of legislation dealing exclusively with juvenile justice matters.

The MACR falls within the scope of juvenile justice. It has been identified as one of the elements making up a child rights-centered juvenile justice system. Article 40(3)(a) of the UNCRC and article 17(4) of the ACRWC are the essential articles calling upon ratifying States to set out a minimum age below which children in conflict with the law will not be criminally responsible. The purpose of establishing a minimum age is to prevent children from entering into the criminal justice system as it would undoubtedly have an adverse effect on young immature children. The problem ultimately arises when this minimum age needs to be established and States Parties differ as to what the MACR should be. A study done by the United Nations Children’s Fund (UNICEF) has described the MACR as the lowest age at which a State or international community is willing to hold someone liable for alleged training and capacity building for role players involved in promoting and protecting children’s rights etc. See The African Child Policy Forum (2007) ‘Harmonisation of the laws on children: Some practical guidance’. Available at http://www.africanchild.info/documents/Harmonisation%20Guidelines.pdf [accessed 29 October 2008]; J Sloth-Nielsen (2008) ‘Domestication of Children’s Rights in National Legal Systems in African Context: Progress and Prospects’ in Sloth-Nielsen, J (Ed) Children’s Rights in Africa: A legal perspective 54.


criminal acts. In other words, it is the age at which a country is willing to prosecute children in a court of law. In determining what this age should be, regard should be had for the Beijing Rules (discussed in chapter 2), General Comment No.10 (discussed in chapter 2), the recommendations of the CROC, as well as best practice models.

This chapter aims to assess and compare the MACR in the twelve African legal systems under study, namely, Uganda, Ghana, Kenya, South Africa, Namibia, Lesotho, Gambia, Ethiopia, Malawi, Mozambique, Sierra Leone and Zambia. It seeks to determine the status of international law in the countries under study. Secondly, it briefly proposes to outline the child law reform processes of the States Parties post ratification of the international instruments and finally to draw comparisons as to how minimum age provisions have been interpreted and implemented at domestic level and the problems encountered in implementation.

2. The status of international law: dualist and monist approaches

Upon defining the nature and status of international law, Dugard argues that States comply with international law for reasons unrelated to fear of possible sanctions. He

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7 The rationale behind selecting these 12 countries are provided for in Chapter 1.
cleverly asserts that this means that ‘international law is not binding because it is enforced, but that it is enforced because it is already binding’. International law plays a significant role in shaping legal reform initiatives as it provides the basic framework for such reform to take place.

The method of national implementation is dependent on the status of the international instruments (UNCRC and ACRWC) in each respective country’s legal system. Every country whether it has a civil, common or hybrid legal system follows a dualist or monist approach by which they receive international instruments into their national laws. Countries who subscribe to the dualist approach do not automatically

12 D Kley & F Viljoen (2002) ‘Beginners Guide for Law Students’ 82-87; Common law systems originated in England and are usually referred to as a body of judge made laws. It is based on the doctrines of court decisions, custom and practices arising out of general usage rather than written codes. Where the prevailing common law no longer meet the standards of existing and evolving case law it is superseded by legislation.
13 A hybrid legal system is a mixture of civil and common law combined with aspects of customary and religious law.
receive international law as binding in their national system.\textsuperscript{14} International law only becomes binding in these countries once they have incorporated it into their national laws through legislative transformation.\textsuperscript{15} Countries that follow the monist approach\textsuperscript{16} are automatically bound by international law once they ratify it and that ratification is made public. Another way of incorporating international law into national legal systems is through judicial adoption.\textsuperscript{17} This way of incorporation allows judges to rely on their discretion to use international law principles in their rulings where a country has ratified international law but not incorporated it through legislative transformation.\textsuperscript{18} The judge’s rationale for incorporating international law is that it should apply in cases where there is no national law on the issue, or a national law conflicts with international law.\textsuperscript{19}


\textsuperscript{15} Legislative transformation means that international law is either given constitutional status or incorporated through an enacting domestic legislation that give rise to the rights contained in international instruments.

\textsuperscript{16} Ethiopia is the only country subscribing to a partly monist approach as it is the only country under study that has not been colonized and international law will only become binding once ratification is published.

\textsuperscript{17} This method of domestication has been adopted in South Africa with regard to women’s rights under the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW).


The UNCRC provides the platform for African countries to re-examine their child laws.\textsuperscript{20} On examination of the six countries under study by Odongo the following child law reform initiatives were followed from 1990 to 2005. The first country to initiate the development of child reform in Africa was Uganda\textsuperscript{21} resulting in the Children’s Statute.\textsuperscript{22} This was one Act covering social welfare and juvenile justice for children.\textsuperscript{23} After Uganda, Ghana followed with the promulgation of the Children’s Act\textsuperscript{24} in 1998 and a separate Juvenile Justice Act\textsuperscript{25} in 2003. Kenya followed the Ugandan approach and passed their Children’s Act\textsuperscript{26} in March 2002 which incorporated both social welfare and juvenile justice. South Africa’s child law reform process started much later with ratification of the UNCRC only taking place in 1995. It resulted in a separate Child Justice Bill\textsuperscript{27} (August 2002) covering juvenile justice issues and a new Children’s Act (August 2003) dealing with child protection and social welfare. The latter has since become the Children’s Act No. 38 of 2005.\textsuperscript{28}

\begin{itemize}
\item \textsuperscript{24} Act No. 560 of 1998.
\item \textsuperscript{25} Act No. 650 of 2003.
\item \textsuperscript{26} The Children’s Act of 2001.
\item \textsuperscript{27} Bill No. 49 of 2002. The Bill was first tabled before parliament in 2003 and an amended version of it was tabled in 2007. It has since been approved by the National Assembly and currently making its way through the National Council of Provinces.
\item \textsuperscript{28} The Child Care Act 74 of 1983 is still in force; however, certain sections of the Children’s Act came into operation on 01 July 2007. Section 17 provides for lowering of the age of majority from the age of 21 to the age of 18. The lowering in the age of majority to 18 is on par with most international jurisdictions but it has not been gladly received by the South African public.
\end{itemize}
Namibia’s reform process led to the Child Care and Protection Bill of 1996 and a revised Child Justice Bill (2002).\textsuperscript{29} Finally, Lesotho follows the same practice as Uganda and Kenya in incorporating child protection laws, social welfare and juvenile justice into one Bill.\textsuperscript{30}

The countries I have undertaken to research took the following child law reform initiatives with regard to the MACR from 1997 to the law as it stands on 30 September 2008. I did not follow the same process as Odongo in determining which countries reform initiatives followed on from each other. The reason for this is due to my selection process in choosing countries based on the availability of information at the time I started my research in 2007. Odongo’s study is very much based on the UNCRC and the recommendations of the CROC. My experience has been much the same, by reason of the lack of State reports being submitted to the ACERWC.

Child law reform in the Gambia resulted in the enactment of the Children’s Act of 2005. The Act covers both social welfare and juvenile justice for children and gives force of law to the UNCRC and ACRWC. Ethiopia’s legal reform did not result in the enactment of a Children’s Act; instead it adopted a new Criminal Code in 2005 to deal with increasing delinquency rates in the juvenile sector. Malawi and Mozambique’s child law reform has led to the adoption of the Child (Justice, Care and Protection) Bill in the former and two Draft Bills in the latter on Protection issues and Jurisdictional Organisation of Minors. At present all three Bills are still pending.


enactment by Parliament. Sierra Leone’s child law reform has been the most successful in carrying out its international obligations. In 2007, it enacted the Child Rights Act which incorporates all areas concerning children. Zambia, unfortunately has not undertaken any serious child law reform and relied on its Penal Code when it considered the MACR.

3. Child Law Reform and Current Developments on the MACR to date

3.1 Uganda

Shortly before, Uganda ratified the UNCRC in 1990, an independent Child Law Review Committee (CLRC) was appointed by the Minister of Children’s Welfare. A group of six consultants from Africa and Europe joined the CLRC helping them with law reform in a broader context. The CLRC began its work in drafting children’s legislation that would benefit disadvantaged children and children in conflict with the law. It divided its work into three distinct areas, ‘young offenders’, ‘child care’ and ‘domestic relations’. The reform process included research, consulting, task group discussions, workshops, internal debates and meetings, public

33 Mbazira, C (2006) ‘Harmonisation of national and international laws to protect children’s rights: The Uganda case study’ (Unpublished Report); The first area of ‘young offenders’ would include all juvenile justice related issues while ‘child care’ and ‘domestic relations’ would deal with all child care protection issues and social welfare for children.
34 Ministers, parliamentarians, international agencies, civil servants, member of the public, teachers, NGO’s etc.
debates, legislative drafts, field work and media coverage popularising child law reform through articles, commentaries and correspondence.\textsuperscript{35}

The CLRC agreed on the principles that should underpin and guide its work. The first principle was that the UNCRC, the ACRWC and other relevant non-binding UN Rules be the guide when legislating for children. Most of these principles were reflective of the UNCRC provisions such as the ‘best interests’ of the child principle,\textsuperscript{36} child participation\textsuperscript{37} and detention as a last resort and for the shortest possible period.\textsuperscript{38} It was after this agreement amongst the CLRC members that they submitted a memorandum to the Constitutional Commission. At the time of submitting the memorandum the Constitutional Commission was writing up the Ugandan Constitution.\textsuperscript{39} There is no doubt that the submission of the memorandum had an impact on the section devoted to children in the Constitution which is inclusive of a few UNCRC provisions relating to juvenile justice.\textsuperscript{40}


\textsuperscript{36} Article 3 of the UNCRC.

\textsuperscript{37} Article 12 of the UNCRC.

\textsuperscript{38} Article 37(b) of the UNCRC.


\textsuperscript{40} Section 34 of the Ugandan Constitution is the section devoted to children. The section provides:

‘34 (1) Subject to laws enacted in their best interests, children shall have the right to know and be cared for by their parents or those entitled by law to bring them up.

(2) A child is entitled to basic education which shall be the responsibility of the State and the parents of the child.

(3) No child shall be deprived by any person of medical treatment, education or any other social or economic benefit by reason of religious or other beliefs.

(4) Children are entitled to be protected from social or economic exploitation and shall not be employed in or required to perform work that is likely to be hazardous or to interfere with their education or to be harmful to their health or physical, mental spiritual, moral or social development.
In 1992 the CLRC handed over the final report detailing child law reform to the relevant ministry. A few years later they produced the draft Bill and sent it to Parliament’s National Assembly for the Bill to be debated. In 1996, the Bill became a Statute when Parliament enacted it as the Ugandan Children’s Statute No.6 of 1996.\(^41\)

In its concluding observations, the CROC welcomed the advent of the new Constitution adopted in 1995 as well as the Children’s Act (previously the Children’s Statute).\(^42\) It noted the efforts made by the State Party since its last report in the field of juvenile justice but express concern that the progress achieved was limited. It recommended that the State Party continue to ensure juvenile justice be administered in accordance with articles 37(b), 39 and 40 of the UNCRC.\(^43\) Both concluding observations are silent with regard to the minimum age of criminal responsibility as the age is already in accordance with international principles.\(^44\) Prior to the

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\(^{5}\) For the purposes of clause (4) of this article, children shall be persons under the age of sixteen years.

\(^{6}\) A child offender who kept in lawful custody or detention shall be kept separately from adult offenders.

\(^{7}\) The law shall accord special protection to orphans and other vulnerable children.’


\(^{42}\) CRC/C/15/Add.80, 21 October 1997, para 4 (Adopted at 16th session); CRC/C/UGA/CO/2, 23 November 2005, para 4 (Adopted at 40th session).

\(^{43}\) CRC/C/UGA/CO/2, 23 November 2005 (Adopted at 40th session).

\(^{44}\) CRC/C/15/Add.80, 21 October 1997 (Adopted at 16th session); CRC/C/UGA/CO/2, 23 November 2005, para 4 (Adopted at 40th session).
promulgation of the Children’s Act the MACR was raised from 7 years old to 12.\textsuperscript{45} It is not clear why the age of 12 and not 14 as recommended by the CLRC was chosen. The increase in the MACR from 7 to 12 is a positive step for Uganda in complying with the provisions of the UNCRC and the ACRWC.

To date Uganda has submitted its second periodic report to the CROC and its first report the ACERWC under article 43 of the ACRWC.\textsuperscript{46} Uganda is the only country under study that has submitted a report to the ACERWC however it has not yet been considered. As a common law legal system recognising customary law as well, it follows a dualist approach. Thus it does not incorporate international law automatically but through domestication.

3.2 Ghana

Ghana was the first African country to ratify the UNCRC within the first year of its adoption.\textsuperscript{47} In 1992, Ghana promulgated a new Constitution containing s28 which was aimed at protecting children’s rights.\textsuperscript{48} Following the promulgation of the


\textsuperscript{47} Signed on 29 January 1990 and ratified it 05 February 1990.

\textsuperscript{48} Section 28 provides: ‘(1) Parliament shall enact such laws as are necessary to ensure that

\begin{enumerate}
\item every child has the right to the same measure of special care, assistance and maintenance as is necessary for its development from its natural parents, except where those parents have effectively surrendered their rights and responsibilities in respect of the child in accordance with law;
\item every child, whether or not born in wedlock, shall be entitled to reasonable provision out of the estate of its parents;
\end{enumerate}
Constitution, a Child Law Reform Advisory Committee was elected by the National Commission on Children to review Ghana’s existing child laws and recommend law reform to the government.\(^49\) The recommendations put forward by the Committee for law reform had to ensure that Ghana’s national laws were fully compliant with the principles and provisions of the UNCRC.\(^50\)

In its concluding observations of the CROC to Ghana’s initial report, the CROC expressed its concern as to the urgency of adopting a Children’s Act and the need to reform the administration of juvenile justice. CROC was particularly concerned, amongst other things, with the low minimum age of criminal responsibility set at 7 years old.\(^51\) It recommended that the general principles\(^52\) of the UNCRC must always be taken into account and used as guidance in policy discussions, decision-making


\(^{50}\) CRC/C/15/Add.73, 18 June 1997, para 4 (Adopted at 15\(^{th}\) session).

\(^{51}\) CRC/C/15/Add.73, 18 June 1997, para 27 (Adopted at 15\(^{th}\) session).

\(^{52}\) The general principles being Articles 2, 3, 6 and 12 of UNCRC.
and implementation. Juvenile justice law reform must be in accordance with articles 37, 39 and 40 of the UNCRC and any other relevant UN standards.\(^{53}\) The State Party should pay special attention to raising the MACR so that it is reflective of international standards.

The law reform process by the multi-sectoral Advisory Committee led to the enactment of the Children’s Act in 1998 dealing with issues of child care, social welfare, guardianship, adoption etc.\(^{54}\) A separate Act was enacted in 2003 to deal solely with juvenile justice issues such as protecting the rights of children and providing rights for young offenders.\(^{55}\) Upon submission of its second periodic report under article 44 of the UNCRC, CROC noted Ghana’s progress since its initial State report. It had ratified the ACRWC in 2005 and adopted new legislation which was in conformity with the UNCRC, including the Amendment to the Criminal Code (Act 554) in 1998 and the increase in the MACR from 7 to 14 years old.\(^{56}\) Thus, Ghana has met its minimum international treaty obligations with regard to MACR.

### 3.3 Kenya

Kenya ratified the UNCRC in July 1990\(^{57}\) and is one of the countries that have submitted its second report to the CROC under article 44.\(^{58}\) Following its ratification,\(^{55}\) CRC/C/15/Add.73, 18 June 1997, para 48 (Adopted at 15\(^{th}\) session).


\(^{56}\) CRC/C/GHA/CO/2, 17 March 2006, para 4, 5 and 73 (Adopted at 41\(^{st}\) session).

many NGO groups got together to improve rights for children in light of Kenya’s new treaty obligations. Firstly, its conservative colonial legislation urgently needed to be revisited and reworked. Secondly, there was a great demand to conceptualise children’s rights in the applicable laws and thirdly, the need to fill the absence of a dedicated section for children in the Constitution. Thus, a much pressurised Attorney-General put a task force in place to review its child laws.

The task force set up by the Kenyan Law Reform Commission had to undertake a process of legislative review and make recommendations advancing the rights and welfare of children. This was a three year process which started in 1991 aimed at establishing one comprehensive piece of legislation detailing all issues affecting children. It was a highly consultative venture between government officials, the general public, NGO’s, outside experts, practitioners and children themselves.

58 CRC/C/KEN/CO/2, 19 June 2007 (Adopted at 44th session).
At the end of the review process the task force submitted a comprehensive report outlining the scope of child law issues but failed to adequately address issues of juvenile justice such as the MACR and diversion. One of the main recommendations put forward in the report was the enactment of a Children’s Bill. The Bill, however, was opposed twice by NGO lobbyists and those advocating children rights. Finally in 2001, after much redrafting, Parliament enacted the Bill as the Children’s Act.

In its recent concluding observation to Kenya’s second periodic report the CROC welcomed the new Children’s Act, the National Council for Children Services and the ratification of the ACRWC in July 2000. The Children’s Act repeals the Children and Young Persons Act, the Adoption Act and the Guardian and Infants Act and consolidates them into one piece of legislation. It has been acknowledged as a

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‘landmark’ for Kenya because it is the first piece of legislation that gives effect to the international human rights treaties that Kenya is a party to.\(^{69}\) Part II of the Children’s Act identifies the four key principles underlying the UNCRC while Part XIII (s184-s194) sets out the administration of juvenile justice.\(^{70}\) With regard to the latter, CROC expressed its concern in its concluding observation to Kenya’s initial state report that the MACR, set at 8 years old, is too low.\(^{71}\) One downside to the Act is that it does not raise the MACR. Thus, Kenya has allowed the 1930 common law position of the \textit{doli incapax} rule as set out in Kenya’s Penal Code to hold firm.\(^{72}\)

CROC urges Kenya to continue to harmonise its national legislation in accordance with international treaties and to address and implement recommendations in its initial State Party reports that have not yet been implemented.\(^{73}\) The CROC reiterated its earlier position with regard to the MACR being too low in its second periodic report.\(^{74}\) It recommended that the State party ensure that its juvenile justice system is

\[\text{Children’s Rights} 420; \text{GO Odongo (2005) ‘The domestication of international law standards on the rights of the child with specific reference to juvenile justice in the African context (Unpublished LLD Thesis) 100.} \]
\[\text{CRC/C/15/Add.160, 07 November 2001, para 22 (Adopted at 28\textsuperscript{th} session).} \]
\[\text{Chapter 63 Laws of Kenya, s14. The only difference with the rule is that it represents a one year increase from the normal common law rule which is set at 7 years old; GO Odongo (2006) ‘Harmonisation of national and international laws to protect children’s rights: The Kenya Case Study’ (Unpublished Report).} \]
\[\text{CRC/C/KEN/CO/2, 19 June 2007, para 7 & 9 (Adopted at 44\textsuperscript{th} session).} \]
\[\text{CRC/C/15/Add.160, 07 November 2001, para 22 (Adopted at 28\textsuperscript{th} session); CRC/C/KEN/CO/2, 19 June 2007, para 67(Adopted at 44\textsuperscript{th} session).} \]
carried out in accordance with the UNCRC’s articles outlining juvenile justice, other relevant UN guidelines as well as the Committee’s General Comment No. 10. In particular, in paragraph 68(a) it recommends the State party raise its minimum age to 12 years and consider increasing it, the age of 12 being the minimum requirement set out in the recent General Comment No.10. The Children’s Act has failed to raise the MACR despite CROC’s pleas in its recommendations to the Party’s reports. It is submitted that Kenya’s minimum age is in violation of article 40(3)(a) of the UNCRC and article 17(4) of the ACRWC.

3.4 South Africa

South Africa ratified the UNCRC and the ACRWC after a long and arduous apartheid struggle which excluded South Africa from the international arena. The 1993 Interim Constitution laid the foundations for South Africa’s new democracy in 1994 which was embraced with open arms. The final Constitution was adopted in 1996 which included a laudable Bill of Rights and an elaborate s28 detailing children’s

75 Articles 37, 39 and 40 of the UNCRC.
77 CRC/C/GC/10, 02 February 2007.
78 CRC/C/KEN/CO/2, 19 June 2007 (Adopted at 44th session).
79 CRC/C/GC/10, 02 February 2007, para 30 and 31.
rights and juvenile justice provisions. Many of the provisions incorporated in s28 are straight from the UNCRC.

South Africa has a hybrid legal system and follows a dualist approach with regard to international law. The Constitution provides for this approach in chapter 14 which deals with international law. Section 231(4) states that international agreements only become law in South Africa when they are given domestic status through national enactment. Due consideration, however, must be given where international law has

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(a) to a name and a nationality from birth;
(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
(c) to basic nutrition, shelter, basic health care services and social services;
(d) to be protected from maltreatment, neglect, abuse or degradation;
(e) to be protected from exploitative labour practices;
(f) not to be required or permitted to perform work or provide services that:
   (i) are inappropriate for a person of that child’s age; or
   (ii) place at risk the child’s well-being, education, physical or mental health or spiritual, moral or social development;
(g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the rights to be:-
   (i) kept separately from detained persons over the age of 18 years; and
   (ii) treated in a manner, and kept in conditions, that takes account of the child’s age;
(h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
(i) not be used directly in armed conflict, and to be protected in times of armed conflict.

(2) A child’s best interests are of paramount importance in every matter concerning the child.

(3) In this section ‘child’ means a person under the age of 18 years.’


not been directly incorporated into domestic legislation but has acquired legal recognition through constitutional provisions. Our children’s rights section includes many UNCRC concepts and since our children’s rights are justiciable in our courts, so too has the UNCRC acquired legal status in our law. In addition to this, s39(1) states that a court or tribunal ‘must’ at the very least consider international law when interpreting the Bill of Rights, while s233 states a court must prefer an interpretation consistent with international law when interpreting legislation.

After submitting its initial State report, the CROC welcomed the 1996 Constitution with s28 directly incorporating rights and freedoms provided for in the UNCRC. It noted the stumbling blocks such as the apartheid legacy, high levels of unemployment and poverty, lack of adequate statistical data in juvenile systems (to mention a few) that hinder the State party in implementing the provisions of the UNCRC. It further encouraged the State to continue in its efforts in reforming legislation to make it UNCRC compliant and in so doing introduce additional reforms.

88 CRC/C/15/Add.122, 23 February 2000, para 3 ( Adopted at 23rd session).
89 CRC/C/15/Add.122, 23 February 2000, para 9 (Adopted at 23rd session); O Sewpaul ‘SA Presentation to UNCRC – setting the agenda for transformation’ (2000) 2(2) Article 40 2.
South Africa’s child law reform followed a split process with child protection and social welfare being dealt with on the one hand and juvenile justice on the other. The existing child legislation was the Child Care Act 74 of 1983 which was in dire need of review and reform. Over the years this Act had been amended several times. A substantial improvement in child care was made with the enactment of the Child Care Amendment Act 96 of 1996. In the same year, the Minister of Justice in charge of the then South African Law Commission (now known as South African Law Reform Commission (SALRC)) appointed a project committee on juvenile justice. This committee was tasked with investigating new reform proposals for a separate juvenile justice system. It was highly consultative involving all the relevant stakeholders, role-players and children themselves. The Child Justice Bill 49 of 2002 was the product of this law-making process. It was tabled before parliament in 2002 and debated in 2003 but lay dormant until mid 2008 when a revised Bill was reintroduced. The Child

Justice Bill has since been approved by the National Assembly and making its way through the National Council of Provinces. Parliament also enacted parts of the Children’s Act 38 of 2005 earlier this year which deals with child protection and social welfare.

The Child Justice Bill provides for a new and separate juvenile justice system for South Africa. It details the procedures from the moment of the child’s arrest up until the case is disposed of. The CROC raised concerns about the provisions relating to the MACR which were arguably contrary to international principles. The Bill raised the MACR from the very low age of 7 to 10 years old and retained the common law doli incapax presumption for children between the ages of 10 and 14. The CROC expressed its disapproval that the age of 10 is still too low and that the State should reassess its draft legislation with the view of increasing the proposed MACR. Furthermore, CROC noted in General Comment No. 10 that a split age often leads to discriminatory practices.

Chapter 4 of this thesis details a thorough discussion outlining the SALRC proposals surrounding the Child Justice Bill and its decisions with regard to the MACR.

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97 CRC/C/15/Add.122, 23 February 2000, para 17 (Adopted at 23rd session).
98 CRC/C/GC/10 para 30.
3.5 Namibia

Namibia became an independent state in 1990 and inherited the devastating effects of apartheid because of its shared borders with South Africa.\textsuperscript{99} It has a hybrid legal system consisting of common law and Roman-Dutch law and supports a dualist approach to international law.\textsuperscript{100} Children were amongst those mostly affected by the apartheid regime. The government has since dedicated its time to addressing the inadequate situation that children find themselves in. It is against this backdrop that Namibia became a party to the UNCRC\textsuperscript{101} and the ACRWC.\textsuperscript{102} The adoption of these human rights treaties provided the State an opportunity to review its national laws ensuring its compliance with international principles and provisions. This review is done through comprehensive law reform and the harmonisation of international and national laws.

\textsuperscript{99} CAD Tiki (2006) ‘Harmonisation of national and international laws to protect children’s rights: The Namibia report’ (Unpublished Report); CRC/C/15/Add.14, 07 February 1994, para 5 notes this as one of the impediments of implementation (Adopted at 5\textsuperscript{th} session).


Prior to child law reform in 1992, the South Africa’s Children’s Act 33 of 1960 governed protection and rights for children. The Act included a wide variety of issues around children in need of care, protection, prevention from neglect, ill-treatment, exploitation etc. The introduction of the 1990 Constitution and adoption of human rights treaties called for comprehensive law reform as the 1960 South African Act was no longer the suitable vehicle for governing children’s rights.

The Namibian Constitution provides for the underlying key principles of the UNCRC in articles 10 and 15. Article 15 was specifically drafted for the rights and protections of children. In addition to this article, Namibia’s reform process

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106 Article 10 providing for equality and non-discrimination and Article 15 providing for the best interest of the child and survival and development in sub article 2.
107 Article 15 of the Constitution of the Republic of Namibia states:

‘(1) Children shall have the right from birth to a name, the right to acquire a nationality and, subject to legislation enacted in the best interests of children, as far as possible the right to know and be cared for by parents.

(2) Children are entitled to be protected from economic exploitation and shall not be employed in or required to perform work that is likely to be hazardous or to interfere with their education, or to be harmful to their health or physical, mental, spiritual, moral or social development. For the purposes of this sub article children shall be persons under the age of sixteen.

(3) No children under the age of fourteen shall be employed to work in any factory or mine, save under conditions and circumstances regulated by act of parliament. Nothing in this sub article shall be constructed as derogating in any way from sub article (2) thereof.

(4) Any arrangement or scheme employed on any farm or other undertaking, the object or effect of which is to compel the minor children of an employee to work for or in the interest of the employer of
resulted in three separate draft Bills, namely, the Child Care and Protection Bill, the draft Regulations to the Bill and the Children’s Status Bill.108 The Child Care and Protection Bill was enacted in 2003109 while the Children’s Status Bill, after much redrafting, was enacted in 2006110 but is not yet in force.

Law reform is a top priority on the juvenile justice agenda in Namibia.111 The CROC recommended that the States Party take articles 37 and 40 of the UNCRC and the other relevant UN standards into account when administering juvenile justice.112 Namibia has since then redrafted a Child Justice Bill (2002) modelled on South Africa’s Child Justice Bill.113 Despite much redrafting the Bill has not yet been introduced into Parliament. Section 6 of the Child Justice Bill maintains the age of 7 years old as the MACR and retains the doli incapax rule for children between age 7

such employee, shall for the purposes of Art 9 hereof be deemed to constitute an arrangement or scheme to compel the performance of forced labour.

(5) No law authorising preventative detention shall permit children under the age of sixteen years to be detained’.


and 14.\footnote{Child Justice Bill (2002); GO Odongo (2008) ‘The Impact of International law on Children’s Rights on Juvenile Justice Law Reform in the African Context’ in Sloth-Nielsen, J (Ed) Children’s Rights in Africa: A legal perspective 151.} The age of 7 is too low considering international standards which require the age of 12 as the lowest minimum age. The CROC has expressed its disapproval of countries setting their MACR below 12 and of those who practice a ‘split age’.\footnote{See Chapter 1 3.2.3.} Thus Namibia fails to comply with its international obligations relating to the MACR.

### 3.6 Lesotho


The CROC praised Lesotho’s progress since ratifying the UNCRC. It made special mention of the UNCRC being translated into Sesotho, the effort involved in raising awareness of children’s rights and the UNCRC through media broadcasts and the significant improvement in establishing a juvenile justice system.\footnote{CRC/C/15/Add.147, 21 February 2001, para 3 and 61 (Adopted at 26\textsuperscript{th} session).} It highlighted the problems hampering effective implementation and raised a few issues of concern. The first was the need to review existing legislation in a legal system embodying a mixture of civil, common and customary law and where domestic legislation always...
prevails in conflict situations. Secondly, the lack of clarity regarding the definition of a child and the low MACR set at 7, further undermined by the ever increasing low rate of birth registrations. The CROC recommended that the State continue to adopt and amend domestic legislation that adequately reflects the principles and provisions of the UNCRC. Of particular importance was the need to consider the enactment of a comprehensive children’s rights statute and to catalyse the approval of draft legislation.

Child law reform in Lesotho under the aegis of the Law Reform Commission has been hailed as forward looking and serves as a best practice model for other countries. It was a highly extensive consultative process with Dr. Itumeleng Kimane holding the reigns and directing. The Commission appointed multi-sectoral task teams to undertake legislative review. Other key role players included in the process that provided their expertise and views were academics, government officials, NGO’s, parliamentarians, researchers, Lesotho citizens and children. The reform process led to one piece of legislation underpinning the key principles of the UNCRC and the

121 CRC/C/15/Add.147, 21 February 2001, para 23& 29 (Adopted at 26th session).
122 CRC/C/15/Add.147, 21 February 2001, para 10 (Adopted at 26th session).
123 It must however be noted that South Africa’s child law reform acted as a best practice model in many respects for Lesotho’s reform process.
ACRWC as well as providing for child protection, social welfare and juvenile justice.\textsuperscript{126} The Children’s Protection and Welfare Bill was the result of this law reform process and has been tabled before parliament but is still pending enactment.\textsuperscript{127}

The Bill defines a ‘child’ as a person who is under the age of 18 as opposed to two separate pieces of legislation containing two conflicting ages.\textsuperscript{128} The definition of a ‘child’ goes further to define a child in respect of criminal proceeding as a person who attained the age of criminal responsibility as referenced in s83. The CROC noted that one of the weaknesses of the Lesotho’s juvenile justice system is the low age of criminal responsibility which the Bill tries to remedy in s83.\textsuperscript{129} Section 83 of the Bill deals with the MACR and the *doli incapax* rule. It raises the minimum age of 7 to 10 years old and provides for the retention of *doli incapax* rule for children between the ages of 10 and 14, which still falls short of international standards.\textsuperscript{130}

\subsection*{3.7 The Gambia}

The Gambia is party to both the UNCRC and the ACRWC.\textsuperscript{131} This means that the Gambia has undertaken to be accountable before the international community in promoting and protecting children’s rights. The Constitution is the supreme law of

\begin{footnotesize}
\begin{enumerate}
\item Children’s Protection Act 6 of 1980 and Age of Majority Ordinance 62 of 1829.
\item CRC/C/15/Add.147, 21 February 2001, para 61 and 62 (Adopted at 26\textsuperscript{th} session).
\item Children’s Protection and Welfare Bill 2004 at s83(1)-(4).
\item Ratified the UNCRC on 08 August 1990 and the ACRWC on 14 December 2000.
\end{enumerate}
\end{footnotesize}
the Gambia. In addition to the Constitution, other subsidiary laws are provided for in s7 because of its legal system based on English common law, customary law and Shari’a. The Gambia subscribes to a dualist approach meaning that international law is not automatically received into national laws unless approved by Parliament and domesticated.

The Constitution obliges the State to take cognizance of the international instruments signed by the Gambia when making protective polices for the fundamental rights in the Bill of Rights. Secondly it empowers the courts to consider these protective policies when interpreting laws based on them. There is also the possibility of the courts relying directly on the international instruments as an interpretive tool when interpreting the fundamental rights protected in the Bill of Rights and any other legislation. The rationale behind this reliance is based on the logic that because the protective policies made by the State must be in accordance with the international instruments there is no reason why the court should not be able to rely on the international instrument themselves. On the basis of these Constitutional provisions, the provisions of the UNCRC and ACRWC have been indirectly domesticated into the laws of Gambia and therefore can be invoked by the courts.

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134 Domestication happens through a country’s constitutional provisions or enacting new legislation which gives international law domestic status.
136 Section 211(b) of the Constitution of the Republic of Gambia (1997).
In response to the Gambia’s initial report under article 44, the CROC in its concluding observations noted with appreciation the Constitution’s inclusion of s29 dedicated to the rights of children.\(^{138}\) CROC goes on to highlight the difficulties accompanying implementation of the UNCRC’s provisions citing Gambia’s legal system as one of the contributing factors.\(^{140}\) As noted earlier Gambia’s legal system consists of English common law, customary law and \textit{Shari’a} and CROC is concerned that latter two are not reflective of the provisions in the UNCRC.\(^{141}\) The Committee has urged the States Party to review its existing fragmented children’s legislation and speed up the law reform process by enacting a comprehensive children’s code.\(^{142}\) A further concern raised by the Committee is the absence of a legal definition of a child and the many differing legal ages, in particular the MACR being too low.\(^{143}\) CROC recommended that the States Party raises the age of criminal responsibility, taking into account all appropriate measures to ensure a juvenile justice system that is reflective of articles 37, 39 and 40 of the UNCRC and other UN guidelines.\(^{144}\)

\(^{138}\) Section 29 provides the following rights for children: ‘(1) Children shall have the right from birth to a name, the right to acquire a nationality and subject to legislation enacted in the best interests of children, to know and be cared for by their parents.

(2) Children under the age of sixteen years shall be entitled to be protected from economic exploitation and shall not be employed in or required to perform work that is likely to be hazardous or to interfere with their education or be harmful to their health or physical, mental, spiritual, moral or social development’.

(3) A juvenile offender who is kept in lawful custody shall be kept separately from adult offenders.

\(^{139}\) CRC/C/15/Add.165, 06 November 2001, para 3 (Adopted at 28\(^{th}\) session).

\(^{140}\) CRC/C/15/Add.165, 06 November 2001, para 10 (Adopted at 28\(^{th}\) session).

\(^{141}\) CRC/C/15/Add.165, 06 November 2001, para 11 (Adopted at 28\(^{th}\) session).

\(^{142}\) CRC/C/15/Add.165, 06 November 2001, para 12 (Adopted at 28\(^{th}\) session).

\(^{143}\) CRC/C/15/Add.165, 06 November 2001, para 23 (Adopted at 28\(^{th}\) session).

\(^{144}\) CRC/C/15/Add.165, 06 November 2001, para 67 and 68(b) (Adopted at 28\(^{th}\) session).
Law reform in the Gambia resulted in the enactment of Children’s Act on the 23 June 2005 dealing with both social welfare and juvenile justice. The enactment of the Children’s Act gave the UNCRC and the ACRWC full force of law in the Gambia. Section 2(1) of the Act defines a child as a person under the age of 18. The Constitution does not expressly state who is a child but it can be inferred from s39(1)\textsuperscript{145} and s26\textsuperscript{146} that the full age is 18 and that a child is someone below the full age. Part XVII of the Children’s Act details the administration of juvenile justice. Under its Criminal Code, Cap 10 Laws of the Gambia and qualified by other parts of the Code, the Gambia was an adherent of the *doli incapax* rule.\textsuperscript{147} This meant that criminal responsibility began at the tender age of 7 if a child had knowledge and understanding of his or her wrongful actions. There existed a rebuttable presumption that a child between the ages of 7 and 12, lacked criminal responsibility at the time of the commission of the alleged offence, if he or she did not posses the required knowledge and understanding of his or her wrongful actions determined by a court. The *onus* was on the prosecution to rebut the presumption that the child lacked criminal responsibility. Section 209 of the Children’s Act increased the MACR from 7 to 12 and abolished the *doli incapax* rule.\textsuperscript{148} In raising its MACR from 7 to 12 the Gambia is acting in accordance with international principles and its State obligations.\textsuperscript{149}

\textsuperscript{145} ‘Every citizen of the Gambia being eighteen years or older and of sound mind shall have the right to vote for the purposes of elections’.

\textsuperscript{146} ‘Every citizen of the Gambia of full age and capacity shall have the right without unreasonable restrictions to take part in the conduct of public affairs and to vote and stand for elections’.

\textsuperscript{147} CRC/C/3/Add.61, 28 September 2000, para 65.


\textsuperscript{149} CRC/C/15/Add.165, 06 November 2001, para 68(b) (Adopted at 28th session).
3.8 Ethiopia

Ethiopia is the only African country under study that has not been colonized and that follows a partly monist approach to international law. This means that international treaties automatically become binding law in the State upon ratification. Such binding law can only be directly invoked and applied once ratification is published. Ethiopia is a party to both the UNCRC and ACRWC and has submitted its third periodic report to the CROC under article 44 of the UNCRC.

The 1995 Constitution recognises all international agreements ratified by Ethiopia as law of the land and any national laws and constitutional human rights shall be interpreted in accordance with these international agreements. Article 36 of the Constitution is dedicated to children and their rights. The principles and the provision of the UNCRC influenced the drafting of this section as it was already ratified by Ethiopia at the time the Constitution was being drafted.

In its concluding observations, CROC notes with satisfaction the progress that Ethiopia has made since its initial report. The adoption of the 1995 Constitution was

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152 CRC/C/ETH/CO/3, 01 November 2006 (Adopted at 43rd session).

153 Section 9(4) of the Constitution of the Federal Democratic Republic of Ethiopia (FDRE).

154 Article 13(2) of the Constitution of the FDRE.

Ethiopia’s first move in the right direction. Following the Constitution was the establishment of the inter-ministerial committee to review its legislation and monitor the implementation of the UNCRC at all levels of government. Thirdly, the States Party in collaboration with NGO’s translated the UNCRC into 11 local languages and took every effort in publicizing the UNCRC so as to ensure its effective implementation. The CROC welcomed the adoption of the new Criminal Code in 2005 and the States ratification of the ACRWC in 2002. It is submitted that all this reform coupled with the fact that Ethiopia is the only African country thus far to submit its third report to the CROC is very progressive.

Two weaknesses reflected from the periodic reports is the failure of the State to publish the UNCRC in the official Gazette and the need for much development in the administration of juvenile justice. On 09 May 2005, Ethiopia adopted a new Criminal Code in keeping with its treaty obligations of adopting legislation as a way of realising children’s rights. One of the main reasons in adopting the Code was to deal with the alarming increase in delinquency rates within the juvenile sector. The Code stipulates three distinct ages, namely, ‘infants’, ‘young persons’ and ‘adults’. Infans are children below the age of 9 years old who cannot be held criminally

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156 CRC/C/15/Add.67, 24 January 1997, para 3 (Adopted at 14th session).
158 CRC/C/15/Add.144, 21 February 2001, para 8 (Adopted at 26th session).
159 CRC/C/ETH/CO/3, 01 November 2006, para 3 and 5 (Adopted at 43rd session).
160 Ethiopia is currently preparing to submit a consolidated 4th and 5th report due 12 December 2011.
161 CRC/C/ETH/CO/3, 01 November 2006, para 8 and 78 (Adopted at 43rd session).
responsible for their criminal acts as they lack accountability.\textsuperscript{164} Young Persons are children aged 9 to 15 while children aged 15 to 18 are treated in the same manner as adults.\textsuperscript{165} The Criminal Code thus sets the MACR at 9 years old and the upper age limit at 15 years old despite CROC’s numerous recommendations for the State to raise the minimum age to an internationally acceptable level.\textsuperscript{166}

3.9 Malawi

Malawi became a party to the UNCRC on 02 January 1991 and the ACRWC on 16 September 1999.\textsuperscript{167} These human rights instruments obligate State Parties to realise children’s rights through adopting legislation and formulating and implementing any other measures in favour of such realisation. Malawi ratified the UNCRC at a time when the State was ruled by a dictatorship.\textsuperscript{168} Thus, implementation of its provisions was pretty much at a standstill until the end of the Banda Regime.

\textsuperscript{164} Article 52 of The Criminal Code of the Federal Democratic Republic of Ethiopia; CRC/C/70/Add.7, 23 March 2000, para 28; 43\textsuperscript{rd} Session of the UN Committee on the Rights of the Child: Information notes on juvenile justice related issues. Defence for Children International (October 2006).

\textsuperscript{165} Article 53 and Article 56 respectively of The Criminal Code of the Federal Democratic Republic of Ethiopia; CRC/C/70/Add.7, 23 March 2000, para 28; 43\textsuperscript{rd} Session of the UN Committee on the Rights of the Child: Information notes on juvenile justice related issues. Defence for Children International (October 2006).

\textsuperscript{166} CRC/C/ETH/CO/3, 01 November 2006, para 78(a) (Adopted at 43\textsuperscript{rd} session).


\textsuperscript{168} DW Chirwa (2006) ‘Harmonisation of national and international laws to protect children’s rights: The Malawi case study’ (Unpublished Report); DM Chirwa & T Kaime ‘Where are the missing pieces? Constructing a mosaic of the CRC and the African Children’s Charter in Malawi’s law and policy’ (2008) Vol 2(1), Malawi Law Journal 86. At the time it adopted the UNCRC human rights were not a priority in Malawi. Thus its adoption was aimed at public relations rather than improving children’s rights.
The end of the Banda regime brought with it a new multiparty government and a new Constitution containing a justiciable Bill of Rights in 1994. The advent of the Constitution meant that the State had to review its enactments and policies over the last 30 years of dictatorship and colonialism. The State appointed a special ministry for women and children and tasked the Malawi Law Commission to deal with comprehensive law reform. However, in 2001 a Special Law Commission was appointed to deal with reform relating to children. This resulted in one comprehensive piece of legislation called the Child (Justice, Care and Protection) Bill. At present the Bill is still pending enactment.

Malawi has a common law legal system which recognises customary law as well. It subscribes to a dualist approach to international law. Section 211(2) of the Constitution provides that international treaties that were binding on the Republic before the commencement of the Constitution will remain binding unless an Act of Parliament provides otherwise. Thus the UNCRC forms part of Malawian law and can be invoked in their courts while the ACRWC cannot unless it is domesticated through an Act of Parliament.

The Constitution defines a child as a person below the age of 16 which is inconsistent with the ACRWC’s definition of below 18. The CROC raised concern about the definition in its concluding observations and recommended that the State establish a definition that is in accordance with article 1 of the UNCRC and other related provisions. The proposed Child (Justice, Care and Protection) pending enactment had sought to adopt a comprehensive definition of the child that complies with the UNCRC and the ACRWC.

Another concern raised by the CROC was Malawi’s MACR that is set at 7 years old. The Malawi Penal Code provides that children below the age of 7 lack criminal capacity. Children between the ages of 7 and 12 are presumed to lack criminal capacity until proven otherwise. The CROC has expressed that the MACR set at 7 is far too low and contrary to international standards. It recommended that the State take legislative measures in accordance with the ‘best interests’ of the child principle as well as the juvenile justice provisions in the UNCRC and the other relevant UN guidelines in the raising the MACR.

\[\text{\textsuperscript{172}}\text{ Section 23 of the Constitution of the Republic of Malawi.}\\ \text{\textsuperscript{173}}\text{ CRC/C/15/Add.174, 02 April 2002, para 19(a) (Adopted at 29\textsuperscript{th} session).}\\ \text{\textsuperscript{174}}\text{ A Stapleton ‘African focus: The role of juvenile justice in Malawi’ (2000) 1(1) \textit{Article 40} 8.}\\ \text{\textsuperscript{175}}\text{ CRC/C/8/Add.43, 26 June 2001, para 343.}\\ \text{\textsuperscript{176}}\text{ DM Chirwa & T Kaim\\eacute; ‘Where are the missing pieces? Constructing a mosaic of the CRC and the African Children’s Charter in Malawi’s law and policy’ (2008) Vol 2(1), \textit{Malawi Law Journal} 87.}\\ \text{\textsuperscript{177}}\text{ CRC/C/15/Add.174, 02 April 2002, para 18 and 67 (Adopted at 29\textsuperscript{th} session).}\\ \text{\textsuperscript{178}}\text{ CRC/C/15/Add.174, 02 April 2002, para 19(b), 68 and 69(a) (Adopted at 29\textsuperscript{th} session); DW Chirwa (2006) ‘Harmonisation of national and international laws to protect children’s rights: The Malawi case study’ (Unpublished Report); Malawi’s second periodic report is to be discussed at the 09 January 2009 CROC meeting.}\]
According to State practice and public opinion the MACR should be set at 12. Yet the Malawi Law Commission has recommended that the MACR be raised from 7 to 10 contrary to State practice as submitted in Malawi’s initial report. The rebuttable presumption would then apply for children between the ages of 10 and 14. In light of these concerns and State practice, it is my submission that Malawi should review its legislation pertaining to the MACR, in an attempt to comply with its international obligations.

3.10 Mozambique

Mozambique has a civil law legal system and subscribes to a dualist approach to international law. It has ratified both the human rights treaties, the UNCRC in 1994 and the ACRWC in 1998. Prior to its ratification of the UNCRC, Mozambique adopted its own 12 point Declaration on the Rights of the Mozambican Child.

Subsequent to Mozambique’s initial report, the CROC commended the State on its efforts thus far in reviewing its legal codes to ensure compatibility with international standards and the incorporation of article 3 into its Constitution, the establishment of the Ministry for the Co-ordination of Social Action (MICAS) and a children’s parliament. CROC however raised the following concerns; firstly, there remained inconsistencies between domestic legislation and international standards of the

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182 CRC/C/15/Add.172, 03 April 2002, para 5 and 6 (Adopted at 29th session).
When conflict arises between the two, domestic legislation takes precedence which may lead to a violation of the UNCRC provisions. Secondly, there was no specialised body in place to oversee the MICAS and take the lead for developing children’s rights policy, planning and programming. Thirdly, on the issue of juvenile justice, the CROC was concerned that 16 and 17 year olds were excluded from the benefits of the juvenile system.

It was these concerns that led to the process of child law reform in Mozambique initiated by MICAS, the Ministry of Justice and UNICEF. In carrying out its law reform processes, the State had to ensure that its national laws reflected the four key principles enshrined in articles 2, 3, 6 and 12 of the UNCRC. In keeping with international law and UN standards, Mozambique’s Penal Code sets the MACR at 16 years old. The high age of 16 was inherited from Mozambique’s colonial laws and remained intact post the civil war. A consultative process was followed in determining whether 16 was a suitable age for criminal capacity and the results showed an almost even split. Cantwell, an expert in the field of children’s rights, noted that the real issue was not so much at what age the State sets the minimum, but what the State does with the children below that age who

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183 CRC/C/15/Add.172, 03 April 2002, para 11 (Adopted at 29th session).
184 CRC/C/15/Add.172, 03 April 2002, para 13 (Adopted at 29th session).
185 CRC/C/15/Add.172, 03 April 2002, para 72(b) (Adopted at 29th session).
187 Article 40(3)(a) of the UNCRC.
188 Rule 4.1 of the Beijing Rules.
find themselves in conflict with the law. States with high minimum ages are allowed to resort to non-penal measures such as referring children to educational institutions (the so-called ‘sleep over institutions’) which amounts to a deprivation of the child’s liberty without a trial. This could result in welfare processes being more harmful to the child than the normal criminal process, thus presenting a very real need for alternative measures for children under the age of 16.

Article 40(3) of the UNCRC requires States to have separate legislation, institutions and authorities specifically for children in conflict with the law. Article 1 of the UNCRC defines the child as a person below the age of 18 unless majority is attained earlier. A problematic area concerning Mozambique’s high MACR, is the age of majority is also set quite high. The MACR is set at 16 and the age of majority at 21 yet young persons between these age categories are denied the protective benefits of the juvenile justice system. I submit that the State needs to reassess this provision bringing it into accordance with the CROC’s initial response of a child in conflict with the law who is a person below the age of 18. Thus there is no reason why a child over the age of 16 but below 18 should not benefit from protective benefits of the juvenile justice system.

A consultative law reform process resulted in two pieces of Draft legislation for children. One of the Draft Bills deal with Child Protection issues while the other Bill on the Jurisdictional Organisation of Minors details issues of juvenile justice. At present, neither of the Bills has been enacted by Parliament.

3.11 Sierra Leone

Sierra Leone is a party to both the UNCRC and ACRWC. It has a common law legal system but also subscribes to customary law. The Constitution is the supreme law of the land. Second to the Constitution are international treaties and conventions followed by common law and judicial precedent. Customary law is at the bottom of Sierra Leone’s legal hierarchy yet it regulates most of the law relating to criminal behaviour. This has proved problematic in the area of criminal and family law as traditional rules and cultural values often clash with the Constitution and international human rights treaties at the expense of women and children.

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In 1991 a civil war broke out in Sierra Leone and came to an end in 2002. The period between ratification of the two treaties saw the most heinous human rights atrocities especially against women and children. Children found themselves in the position of being both the perpetrator and the victim. The country was riddled with the effects of war and slowly started implementing disaster relief methods. As a States Party to both the UNCRC and the ACRWC, Sierra Leone is under an obligation to review its current child laws and policies and reform them in a manner that will best serve the interest of the child. This means that Sierra Leone needs to initiate legal reform in accordance with the international provisions advocated in the above treaties to promote and protect children’s rights in their jurisdiction.

Sierra Leone submitted its initial report in April 1996 which was considered by the CROC in January 2000. In its concluding observations, the CROC addressed its concerns pertaining to the definition of a child and the low MACR set at 10 years old. The CROC recommended that the States Party review its country’s domestic legislation in formulating a consistent definition of a child and in raising its very low MACR. It advised the States Party to adopt the age of 18 in defining a child. This age is also consistent with provisions of the UNCRC and the ACRWC which defines

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202 CRC/C/15/Add.116, 24 February 2000, para 22 and 28 ( Adopted at 23rd session); CRC/C/3/Add.43, 03 June 1996, para 33.
a child as under the age of 18. Furthermore, in light of articles 37, 39, 40 and other the other relevant UN standards, it recommended that Sierra Leone harmonise its domestic legislation in accordance with these international provisions.

In carrying out the recommendations of the CROC, Sierra Leone’s Parliament enacted a long awaited and most elaborate Child Rights Act on 13 July 2007. It is a laudable reform initiative on the part of Sierra Leone which is very closely linked with the provisions of the UNCRC and ACRWC for the purposes of implementation. It is divided into eight sections covering areas such as child rights, parental and state responsibilities, custody and maintenance, juvenile justice, social welfare, employment and miscellaneous matters. In the definition section of the Act a child is defined as any person under the age of 18 and the best interests of the child shall be paramount in the administration of justice and the protection of children’s rights. Article 70 of the Act outlines the MACR provision as follows, ‘In any judicial proceedings in Sierra Leone, a child shall not be held to be criminally responsible for his actions if he is below the age of fourteen years’.

In its concluding observations to Sierra Leone’s second periodic report, the CROC commended the States Party on its Child Rights Act that was drafted in response to its

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203 CRC/C/15/Add.116, 24 February 2000, para 23 (Adopted at 23rd session); Article 1 of the UNCRC (which attaches a caveat ‘unless the law applicable to the child, majority is attained earlier’) and Article 2 of the ACRWC.

204 CRC/C/15/Add.116, 24 February 2000, para 92 (Adopted at 23rd session).


207 Article 2 and article 3(1) of the Child Rights Act, 2007; Save the Children UK. ‘A critical analysis of the Child Rights Act, 2006, Sierra Leone (Unpublished draft working paper, copy on file with the author).
It praised Sierra Leone’s efforts in reviewing and upgrading its laws in accordance with international standards. It noted the increase of MACR from 10 to 14 with satisfaction and advised that the States Party must ensure its full implementation in light of article 37, 39, 40, the other relevant UN standards and the invaluable General Comment No.10. In raising its MACR from 10 to 14, Sierra Leone has met its international treaty obligations. I submit that Sierra Leone is the only country under study that has correctly adhered to CROC’s views concerning the MACR in General Comment No. 10. It is noteworthy that General Comment No. 10 has gained an entry way into the concluding observations to Sierra Leone. It is my submission that since gaining entry into the concluding observations of the CROC it should be afforded more weight than a reference document with persuasive force as described in chapter 1.

3.12 Zambia

Zambia ratified the UNCRC on 06 December 1991 and signed the ACRWC on 28 February 1992 but has not yet ratified it. Its legal system is based on the common

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209 CRC/C/SLE/CO/2, 20 June 2008, para 76 and 77 (Adopted at 48th session).
210 Fact Sheet # 4: Ensuring Appropriate Age Limits of Criminal Responsibility. Available at http://www.dci-is.org/db/nl/up_files/GC_10_FactSheet4_Ensuring_Appropriate_Age_of_Criminal_Responsibility_EN.pdf [accessed 10 May 2008].
211 CRC/C/KEN/CO/2, 19 June 2007, para 68 (Adopted at 44th session); CRC/C/SLE/CO/2, 20 June 2008, para 77 (Adopted at 48th session).
212 See Chapter 1 3.2 and 4.
law but it recognises and incorporates customary law as part of its system. Zambia follows a dualist approach to international law, thus, until Zambia domesticates the principles and provisions of the UNCRC or the ACRWC it is not legally binding on its citizens.

In 2003, CROC in its concluding observation welcomed the appointment of the Law Development Commission and noted Zambia’s attempts in harmonising their domestic legislation with international law. However, the CROC was concerned that their domestic and customary legislation was not fully reflecting the principles and provisions enshrined in the UNCRC. The CROC raised its concerns about the various minimum ages under the different statutes. For example, the Constitution defines a child as person under the age of 15, customary law bases the end of childhood on puberty, and the MACR is set at 8 years old.

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216 CRC/C/15/Add.206, 02 July 2003, para 19 and 70 (Adopted at 33rd session).
The CROC has urged the State to make every effort in determining a clear and precise
definition for the child that is in compliance with article 1 and other relevant
principles of UNCRC.\textsuperscript{217} It further recommended that the State increase the existing
low MACR in accordance with article 40 and the relevant UN standards.\textsuperscript{218} Finally,
on the issue of age, I submit that the State should review its statutory legislation and
customary law that have set minimum ages which are contradictory to various fields
and international standards as well.\textsuperscript{219}

Section 14(1), of the Zambian Penal Code, Chapter 87 of the Laws of Zambia sets out
the MACR. The section stipulates that children under the age of 8 years old cannot be
held criminally liable for any act or omission on their part. Subsection (2) provides
for the \textit{doli incapax} presumption for children between the ages of 8 and 12 years old.
I submit that even though the minimum of 8 is raised by one year in comparison to the
common law age of 7, it is still too low. Zambia has not increased its MACR despite
the CROC’s urgent recommendations. To make matters worse the provisions of the
Penal Code only hold true in theory but not in practice. There is a tendency in
Zambia to disregard the rights of children set out in the Penal Code and reiterated in
the human rights instruments that Zambia is a party to.\textsuperscript{220}


\textsuperscript{218} DN Ng’ambi (2006) ‘Harmonisation of national and international laws to protect children’s rights: The Zambia case study’ (Unpublished Report); CRC/C/15/Add.206, 02 July 2003, para 70 and 71 (Adopted at 33\textsuperscript{rd} session).


\textsuperscript{220} Mwansa, A ‘Boy, six, in maximum security prison: Zambia’ (2004) 6(1) \textit{Article 40} 5.
4. The CROC’s jurisprudence on the MACR

Since the adoption of the UNCRC, the CROC has continually developed the way it views the MACR. These developments are said to be threefold; the first view taken by CROC with regard to the MACR is the failure to have a MACR in place. Those States Parties that have failed to establish a MACR are in clear violation of the UNCRC. The second view is a very low MACR set by States Parties. The CROC has expressed its disapproval (through the system of State reporting) of States Parties setting their age minimums at 10 and below. At a later stage, but still when there was no definitive recommended age, the CROC began criticizing countries that set their age minimums at 12 and below. The third and final view deals with the *doli incapax* rule. Initially, the CROC held that the abolition of this rule would be a violation of the UNCRC. However, since the arrival of General Comment No.10, the CROC has rejected a ‘split age’ as it leads to discriminatory practices. This ‘split age’ ultimately arises through the retention of the *doli incapax* rule which means that States Parities practicing a ‘split age’ is in violation of its treaty obligations. Some commentators may argue that the CROC’s jurisprudence is inconsistent and thus confusing for States Parties. I submit that it shows development over the last 18 years and that the CROC has been consistent in that it always advocates for an increase of the MACR.

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223 CRC/C/15/Add.134, 16 October 2000, para 18 and 19.

224 CRC/C/GC/10 para 30.
5. Assessing and comparing child law reform initiatives on the MACR of the countries under study

Uganda, Ghana, Gambia, Kenya and Sierra Leone have all successfully enacted child legislation within their Parliaments. All 5 of them with the exception of Ghana have their reforms in one comprehensive Act. Ghana has two separate Acts, one for child care and one for juvenile justice. South Africa, Namibia, Lesotho, Malawi and Mozambique all have their child-centered bills still pending in Parliament or partially in operation. South Africa, Namibia and Mozambique each have a separate Bill for juvenile justice while Lesotho has all its child law reforms in one Bill. Namibia, Lesotho and Malawi have relied on South Africa’s juvenile justice legislative reform as a good practice model and have modelled their bills in a similar fashion. South Africa’s Child Justice Bill is in its second phase of approval (at the National Council of Provinces) and is soon to be enacted. Ethiopia and Zambia have both relied on their Penal Codes for establishing a MACR.

Uganda, Ghana and the Gambia have all increased their age minimums from 7 to 12 (14 for Ghana) and abolished the *doli incapax* rule. Kenya and Zambia have opted to keep their minimum age set at 8 and retain the *doli incapax* rule for children between the ages of 8 and 12. Namibia kept its MACR at 7 and retained the *doli incapax* rule for children between 7 and 14. South Africa, Lesotho and Malawi have increased their minimum age from 7 to 10 and retained the *doli incapax* rule for children

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225 South Africa’s Children’s Right Act 38 of 2005 is partially in operation.
between the ages of 10 and 14. Ethiopia has three different age categories with the MACR set at 9. Mozambique has its minimum age set at 16 and Sierra Leone at 14.

The *doli incapax* rule forms part of the legal systems of Kenya, South Africa, Namibia, Lesotho, Malawi and Zambia. It serves as a ‘protective mantle’ for young children who find themselves in the criminal justice system.\(^{227}\) It used to form part of the legal systems of Uganda, Ghana and the Gambia before they abolished it as part of their child law reform process. This means that initially 9 of the 12 countries under study subscribed to the *doli incapax* rule. However, since each country has undergone a process of legal reform only 6 of the 9 still subscribe to the rule.

Ethiopia does not subscribe to the *doli incapax* rule but falls short its international treaty obligations with its MACR set at 9. More than half of the countries under study are in violation of the UNCRC according to the CROC’s second and third views on the MACR. Even though Uganda and Gambia meet the UNCRC and ACRWC standards, the CROC has indicated that 12 is the absolute minimum age requirement.\(^{228}\) This means that Uganda and Gambia should keep reviewing their child laws in view of raising their minimum age of 12 progressively. Ghana, Sierra Leone and Mozambique have met their international treaty obligations regarding the MACR with the commendable high minimums of 14 and 16 respectively.

Some of the problems affecting the MACR such as the increasing low rate of birth registrations and poor statistical data were highlighted in all the States Parties reports.

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\(^{228}\) CRC/C/GC/10 para 30.
under study. The CROC recommended that these countries should implement mobile registration units for easier access and awareness campaigns educating government officials, community and religious leaders, midwives and parents on the importance of registration.\textsuperscript{229} Another helpful mechanism that could strengthen efforts to make birth registrations a less costly exercise is by issuing certificates free of charge. Such efforts by States Parties will ensure compliance with articles 7 and 8 of the UNCRC. On the problem relating to poor statistical data, the CROC recommends that States Parties should develop indicators to monitor and evaluate their progress in collecting systematic and disaggregated data.\textsuperscript{230} They should also seek technical assistance from organisations such UNICEF.

All the countries under study have submitted their initial periodic reports to the CROC. Some of the countries have submitted more than one and Ethiopia has already submitted its third periodic report. However, only one country under study has submitted its initial report to the ACERWC.\textsuperscript{231}

6. Conclusion

Upon ratification all countries under study needed to review their laws pertaining to children and bring them in accordance with international law principles. The MACR

\begin{itemize}
\item \textsuperscript{229} CRC/C/15/Add.122, 23 February 2000, para 20 ( Adopted at 23\textsuperscript{rd} session); CRC/C/15/Add.144, 21 February 2001, para 35 ( Adopted at 26\textsuperscript{th} session); CRC/C/15/Add.172, 03 April 2001, para 35 ( Adopted at 29\textsuperscript{th} session); CRC/C/ETH/CO/3, 01 November 2006, para 32 ( Adopted at 43\textsuperscript{rd} session).
\item \textsuperscript{230} CRC/C/15/Add.165, 06 November 2001, para 15 ( Adopted at 28\textsuperscript{th} session); CRC/C/Add.160, 07 November 2001, para 15; CRC/C/Add.174, 02 April 2002 para 11 ( Adopted at 29\textsuperscript{th} session).
\item \textsuperscript{231} Uganda is the only country under study who has submitted its initial report to the ACERWC but it has not yet been considered. See The African Child Policy Forum (2007) ‘Realising rights for children: Harmonisation of laws on children: Eastern and Southern Africa’ 10. Available at http://www.africanchild.info/documents.asp?page=3 [accessed 05 October 2008].
\end{itemize}
has not been given much attention in the past but it has definitely moved up on the juvenile justice agenda. It is also a substantive provision that must be incorporated into any piece of legislation affecting children in conflict with the law.

This chapter looked at how each country undertook child law reform initiatives to bring their laws in accordance with the principles of the UNCRC and the ACRWC. Despite lengthy and consultative reform processes, more than half the countries under study failed to meet the MACR standards prescribed by the international instruments. Kenya, South Africa, Namibia, Lesotho and Malawi have inherited the *doli incapax* rule into their legal systems serving as a ‘protective mantle’ for young children in conflict with the law. The CROC has argued that the retention of this rule is a violation of their treaty obligations as it leads to discriminatory practices. Ethiopia and Zambia’s reliance on their Penal Code has also led to their failure to meet their treaty obligations. Uganda, Ghana and the Gambia, Mozambique and Sierra Leone are the countries that have met their international treaty obligations through their legal reform processes.

The next chapter critically analyses the two opposing views held by the SALRC and the CROC with regard to the MACR. It provides an overview of the drafting history of South Africa’s Child Justice Bill and an in depth discussion on the development of the relevant MACR provisions since 2002. Cogent arguments by the SALRC in favour of raising the MACR from 7 to 10 which falls below international standards set by the CROC in General Comment No. 10 will be documented in the next chapter.
Chapter 4
A CRITICAL ANALYSIS OF THE SALCR CHILD JUSTICE BILL AND THE RECENT POSTION ADOPTED BY THE CROC IN GENERAL COMMENT NO. 10 ON THE MACR

1. Introduction
This chapter is a critical appraisal of the arguments for and against raising the MACR in the South African legal system in light of the position in international law (set out in chapter 2). A brief overview of the concept of criminal capacity in South Africa is provided and an explanation of how it works in practice. It further examines the work of many academics involved in advocating juvenile justice reform; NGO’s views and the many other role players that have discussed and given comment on the issues around the MACR are also given. Finally, this chapter it takes a more detailed look at the legislative process of the SALRC in formulating the Child Justice Bill and how it differs to or accords with that of the international perspective of the CROC.

2. The concept of criminal capacity in South Africa
Criminal capacity (in the context of children) refers to (1) a child’s mental ability to distinguish between right and wrong and to understand or appreciate the consequences involved (cognitive mental function) and (2) to act in accordance with such understanding or appreciation (conative mental function).¹ The concept was

derived from a mixture of civil law, Roman law and Germanic law.² For a child to be held criminally liable for his or her unlawful act or omission both elements (1) and (2) need to be present.³ Thus, if one of the elements is lacking the child cannot be held criminally liable.

In South Africa the concept of criminal capacity has been used synonymously with criminal accountability, criminal responsibility and imputability.⁴ This however, is not accurate as criminal capacity determines criminally responsibility. It is the *sine quo non* for the proof of criminal responsibility.⁵ Before a child can be held responsible for his or her unlawful actions an inquiry into whether or not he or she had the requisite criminal capacity must first take place. If the child is found to have criminal capacity then only can the child be held responsible (provided the other conditions for criminal liability are met).⁶ Similarly, if the child lacks the requisite criminal capacity then the child cannot be held criminally responsible.

The cognitive and conative elements of criminal capacity are often misunderstood and as a result not adequately dealt with in practice. The courts have accepted or are too easily satisfied with the prosecution simply providing evidence that indicates that the child knows the difference between right and wrong.⁷ The consequences of dealing

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⁶ Such as conduct, unlawfulness and *mens rea*.
with the elements in such an incomplete manner are three-fold. The first problem that arises is that criminal capacity and awareness of unlawfulness are treated as one and the same. Yet these are two separate requirements for criminal liability. Secondly, it only focuses on the child’s knowledge of wrongfulness of the conduct and not on the understanding of the nature and consequences of the conduct which is equally important. Finally, no mention is made of the conative function which is the child’s ability to act in accordance with the appreciation of the distinction between right and wrong.

3. Criminal capacity and the doli incapax presumption

The youthfulness of a child often excludes criminal capacity. It was laid down in the Corpus Iuris Civilis that children under 7 (infans) were exempted from criminal responsibility while children who had reached puberty (puberes) were not exempted. Puberty was assessed by the child’s physical development. Currently in our law there is an irrebuttable presumption of doli incapax for children under the age of 7. This means that they lack criminal capacity and thus may never be prosecuted for any criminal conduct. For children between the ages of 7 and 14 there exists a rebuttable presumption of doli incapax. This means that children falling within the

age group of 7 and 14 stand to be prosecuted if they possessed the requisite criminal capacity at the time of committing the alleged offence. Children over the age of 14 are presumed *doli capax* and are treated in the same manner as adults. Our common law presumptions found its origins in Roman law which forms the basis of South Africa’s legal system and several others in Southern Africa. The age of 7 represents one of the lowest MACR in the world. Many experts in the field of juvenile justice find this age unacceptably low and have varying opinions with regard to children between the ages of 7 and 14 being rebuttably presumed to lack criminal capacity. The 1924 case of *Attorney-General, Transvaal v Additional Magistrate of Johannesburg* confirms these presumptions *obiter*.

The prosecution is responsible for collecting and adducing sufficient evidence to rebut the presumption of *doli incapax*. The burden of proof that is placed upon the

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16 1924 A.D. 421.
17 At p 434 of the judgment the appeal court held that the law in South Africa has always been that a child under the age of 7 is conclusively *doli incapax* and the child between the ages 7 and 14 are presumed to be *doli incapax*, but this presumption ‘is rebuttable on proof of a malicious mind on the part of the child’. This obiter remark is quoted in almost every case where the court has to establish or fails to establish criminal capacity of children between the ages of 7 and 14.
prosecution in rebutting the presumption is beyond a reasonable doubt.\textsuperscript{18} Establishing the presence of the cognitive mental function on its own is not sufficient to disprove the presumption. Both functions must be present and all the circumstances of the case must be taken into account for the prosecution to rebut the presumption. The closer the child is to 7 the harder it is for the prosecution to rebut the presumption. The presumption however weakens the closer the child is to 14.\textsuperscript{19}

In rebutting the presumption our courts have been urged to avoid placing ‘an old head on young shoulders’ and should consider the child’s age, knowledge and the specific circumstances facing the child at the time of the commission of the offence.\textsuperscript{20} Children very often act irrationally, impulsively, or succumb to peer-pressure forgetting what they have been taught and impervious of any consequences. Section 73(3) and 74 of the Criminal Procedure Act provides that the prosecution may call upon the parent or guardian to accompany the child to court and to testify.\textsuperscript{21} The prosecution will ask the parent or guardian to confirm the child’s age and whether or not the child has been taught the difference between right and wrong and was able to distinguish between the two at the time the alleged offence occurred. Parents and guardians are often misled by this unfair practice of the prosecution calling them to


\textsuperscript{21} Act 51 of 1977.
testify. They believe that they are providing mitigating evidence in favour of their children. Instead the prosecution uses such evidence as confirmation that the child in question did in fact possess criminal capacity at the time the offence was committed. It is my submission that the prosecution should avoid the practice of calling parents or guardians and should rather call upon teachers, probation officers or psychologists to assist in proving criminal capacity.

4. Case law illustrations of the doli incapax presumption in practice

In *R v K* the 13 year old boy was charged with the murder of his mother. The child’s mother was mentally unstable and often had violent outbursts. On the day in question, the mother had a violent episode and chased the accused with a plank. The sister of the accused testified that there was a struggle. Her mother fell down and her brother ran away. Consequently the mother died of a knife wound. The father testified that his son owned a pocket knife, knew the difference between right and wrong, and thought that his son could appreciate that a knife is a dangerous weapon. The court *a quo* held that the Crown had to show that the accused knew what the reasonable and possible consequences of his act would be. The court *a quo* found that the Crown had discharged its *onus* and the child was convicted. On review the conviction was set aside on the basis that it had not been proven beyond a reasonable

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24 1956 (3) SA 353 (A).

25 *R v K* 1956 (3) SA 353 (A) at 357 para G – H.
doubt that the accused was *doli capax* and that his actions exceeded the grounds of self-defence.26 The court reasoned that the Crown did not prove that the child was aware that his use of his pocket knife was a wrongful act, rather it was to defend himself against his mother’s violent outburst. The act of running away and not returning could be explained by the fact that he feared his mother may have been waiting for him to finish off what she had started.

In *R v Tsutsu*27 a 10 year old was convicted of culpable homicide based on the testimony of one eye witness who was the wife of the victim. The victim had a fight with the accused’s father. Shortly after the fight the accused was charged with culpable homicide. The magistrate was faced with the question of motive. He could not determine with certainty whether the accused killed the victim out of revenge or because he thought it was his duty to protect his father’s honour. He averred that the accused must have had the knowledge that a knife is a dangerous object and that using it to stab someone would cause great harm to that person. The magistrate interpreted the accused’s act of running away as a sign that the accused knew what he had done was wrong. The matter went on review and the review court held that running away from the scene does not necessarily constitute an admission of guilt. It could be explained as the boy being frightened.28 The doctor who examined the accused after the incident provided evidence that the boy showed no signs that he fully appreciated the seriousness of the allegations against him. Upon closer consideration of the facts the court was of the opinion that the Crown had not proved beyond a reasonable doubt

26 *R v K* 1956 (3) SA 353 (A) at 359 para E – F.
27 1962 (2) SA 666 (SR).
28 *R v Tsutso* (2) 1962 SA 666 (SR) at 668 para C – D.
that the child was mature enough to understand the wrongfulness of his conduct.\textsuperscript{29} Thus his conviction and sentence were set aside.

In \textit{S v Van Dyk and Others}\textsuperscript{30} an 11 year old and two adults were found guilty of housebreaking with the intent to commit another offence unknown to the State. The 11 year old was sentenced to three strokes with a cane. The case went on automatic review because of the sentence imposed upon the first accused. The magistrate who adjudicated the matter was asked to provide reasons for the conviction and sentence imposed upon the child. The review court was swayed by the age of the child as there was a presumption that he was \textit{doli incapax} and thus he may not fully understand the wrongfulness of his actions.\textsuperscript{31} A further mitigating factor in favour of the child was that the other two perpetrators were adults who may have had a hand in influencing and possibly even coercing the child to partake in their criminal acts.\textsuperscript{32} The court belaboured the point that where a matter involves a child between the ages of 7 and 14, the prosecution has a duty to rebut the presumption before convicting such a child. Even in circumstances where the child pleaded guilty to the offence the prosecution is still under a duty to rebut the presumption before conviction.

The case of \textit{S v S}\textsuperscript{33} involved a 13 year old boy accused of committing the crime of sodomy. He was convicted of attempt to commit sodomy because at the time he committed the crime he was 13 years, 4 months and 16 days old. The court laid down the rule of law that children under the age of 7 are irrebuttably presumed \textit{doli incapax}

\textsuperscript{29} \textit{R v Tsutso} (2) 1962 SA 666 (SR) at 668 para H.
\textsuperscript{30} 1969 (1) SA 601 (CPD).
\textsuperscript{31} \textit{S v Van Dyk and Others} 1969 (1) SA 601 (CPD) at 602 para F – G.
\textsuperscript{32} \textit{S v Van Dyk and Others} 1969 (1) SA 601 (CPD) at 603 para D – G.
\textsuperscript{33} 1977 (3) SA 305 (OPA).
and children between 7 and 14 are presumed to be *doli incapax*.\textsuperscript{34} It was argued that a boy under the age of 14 could not be convicted of rape and thus by analogy neither could he be convicted of sodomy.\textsuperscript{35} The accused pleaded guilty and admitted to having intercourse with the victim. He testified that he waited for the other children to go home before having intercourse with the victim because he feared that they may tell the adults. He told the court that he knew what he was doing was wrong and that he would get a hiding if the adults found out. The review court was satisfied that the State had successfully rebutted the presumption as it was clear from his testimony that he planned the offence and knew what he was doing was wrong because he feared the punishment.

The decision of *S v M and Others*\textsuperscript{36} dealt with three accused charged with stock theft. The first accused was the mother of the second and third accused who were 8 and 7 years old. All three accused were found guilty of stock theft. Accused two and three were convicted and sentenced to a juvenile whipping. The nature of such punishment was not one that ordinarily went on automatic review. The review court held that accused two and three were improperly convicted and sentenced and the courts are obliged to intervene when the conviction and sentence are not in accordance with the aims of justice.\textsuperscript{37} Section 25 of the Transkeian Penal Code codifies the common law *doli incapax* presumption. It states that children under the age of 7 cannot be convicted of any offence. Neither can children over 7 but under 14, unless it can be proven that at the time of the offence, he or she had sufficient intelligence to know

\textsuperscript{34} *S v S* 1977 (3) SA 305 (OPA) at 306 para F – G which cites the *obiter* remark in *Attorney-General, Transvaal v Additional Magistrate for Johannesburg*, 1924 A.D. 421 at 434.

\textsuperscript{35} *S v S* 1977 (3) SA 305 (OPA) at 307 para E – H.

\textsuperscript{36} 1978 (3) SA 557 (TKSC).

\textsuperscript{37} *S v M and Others* 1978 (3) SA 557 (TKSC) at 558 para A – B.
what the nature and consequences would be or to appreciate the wrongfulness of the conduct. The matter was correctly heard in camera which was in accordance with the Criminal Procedure Act. However, upon consideration of their sentence the prosecutor alerted the court from the charge sheet that the accused were both juveniles aged 8 and 7 respectively. The court referred to \textit{R v K} and \textit{R v Tsutso} as precedent that the onus is on the State to prove beyond a reasonable doubt that accused two and three had a sufficiently mature mind at the time of the offence to understand what they were doing was wrong. No further evidence relating to the age of the two accused was conducted by the State. The State did not ask the magistrate to make any estimation as to their age nor did they question the mother of the two accused in relation to their age when she elected to testify on their behalf. The States case was defective and they were not successful in discharging their \textit{onus}. The mother (first accused) testified that she instructed the boys to slaughter any sheep. The children testified to the same evidence in their statements. The review court held that where children below or over the age of 14 acted upon the instructions of an older person, especially a parent, such children cannot be said to have understood or appreciated the wrongfulness of their conduct. In such circumstances children should be excused from criminal liability. Both the conviction and sentence of accused two and three was set aside.

\begin{itemize}
  \item Transkeian Penal Code Act 24 of 1955.
  \item Section 156(5), Act 56 of 1955.
  \item 1956 (3) SA 353 (A) at 356 para E – H.
  \item 1962 (2) SA 666 (SR) at 668 para F and H.
  \item \textit{S v M and Others} 1978 (3) SA 557 at 559 para G –H.
\end{itemize}
In *S v Pietersen and Others*, the three accused were charged with housebreaking with the intent to steal and theft. The first accused was 18 and accused two and three were both 9 years old. All three pleaded guilty to the charge and were questioned in accordance with s112(1)(b) of the Criminal Procedure Act. The magistrate questioned each accused to ascertain whether each of them knew that what they were doing was wrong when they broke into the house and stole property that did not belong to them. Each accused answered that they were aware that what they were doing was wrong. The prosecutor called upon the second and third accused’s parents to testify that they had taught their children the difference between right and wrong and that they were punished when they did something wrong or naughty. The parents affirmed that their children knew that breaking into someone’s house and stealing their possessions was wrong. The father of the second accused further testified that his child was 8 years old at the time of the offence. On the basis of the magistrate’s questioning and the testimony provided by the parents the court found that both accused two and three were *doli capax*. Thus all three accused were found guilty as charged. Before sentencing the matter went on review.

The review court found that the magistrate erred in finding the second and third accused *doli capax*. The circumstances under which a child between the ages of 7 and 14 commits an offence with an adult or an appreciably older youth must be investigated before a magistrate can find the child to be *doli capax*. Furthermore, the prosecuting authorities need to take cognisance of the fact that when charging children under the age of 14 together with adults or older youth, they are responsible

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43 1983 (4) 904 (ECD).
44 Act 51 of 1977.
45 *S v Pietersen and Others* 1983 (4) 904 (ECD) at 910 F – G.
for discharging the onus that the child knew what he or she was doing was wrongful and that he or she acted out of his/her own free will and was not coerced or influenced by the older co-accused. Despite the plea of guilty in terms of s112(1)(b) and the testimony of the parents of the accused, the questioning magistrate and the prosecutor did not inquire into the presence of the first accused who was 18 at the time the offence was committed. The review court was of the opinion that the first accused’s actions and presence during the commission of the offence strongly suggested that he may have coerced, influenced or persuaded them into joining him. Neither the questioning magistrate nor the prosecutor investigated whether the first accused had played a role in influencing the second and third accused. The matter was sent back to the magistrates’ court with the instruction that the magistrate enter a plea of not guilty in terms of s113 of the Criminal Procedure Act for the second and third accused.

In the matter of S v Mbanda and Others, three boys were charged and convicted of burglary and theft of cakes and sweets. Two of the boys were aged 11 and 12 and welfare reports submitted into evidence indicated that the boys lived on the streets. Upon review, the court found that neither the 11 nor 12 year old was doli capax. The State had not been successful in rebutting the presumption on the grounds that the 11 year old was asked only whether he knew it was wrong to break into a place and to take property that did not belong to him. A previous postponed sentence against the 11 year old was also submitted into evidence in an attempt to strengthen the State’s

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46 S v Pietersen and Others 1983 (4) 904 (ECD) at 909 B – C.
47 S v Pietersen and Others 1983 (4) 904 (ECD) at 910 G – H.
48 Act 51 of 1977.
49 1986 (2) PHH 108 (T).
case. The State further submitted that the one year age gap between the two accused assisted in proving that 12 year old was also doli capax. The review court rejected the evidence put forward by the State as insufficient to rebut the presumption and lacking in establishing whether the third accused (an older boy) coerced or influenced them into participating in the offence.

In *S v Ngobese and Others*\(^{50}\) the court had to deal with three children charged and convicted of housebreaking, attempt to steal and theft. One of the children was aged 13 and the other two were 14 at the time of the commission of the offence. The matter went on special review because the court was of the opinion that the 13 year old (the second accused) should have been presumed doli incapax and that his sentence was too severe. The State never raised the issue of capacity other than submitting that when all three accused were confronted by the complainant they ran away. The State conceded that their behaviour was indicative of children who knew that their conduct was wrongful and contended that that was sufficient in rebutting the presumption.\(^{51}\) The court reiterated the common law position and held that if the State wanted to be successful in discharging its onus it had to prove that: (1) ‘The particular accused has been shown to have appreciated the distinction between right and wrong and (2) that he or she knew the act which had been committed by him or her was wrong within the context of the facts of the particular case’.\(^{52}\) The precise age and the nature of the crime itself are factors which may weaken the presumption the closer the child is to 14 and the severity of the act.\(^{53}\) In looking at the facts of this

\(^{50}\) 2002 (1) SACR 562.

\(^{51}\) *S v Ngobese and Others* 2002 (1) SACR 562 at 563 para d.

\(^{52}\) *S v Ngobese and Others* 2002 (1) SACR 562 at 564 para h – j.

particular case there was nothing in the evidence that suggested that the State had tried to prove that the 13 year old was doli capax. The evidence only related to his actions at the time of the offence and not his state of mind or his capacity to act in the manner that he did.\textsuperscript{54} The State completely ignored the conative element of the child’s capacity to resist temptation. Finally, the State did not investigate the fact that 13 year old was accompanied by two older boys who may have influenced him to partake in the commission of the offence. The State failed in discharging its onus of rebutting the presumption beyond a reasonable doubt and thus the child’s sentence and conviction was set aside.

5. Assessing the doli incapax presumption

The presumption was set out in an obiter remark in Attorney-General, Transvaal v Additional Magistrate of Johannesburg\textsuperscript{55} and it offered persuasive force in the cases that followed. In S v Van Dyk and Others\textsuperscript{56} and S v Pietersen and Others\textsuperscript{57} the courts extended the de facto reach of the doli incapax presumption when adults were involved in the commission of the offence. The court held that where children were acting under the coercion or influence of an adult person such children could not be doli capax even if it appears that they appreciated the wrongfulness of their conduct.\textsuperscript{58} This reasoning was taken further in S v M and Others\textsuperscript{59} when the learned judge Rose-Innes averred that whether the child is below or over the age of 14, if such a child was

\textsuperscript{54} S v Ngobese and Others 2002 (1) SACR 562 at 565 para e – f.
\textsuperscript{55} 1924 A.D. 421.
\textsuperscript{56} 1969 (1) SA 601 (CPD).
\textsuperscript{57} 1983 (4) 904 (ECD).
\textsuperscript{58} S v Van Dyk and Others 1969 (1) SA 601 (CPD) at 603 para D – F; S v Pietersen and Others 1983 (4) 904 (ECD) at 910 para A.
\textsuperscript{59} 1978 (3) SA 557 (TKSC).
given an instruction by an adult or a parent and the child acted in obedience with that instruction then in the absence of any evidence to the contrary, such child cannot be doli capax.\textsuperscript{60} It is doubtful whether the child can fully understand or can appreciate the wrongfulness of his or her conduct as he or she is simply carrying out an instruction by someone who they believe would never instruct them to do something wicked or wrong.\textsuperscript{61}

Van Oosten and Louw submit that in \textit{S v Mbanda},\textsuperscript{62} the court deviated from the original test of criminal capacity by adding more criteria for children between the ages of 7 and 14. The additional criteria set by the courts are as follows:

(i) ‘Was the accused, at the time of the perpetration of the alleged crime, aware of the fact that he or she acted in contravention of the law or was he or she aware of such a possibility?; (ii) could the accused, at the time of the alleged perpetration of the crime, control his or her conduct?; and (iii) did the accused intend the consequences of his or her act or did he or she foresee the consequences as a possibility but acted notwithstanding such foresight?\textsuperscript{63} They argue that the added criteria nevertheless fail to recognise the cognitive element of whether the child is able to distinguish between right and wrong and to understand or appreciate the consequences involved.\textsuperscript{64} I agree with the argument put forward by Van Oosten and Louw that these additional criteria

\textsuperscript{60} 1978 (3) SA 557 (TKSC) at 559 para G – H.
\textsuperscript{61} \textit{S v M and Others} 1978 (3) SA 557 (TKSC) at 559 para G – H; \textit{S v Pietersen and Others} 1983 (4) 904 (ECD) at 910 para C – E.
\textsuperscript{62} 1986 (2) PHH 108 (T).
lack the cognitive element and submit further that it confuses and complicates the test of criminal capacity. In *S v Ngobese and Others* the court lists four factors for the State to prove when discharging its onus. I submit that even though the conative element gets lost in the decision the four factors set out by the review judge is far more easy to follow than those set out in *S v Mbanda*.

The case law discussion illustrates that the presumption available to child offenders between the ages of 7 and 14 is often inadequately applied and understood by our courts. Even though the concept of criminal capacity and the presumption has long been part of our legal system there is still no uniformity in its application. Firstly, our lower courts are easily satisfied with the State proving only one of the elements of criminal capacity, instead of both elements, in discharging its onus. Parents are still called on behalf of the State to help prove their children’s criminal capacity. However, they only testify to the fact that they have taught their children the difference between right and wrong, proving only the first part of the test. This was clearly illustrated in the cases of *R v K* and *S v Pietersen and Others*. Secondly, our courts do not spend sufficient time on the inquiry that would establish a child’s criminal capacity. Simply asking a child whether he or she understands the offence and the consequences thereof is not enough to prove criminal capacity. Thirdly, when

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65 2002 (1) SACR 562.
66 The court looked at the precise age of the accused; the nature of the crime, evidence to support that the accused could appreciate the difference between right and wrong and proof that the accused knew that the act which he or she committed was wrong.
67 1986 (2) PHH 108 (T).
70 1956 (3) SA 353 (A).
71 1983 (4) 904 (ECD).
a child pleads guilty to a particular offence, criminal capacity seems to become a ‘non issue’. The inquiring magistrate often does not inquire into the child’s criminal capacity as it is easily assumed that the child must have had the capacity to carry out the offence. This was illustrated in the case of *S v Pietersen and Others*.\(^72\) Finally, it is questionable whether it is possible for a child under the age of 14 to plead guilty to an offence prior to an inquiry which assesses the child’s criminal capacity.

Ann Skelton is one of the experts who are of the opinion that the age of 7 is too low and that the presumption is too easily rebutted. She argues in favour of adopting a balanced approached when considering an appropriate MACR, coupled with better safeguards to make the presumption a little harder to rebut. In making the presumption a little more challenging to rebut, the State can lead expert testimony or if the child has a legal representative, the representative can make appropriate submissions on the child’s behalf.\(^73\) Those who favour the age of 7 as the MACR argue that one of the aims of juvenile justice is not to make children untouchable, but to hold them accountable and responsible for their actions.\(^74\) There is another argument favoured by Labuschagne and Badenhorst that opposes chronological age altogether, known as the individualised approach.\(^75\) This approach focuses on the specific offender’s intellectual abilities. In theory a child of any age is capable of being criminally liable. However, liability should only ensue if the child is aware of

\(^72\) 1983 (4) 904 (ECD).
\(^74\) F Cassim ‘Formulating new juvenile justice legislation in South Africa’ (1998) 38 *CILSA* 335.
the unlawfulness of the act at the time of committing the act, had the ability to control
his or her actions and he or she intended the consequences.\(^ {76}\) Labuschagne argues
that age limits are arbitrary and at most should only serve as guidelines in determining
criminal liability.\(^ {77}\)

According the SALRC the rebuttable presumption was designed to protect children
between the ages of 7 and 14.\(^ {78}\) However instead of serving as a protection it
sometimes serves as a legal impediment for young people by reason of the courts
being far too hasty in permitting its rebuttal.\(^ {79}\) For example, mothers who testify on
behalf of their children confirming that they were taught the difference between right
and wrong is often considered sufficient evidence to rebut the presumption. Dealing
with the presumption in this manner indicates that the courts are merely paying lip-
service to the test of criminal capacity.\(^ {80}\)


\(^{77}\) J Labuschagne & JA Van der Heever ‘Accountability of children in rudimentary legal systems: A
criminal law evolutionary view’ (1993) 26 Comparative and International Law Journal of Southern


Restorative Justice’ Acta Juridica 180; A Skelton & N Zaal ‘Providing effective representation for
children in a new constitutional era: Lawyers in the criminal and children’s courts’ (1998) 14(4) South

\(^{80}\) F Van Oosten ‘Non-pathological criminal incapacity versus pathological criminal incapacity’ (1993)
6(2) South African Journal of Criminal Justice 133.
The *doli incapax* presumption has long been a cause for concern in light of its oversimplification and unsatisfactory application. Additional safeguards need to be undertaken (such as expert testimony by a professional but only where prosecution is warranted to proceed to plea and trial, training of probation officers, guidelines for dealing with children over 10 but below 14 and setting up a database of experts to conduct evaluations and assessments of capacity where the need arises) if the presumption is to be preserved. Without these safeguards the protections offered by the presumption will be an illusion rather than a reality. The SALRC proposed that a separate piece of legislation dealing specifically dedicated to child justice issues should set out specific steps in preparation for rebuttal.

### 6. The need for separate legislation governing children in conflict with the law

South Africa and a few of the African countries under study have opted for separate legislation governing children in conflict with the law. The reasons put forward by the writer are specifically in the context of South Africa, but the same principles would apply in the other African countries under study that share the same system or subscribe to the *doli incapax* presumption.

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82 See 7.3 The Report.
83 Ghana, Mozambique, Namibia and South Africa have enacted or proposed a separate legislation governing children in conflict with the law. Mozambique’s draft bill dealing with juvenile justice issues is still pending before Parliament. The Gambia, Kenya, Lesotho, Malawi, Sierra Leone and Uganda have all opted for one piece of legislation incorporating both social welfare and juvenile justice. Child law reform in the Gambia, Lesotho, Namibia and Malawi has been considerably influenced by South Africa’s Child Justice Bill No. 49 of 2002. Ethiopia and Zambia rely on their Penal Codes when dealing with children in conflict with the law. See Chapter 3 3.1-3.12.
84 Namibia and Lesotho both have the same mixed legal system as South Africa and subscribe to the *doli incapax* rule. Other Common law jurisdictions such as Kenya, Malawi, Zambia and Uganda also
Firstly, s28 of the Constitution governs the rights for children by providing certain guarantees for them.\textsuperscript{85} In sub-section (2) it provides that ‘a child’s best interests are of paramount importance in every matter concerning the child’. Yet often in reality when children find themselves in conflict with the law our current legislation does not allow this constitutional obligation to hold true, especially in relation to the MACR. Sub-section (1)(g) provides that detention should be as a measure of last resort and for the shortest possible time. If children are detained, they must be kept separate from persons over the age of 18 and treated in a manner consistent with their age. The Criminal Procedure Act is not equipped to carry out the aims of s28(1)(g) and (2).\textsuperscript{86} Enactment of a separate piece of legislation, such as the Child Justice Bill, that caters only for children in conflict with the law and their needs will equip South Africa with the necessary legislative frameworks to make these Constitutional guarantees a reality.

laws is in compliance with the relevant articles. South Africa would also need to comply with other non-binding human rights treaties available for the protection of children in conflict with the law. The Bill provides mechanisms for South Africa to meet these obligations and to deal with children in a manner consistent with their age.\(^\text{88}\)

Finally, separate legislation for such children provides for certainty, consistency and fairness in criminal justice practice. We have already implemented some of the procedures available in the Bill.\(^\text{89}\) The Bill (at the time of writing) has only been passed by the National Assembly and not yet formally enacted into legislation thus we face the looming danger of inconsistencies, uncertainty and treating children in conflict with the law unfairly and inappropriately.

### 6.1 The emergence of the Child Justice Bill

When South Africa ratified the UNCRC in 1995 it bound itself as a State Party to carry out the mandate of the convention. In terms of article 40(3), South Africa has undertaken to establish separate laws, procedures, authorities and institutions for children in conflict with the law. It must also establish ‘a minimum age below which children shall be presumed not to have the capacity to infringe the penal law’ which is

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\(^{89}\) Procedures such as assessment, diversion, the preliminary inquiry, family-group conferencing and restorative justice.
central to the discussions that follow. South Africa must endeavour to achieve the directives set out in Article 40 ‘in a manner that is consistent with promoting the child’s sense of dignity and worth, which reinforces the child’s respect for the human rights and fundamental freedoms of others and which takes into account the child’s age and the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society’.

In 1996, the Minister of Justice appointed a Project Committee on Juvenile Justice to head the reform process. The Committee was tasked with investigating proposals for law reform. The process officially commenced in 1997 with an Issue Paper proposing the drafting of a separate bill. The Issue Paper was highly consultative between government and members of civil society. At the end of 1998 a Discussion Paper containing concrete proposals and a draft Child Justice Bill was published. The draft Bill characterised a new justice system for children in conflict with the law providing for substantive law, procedures and the general administration of juvenile justice. The Discussion Paper was followed by a wide consultation process which included workshops, seminars, briefings, questionnaires, written and oral submissions to mention but a few. In July 2000, a comprehensive Report on Juvenile Justice

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90 Article 40(3)(a) of the UNCRC.
91 Article 40(1) of the UNCRC.
followed the Discussion Paper marking the end of the structured consultation process.  

7. The issue of the MACR and the draft proposals

7.1 The Issue Paper

The Issue Paper placed the issue of criminal capacity on the agenda for review. It highlighted the fact that South Africa’s MACR began at the very low age of 7 and that, contrary to public opinion, the practical application of the *doli incapax* presumption did not present an impediment to children because it is too easily rebutted. Secondly, it was suggested that the MACR should be raised in accordance with South Africa’s international treaty obligations without prejudicing the administration of justice. Several options were put forward, such as retaining the *doli incapax* presumption but adding additional safeguards, increasing the MACR (with or without the presumption), establishing a fixed minimum age or abolishing the presumption altogether. A noteworthy inclusion to the Issue Paper was that setting a higher minimum age meant that children who committed offences but were below this

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higher minimum age could not be held criminally liable. Thus such children had to be
dealt with under the welfare system.\textsuperscript{98}

7.2 The Discussion Paper

The problems relating to establishing a new MACR was one of the most controversial
issues up for debate in the Discussion Paper. The Project Committee requested an
explanation and a report detailing the research that supported an increase of the
common law minimum age set at 7. The Committee identified three possible options
to the issue of MACR which are very much based on the options mooted in the Issue
Paper. The first option was to retain the common law position (but raise the lower
age of 7 to 10) as well as providing for additional safeguards to protect children.\textsuperscript{99}
The second option was to do away with the common law presumption and set a
minimum age of prosecution which was not directly related to the child’s criminal
capacity.\textsuperscript{100} Finally, the third option was setting a dual minimum age of prosecution
which meant setting a general minimum age and exceptions when that general age
would not apply.\textsuperscript{101} The most favoured option was the first one of retaining the
common law presumption and raising the lower age of 7 to 10 which was inserted into
the provisions of the Child Justice Bill.\textsuperscript{102}

A seminar conducted in May 1999 at the Centre for Child Law of the University of Pretoria saw the coming together of local and international participants to debate the MACR issue quandary facing the Project Committee. They discussed the present presumption which is afforded to children between the ages of 7 and 14. Many of the participants were of the opinion that the presumption served as a ‘protective mantle’ for children in theory but not in reality. Despite the feeling that the presumption only works in theory, the participants were nevertheless reluctant to depart from the presumption because of ‘psychological and anthropological evidence that children mature at different rates especially in a country as culturally diverse as ours’. They discussed some practical options for the assessment of criminal capacity, such as the requirement of expert evidence, the practice of employing a probation officer to carry out the preliminary screening of children alleged of committing an offence and the procedure of the DPP issuing a certificate (where children face prosecution) to limit expensive expert evidence to only the most serious cases. The majority of the participants held in favour of raising the MACR and that children below the age of 10 should not be prosecuted.


103 See earlier discussion 3. Criminal Capacity and the doli incapax presumption.


7.3 The Report

The Report proposed that our present common law presumption (operating in favour for children between the ages of 7 and 14) be repealed and be replaced with the age limits of 10 and 14. This meant that the MACR would be raised from 7 to 10 years old and that child below the age of 10 cannot be prosecuted.\(^{108}\) Children between the ages of 10 but not yet 14 ought to be presumed to lack criminal capacity. The advantage of this approach was that the presumption operated automatically by virtue of the child being a certain age (10 – 14), thereby providing a ‘protective cloak’.\(^{109}\) It was further argued that the presumption recognised the need for younger children to be treated differently to older children, and that it allowed flexibility in focusing on the individual child.\(^{110}\)

The SALRC considered the effects of abolishing the presumption and held that it would have a negative effect in a culturally and ethnically diverse country like South Africa. Children’s experiences of maturity and mental development differ from one area to another and if the presumption were to be removed it may lead to indiscriminate prosecution.\(^{111}\) Even if the MACR was raised higher than 10 years old


the removal of the presumption would lead to a case of substantive inequality between children within the same age group because of differing maturing rates.\textsuperscript{112}

Establishing support for the upper age of the presumption set at 14 years old proved slightly more difficult. The Report however found in favour of evidence put forward by Ms P Jana\textsuperscript{113} that 14 would be a suitable cut off age for the presumption to cease. She provided that children under the age of 14 found court proceedings intimidating and too technical to understand. Children often had difficulties understanding the language and lost concentration. The power imbalance between lawyers and children further inhibited their ability to provide their lawyers with clear instructions. This was supported by the proposition that children under the age of 14 were in need of the procedural safeguards offered by the presumption.

The Report considered the argument that the presumption works in theory but not in practice because of its incorrect application in the past, viz calling upon parents to testify whether they had taught their children between right and wrong. The SALRC offered the safeguard of expert evidence which is currently not a requirement in considering the criminal capacity of child. They also provided statistical evidence that few children under the age of 13 where either prosecuted or serving a term of imprisonment for criminal offences.\textsuperscript{114} The Discussion Paper also provided statistical


evidence in this regard for children under the age of 14. Thus the argument that the presumption does not provide a ‘protective cloak’ was not convincing at the level of prosecutorial practice.

Paragraphs 3.27 and 3.28 of the Report provided for additional safeguards that needed to be factored into legislation to ensure that the presumption in fact served as a protection for children (rather than an impediment) and was applied correctly. The safeguards were the same as those advocated for at the 1999 seminar at the Centre for Child Law with a few add-ons, such as, guidelines for dealing with children over 10 but below 14 and setting up a database of experts to conduct evaluations and assessments of capacity where the need arises.

Finally, children below the MACR who find themselves in conflict with the law are also catered for in the provisions of the legislation proposed by the SALRC. The Report sets out procedures that will address their social behaviour, links with organised crime or the exploitation by others in the commission of offences. These children were to have access to counselling, social and reintegration services in accordance with the child care and protection system.

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8. The Child Justice Bill (2002 version)

The Child Justice Bill developed by the SALRC was tabled before Parliament in August 2002. Public hearings were hosted in February 2003 and deliberations by the Portfolio Committee followed in March.\textsuperscript{117} Section 5 of 2002 Bill set out the provisions dealing with criminal capacity while s56 provided for the establishment of criminal capacity.\textsuperscript{118} The provisions of the Bill increased the MACR from 7 to 10 years old while retaining the \textit{doli incapax} presumption for children between the ages of 10 and 14 and concretizing these in legislature format as opposed to it being a common law rule.\textsuperscript{119}

Section 5(1) provides for an irrebuttable presumption in favour of children below the age of 10 that they lack criminal capacity and as a result can never be prosecuted. Section 5(2) provides for a presumption in favour of children between the ages of 10 and 14 that they lack criminal capacity. This latter presumption is a rebuttable one and the State is charged with the duty of proving, beyond a reasonable doubt, that a child between the ages of 10 and 14 had criminal capacity at the time he or she contravened the law.\textsuperscript{120} When establishing the criminal capacity of children between the ages of 10 and 14, the State and the child’s legal representative can rely on s 56 for guidance. In terms of this section, the prosecutor or the child’s legal representative may request that an evaluation of the cognitive, emotional,

\begin{itemize}
  \item \textsuperscript{117} GO Odongo ‘Public hearings by the Justice and Constitutional Development Portfolio Committee on the Child Justice Bill’ (2003) 5(1) \textit{Article 40} 1.
  \item \textsuperscript{118} J Gallinetti (Ed) ‘Update on the Child Justice Bill’ (2002) 4(3) \textit{Article 40} 2.
  \item \textsuperscript{119} See Appendix 1.
  \item \textsuperscript{120} Section 5(1) of Child Justice Bill No. 49 of 2002.
\end{itemize}
psychological and social development of the child be conducted by a suitably qualified person and at the expense of the state. The evaluator must furnish the child justice court with a written report within 30 days of conducting the evaluation and may further be requested to give oral testimony in support of his or her findings. It has been submitted by professionals in the field of children’s rights and criminal justice that the evaluation be conducted before the child has to appear before the court. I am of the opinion that conducting the evaluation first would be in the best interest of the child as it would keep the child from unnecessarily being exposed to the criminal justice system if the evaluation shows that the child lacks criminal capacity. The insertion of s5(3) – (5) strengthens the presumption of incapacity and discourages the State from careless prosecution.

In 2003, experts in the field of children’s rights and other interested bodies made submissions to the Committee. Professor J. Sloth-Nielsen made a submission to the Portfolio Committee indicating her support for the increase of the MACR from 7 to 10 years old and urged the Committee to do the same. She submitted that since South Africa became a party to the UNCRC, regularly reviewing the MACR and raising it if it were set too low, was part of its obligations under the UNCRC. After the ASLCR examined the low minimum age and taking into account children’s

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122 See Appendix 1.
123 The Portfolio Committee received written submissions from the Child Justice Alliance, Child Justice Forum (Western Cape), the Community Law Centre (University of the Western Cape), CSIR Crime Prevention Centre, Centre for the Study of Violence and Reconciliation, NICRO, Restorative Justice Centre, SAYstOP and Professor Julia Sloth-Nielsen. The submissions highlighted specific areas in the Bill but the submissions discussed in this text are the ones that commented on the MACR.
growth and development patterns, the MACR was raised from 7 to 10 years old. Yet, at international level, the age of 10 was still to be one of the lowest age minimums in the world. It was argued that retaining the rebuttable presumption of *doli incapax* for children between the ages of 10 and 14 will serve as a protection for children falling in this age category. It would also be apt for a country such as South Africa, where children experience childhood differently because of our diverse cultural and ethnic population.  

The Child Justice Alliance made their submission to the Portfolio Committee on the 26 February 2003. The Alliance supported the raised minimum age of 10 years old and the retention of the rebuttable presumption for children between the ages of 10 and 14.  

It was submitted that setting a minimum age is no easy task. The UNCRC and the Beijing Rules attempt to guide States Parties on setting a minimum age but neither treaty provides a specified age. According to the Child Justice Alliance another guiding factor in determining a suitable minimum age is the critical attitude of the CROC towards countries who set their minimum ages below 10.

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127 Article 40(3)(a) of the UNCRC and Rule 4.1 of the Beijing Rules.

The National Institute for Crime Prevention and Reintegration of Offenders (NICRO) furnished their unanimous support for the increase of the minimum age to 10 and the retention of the rebuttable presumption in their submission to the Committee. The organisation was of the view that the age of 10 was in accordance with their experience as practitioners in child development and the practicalities associated with the commission of the offences at national level. NICRO highlighted that the age of 10 would be the lowest minimum age accepted by international bodies such as CROC. Some of their provincial offices, however, indicated a preference for a higher minimum age in light of recent criticisms by the CROC of countries setting their minimum ages as low as 10.

NICRO further submitted that the rebuttable presumption was an excellent mechanism for proving criminal capacity or the lack thereof. However, the organisation wished to address the availability of other existing options. The option of diversion was available for children under the age of 14. These programmes were much more economical than prosecution and are aimed at those children who commit petty offences. Finally, NICRO noted that the Bill was silent on any procedure that should be followed when children below the minimum age of 10 commit offences. This omission must be addressed by Parliament to incorporate some non-punitive measures for these children, they argued.


The Open Society Foundation acknowledged that South Africa was amongst one of the few countries that still adhered to a minimum age of 7. Section 5(1) of the Bill was welcomed by the Foundation for two reasons. Firstly, it was forward looking for the prosecution services in reducing the burden placed upon them in rebutting the presumption and secondly, it would strengthen the family preservation approach through intervention with young children.\(^{132}\) The Foundation did, however, express its concern that the Bill was silent on any procedures that could be followed when children below the proposed new minimum age committed offences. It submitted that a section devoted to outlining the role of the Children’s Court in such circumstances should be included.\(^{133}\)

9. The international perspective on South Africa’s draft legislation

In response to South Africa’s initial report, the CROC commented on the Child Justice Bill No.49 of 2002 in its concluding observations.\(^{134}\) It noted with appreciation the draft legislation which increased the legal MACR to 10. However, it recommended that South Africa as a States Party reassess their proposed new minimum age with a view to increasing it.\(^{135}\) The CROC did not provide any further guidance as to what an appropriate proposed minimum age would be. In 2003, the Portfolio Committee deliberations on the Bill were sporadic and by 2005, the Minister


\(^{134}\) CRC/C/15/Add.122, 23 February 2000 (Adopted at 23\(^{rd}\) session).

\(^{135}\) CRC/C/15/Add.122, 23 February 2000, para 17 (Adopted at 23\(^{rd}\) session); O Sewpaul ‘SA Presentation to UN CRC – setting the agenda for transformation’ (2000) 2(2) *Article 40* 1-3.
of Justice and Constitutional Development indicated that the Bill was still pending before the Committee.\textsuperscript{136}

Since the Bill was deliberated in Parliament in 2003 significant developments on the domestic and international fronts have taken place. Chapter 3 details the developments across Africa with specific focus on the countries under study and child justice law reform. One of the most noteworthy developments in international law was the CROC’s General Comment No. 10 release in February 2007 (discussed in chapter 2). The CROC elaborated on children’s rights in juvenile justice but most notably took a firm stance on the issue relating to the MACR. In light of varying MACR’s, the CROC sets the minimum age at 12 but States Parties are urged to raise it where possible.\textsuperscript{137}


A revised Child Justice Bill (Cabinet Version)\textsuperscript{138} came under the spotlight earlier this year, in 2008, when it was tabled before Parliament. The 2007 Cabinet version of the Bill bears little resemblance to the 2002 version. Almost every clause has been changed under the direction of the Portfolio Committee and the Executive. A major


\textsuperscript{137} Discussed in chapter 2. Any MACR below 12 is unacceptably low and in contravention of the UNCRC. States Parties are obliged to review their legislation and ensure that it is in compliance with international law. Legal Systems that practice a ‘split age’ inherently emanated by the common law doli incapax presumption are in contravention of article 2 of the UNCRC as it ‘is often not only confusing, but leaves much to the discretion of the court or judge and may result in discriminatory practices’. See CRC/C/GC/10 par 30.

\textsuperscript{138} Child Justice Bill (2007 Cabinet version).
drawback of the 2007 Cabinet version is its complex format containing too many schedules and cross-references. The 2002 version was easy to follow and understand, bearing in mind that lay people and not only legal scholars would be working with the Bill. Unlike the 2002 version applying to all children equally, the 2007 version allowed for bifurcation which meant that it excluded certain children from certain services (assessment, preliminary inquiry and possible diversion) based on their age and category of offence. This was evidence of a change in policy in that only certain children would be entitled to the procedures in the Bill.

The clauses devoted to age and criminal capacity were much more elaborate and extensive than the 2002 equivalents. Clause 6 of the Bill (2007 Cabinet version) set out the provisions relating to the criminal capacity of children below the age of 10 while clause 7 and 8 dealt with the procedure to be followed in respect of these children. This was an improvement of the 2003 version which was silent on the matter, as observed by NICRO and the Open Society Foundation in their 2002 submissions to the Committee. The criminal capacity of children between the ages of 10 and 14 and the establishment of criminal capacity is dealt with in clause 9 and 10 of the Bill. Clause 10(2) and (3) provided that the determination of criminal capacity must be based on the assessment report of the probation officer and that an evaluation may be ordered by a suitably qualified person. However, it does not make any mention of it being a state expense as was done in s56(2) of the 2002 Bill. This is

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141 See Appendix 2.

142 See Appendix 2.
concerning because probation officers are not suitably trained to carry out an
assessment of the child’s criminal capacity. Secondly, if the evaluation is no longer a
State expense, albeit necessary, it may never be ordered because of the cost involved.

Once again submissions were made by interested parities concerning the newly tabled
version of the Bill. Professor J. Sloth-Nielsen submitted her comments on the Bill
earlier this year indicating that over the last eight years our law has developed quite
rapidly resulting in compelling research in favour of increasing the MACR. Her
submission was based on the recent developments in our law and thus took a very
different approach to the one she initially supported in 2002. She submitted that the
Portfolio Committee should be making legislative amendments in accordance with
international law. The age of 10 should be raised to 12 and progressively raised from
there and the *doli incapax* presumption should be abandoned.\(^{143}\) However, if the
presumption is to be retained then it should apply to children over the age of 12. In
her oral submission she gave supporting scientific evidence in favour of criminal
capacity and of having a fixed minimum at the age of 12. It was generally agreed
upon amongst child development experts that children only start developing the
ability to make appropriate choices and to understand the consequences of those
choices at around the age of 11. It is this same consensus that is expressed as the
conative mental function which completes the criminal capacity test. Law reform
over the last decade has shown a number of countries fixing their MACR at 12 which

\(^{143}\) Public Submission. Available at
March 2008]; This submission is based on the United Nations Committee on the Rights of the Child
age of criminal responsibility: 10 or 12 years?’ (2008) 10(1) *Article 40* 9.
becomes a fixed rule of law irrespective of differing maturing rates. She expressed her support for some of the new ideas such as the inclusion of referring children lacking criminal responsibility due to youth in terms of clause 7(3)(a). However, she argued there is much to be desired in that there are too many errors and loopholes in the clauses outlining the procedures relating to criminal capacity and matters related to age.

Despite, the recent release of General Comment No.10 in which the CROC recommends that the minimum age be set at 12, the Child Justice Alliance supported their previous submission under the 2002 version of the Bill but some made additional comments. With regard to clause 6(2), the Alliance brought the typographical error to the attention of the Committee and provided a suggestion on how the clause should be read. Clause 7 did not appear in the 2002 version which indicates reform progress on the part of the Portfolio Committee or the Executive, although, the clause in subsection (2), (3), (4), (6) and (7) need not be limited to a probation officer. Any other suitably qualified person will be allowed to conduct the assessment.

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144 Oral Submissions. Available at http://www.childjustice.org.za/submissions/SlothNielsen1.htm [accessed 10 April 2008]. It was argued by the Commission in the Juvenile Justice Report (para 3.13) that fixing a minimum age, for example at the age of 12, without having the presumption in place may open the door to substantive inequality between 12 year olds because of their differing maturing rates.

145 Clauses 6(1) has the incorrect cross reference while subsection (2) omitted one of the relevant sections that it pertains to. Professor Sloth-Nielsen made many recommendations to better formulate clause 7.

146 See Appendix 2. Clause 6(2). The section that absent is section 10.

147 See Appendix 2.
9(1)(a) is the same as s5(2) of the 2002 version of the Bill.\textsuperscript{148} Clause 9(1)(b) needs to be removed from clause 9 as it deals with the prosecutor’s decision to divert the matter not with criminal capacity.\textsuperscript{149} The criteria establishing criminal capacity is laid out in clause 10.\textsuperscript{150} Establishing criminal capacity has always been a problem area in our law for reasons discussed earlier.\textsuperscript{151} The Alliance urged that the Committee place the careful task of establishing criminal capacity in the hands of appropriate professionals. The Alliance outwardly rejected clause 10(2), as a probation officer is not the appropriate person to assess the criminal capacity of the child during the first 48 hours after the arrest has been made.\textsuperscript{152} Finally they argued that s56(2) – (5) of the 2002 version should be reinserted in place of clause 10(2) – (5).\textsuperscript{153}

When the Bill was first tabled in 2002, NICRO had supported the increased MACR from 7 to 10. They did, however, alert the Committee to the fact that the CROC had become very critical of countries setting their minimum ages at 10. NICRO then raised its concerns that South Africa may fall short of its international obligations if it did not raise the minimum age higher than this. Commenting subsequently on the 2007 version of the Bill, NICRO supported the recommendations they made in their previous submission of raising the minimum age to 12.\textsuperscript{154}

\textsuperscript{148} See Appendix 1 and 2.
\textsuperscript{149} See Appendix 2.
\textsuperscript{150} See Appendix 2.
\textsuperscript{151} See 2. The concept of criminal capacity in South Africa and 3. Criminal capacity and the doli incapax presumption.
\textsuperscript{152} See Appendix 2.
\textsuperscript{153} See Appendix 1 s56(2)-(5) and 2 clause 10(2)-(5).
In its submission to the Portfolio Committee on the 2007 (Cabinet version) of the Bill, Childline South Africa contends that the MACR of 10 in clause 6 be increased to 12. Childline is in favour of 12 as the MACR because it is in accordance with research based on the development of children and the recommendations made by the CROC. Childline has further argued for the retention of the rebuttable presumption for children 12 years and older but younger than 14. Research studies have shown that at the age of 12, a child is developed enough to exercise the ability to make choices and to understand the consequences of those choices. This was evidence in support an increased MACR from 10 to 12 with the presumption coming into operation for children between the ages of 12 and 14. Childline further commended and supported the programmes and services envisaged by clauses 7 and 8 as the 2002 version was silent about the procedures for children below the age of 10. Once the Bill is enacted these programmes and services will serve as crime prevention strategies. The objections Childline raised to some of the clauses dealing with criminal capacity were very much the same as those put forward by the Child Justice Alliance.

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158 See Appendix 1 and 2.
After all the submissions were heard and debated the first clause-by-clause reading of
the Bill took place at the end of April 2008.\textsuperscript{159} The overall feeling amongst civil
society was to reform to the provisions of the 2002 Bill. The following provisional
decisions were made by the Portfolio Committee on Justice and Constitutional
Development; Firstly, the services of assessment, the preliminary inquiry and possible
diversion should be afforded to all children equally and not certain children depending
on their age or the offence committed.\textsuperscript{160} The Committee was persuaded that this
‘exclusion of certain children from these processes and procedures places them in a
more prejudicial position not only with regard to other children but also with regard to
certain adults who appear in criminal courts’.\textsuperscript{161} The provision that allows the
probation officer to carry out an assessment into the child’s criminal capacity remains
the same even though they are not adequately trained for this. This was confirmed by
the Department of Social Development however the Committee is of the opinion that
the provision remains the same as there is still an option for an expert to assess the
child if the prosecution or legal representative apply for it.\textsuperscript{162} I submit that the
Committee should provide a provision catering for procedures (where a suitably
qualified person can carry out the assessment) if the prosecution or legal
representative does not apply for such an assessment contemplated in clause 10(3).

\begin{footnotesize}
\begin{itemize}
\item[161] J Gallinetti (Ed) ‘Overview of the 2007 version of the Child Justice Bill’ (2008) 10(1) \textit{Article 40} 3.
\item[162] J Gallinetti (Ed) ‘First reading of the Child Justice Bill’ (2008) 10(1) \textit{Article 40} 7.
\end{itemize}
\end{footnotesize}
11. Child Justice Bill (2008 Cabinet version as approved by the National Assembly)

On 25 June 2008 the National Assembly approved the Child Justice Bill. The new Bill is set to come into effect on 01 April 2010 after it has been approved by the National Council of Provinces. The initial 2007 draft Bill which was complex and extremely difficult to read was however amended for easier reading and made more user-friendly for all those involved in advocating children’s rights, including children themselves. The issue of bifurcation was laid to rest in this version of the Bill, ensuring that ‘all children will be assessed, appear at the preliminary inquiry and be considered for diversion’.

Clause 4 is worded differently to that of the clause 4 in the 2007 Cabinet version. In consultation with Professor Sloth-Nielsen an error contained in clause 4(1) was brought to my attention. The clause reads, subject to subsection (2) the application of the Act applies to anyone who is alleged to have committed an offence and was (a) under the age of 10 at the time of the offence and (b) was 10 years old or older but under the age of 18. She argued that the way clause 4 has been worded by including

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167 22 October 2008; See Appendix 3.
children under the age of 10 is possibly indicative of the position that South Africa has no MACR. I am of the opinion that if clause 4(1)(a) is read in conjunction with clause 5(1) then the provisions for children under the age of 10 have the same effect as the provisions which were better worded in 2007 Cabinet version.\textsuperscript{168}

Part 2 of the Bill sets out the provisions for the MACR and the procedures dealing with children under 10 years old and those children over 10 years old but below 14. Clause 7(1) determines that children under the age of 10 years old ‘cannot’ be prosecuted even if they committed an offence. Professor Sloth-Nielsen is of the opinion that clause 7(1) should read ‘can never be prosecuted instead of cannot be prosecuted’. The word ‘cannot’ in clause 7(1) has remained unchanged from clause 6(1) in the 2007 Cabinet version. The wording of this clause suggests that a child ‘cannot’ be prosecuted before the age of 10 if he or she committed an offence before then. However, the State can wait until the child turns 10 years old and then prosecute that child for the act committed prior to his or her attaining the age of 10. This too is possibly indicative of the position that South Africa may have no MACR. Clause 7(2) has the effect of raising the MACR to 10 and retaining the common law rebuttable presumption for children between the ages of 10 and older but below 14 despite all the submissions in favour of a MACR of 12.\textsuperscript{169} It also directs the reader to the clause that sets out how the State must rebut the presumption.\textsuperscript{170}

\textsuperscript{168} See Appendix 2 clauses 4 and 7; See Appendix 3 clauses 4 and 5(1).
\textsuperscript{170} See Appendix 3 clause 11.
Clause 8 is a completely new one which was not contained in the 2007 Cabinet version of the Bill. It provides for review of the MACR, ‘not later than five years after the commencement of this section’. This clause must further be cross-referenced with clause 96(4) and (5). The Portfolio Committee has provided that the MACR will be reviewed within five years after date of implementation and raised if need be. Clause 96 provides a detailed outline for review and what the report should contain that must be submitted to Cabinet for approval, and later to Parliament, to be considered.\(^{171}\) The Intersectoral Committee will be responsible for putting the report together in light of the following information: Statistics of the categories of children that are alleged to have committed offences (between the ages of 10 and 13 years old) and the type of offences they allegedly committed, the sentences imposed on each age category of children and the type of offence, if they were convicted, the number of matters that did not go to trial in terms of clause 10(2)(b) and those that were dealt with in terms of clause 11 and whether expert evidence was led and the outcome of the matter with regard to MACR.\(^{172}\) Finally, an analysis of all the statistical information gathered must be undertaken and recommendations should be made as to whether the MACR should remain at 10 years old or be raised.\(^{173}\) It is my submission that the inclusion of clause 8 is not only a significant move for South Africa’s legislative child law reform process but that it is a progressive step toward dealing with some of the MACR concerns raised by the CROC. This clause, in conjunction with clause 96, answers the concern raised by the CROC in view of South Africa’s MACR being too low and contrary to the country’s international treaty obligations. It is clear from clause 8 that the MACR will be kept under review and raised

\(^{171}\) See Appendix 3(A) clause 96(5).

\(^{172}\) See Appendix 3(A) clause 96(4)(a)-(d).

\(^{173}\) See Appendix 3(A) clause 96(4)(e) and (f).
progressively if the statistical data collected foreshadows such a need. I further submit that South Africa is still in the infant stages of implementing such reform especially in view of the fact that the Bill has only recently been passed by National Assembly. The CROC should be patient while South Africa carries out implementing its reform in the best possible manner to eventually bring its MACR in accordance with the position advocated by the CROC.

12. Conclusion

The MACR has finally been awarded some importance within child justice circles. It has become one of the most debated topics in the offices of Parliament when the Child Justice Bill was deliberated upon. The earlier case law discussion has indicated that the doli incapax presumption was not always been given careful consideration by our courts, which resulted in the presumption being incorrectly applied time and time again. The presumption is based on a fundamental principle in criminal law that no one should be punished unless they knew and understood what they were doing was wrong and chose to do it anyway.\footnote{\textsuperscript{174} T Crofts ‘Doli Incapax: Why children deserve its protection’, (2003) Vol 10(3) Electronic Journal of Law. Available at http://www.murdoch.edu.au/elaw/issues/v10n3/crofts103_text.html [accessed 29 September 2008].} It also takes into account that children mature at different levels and that they develop gradually especially in a diverse country such as South Africa. I submit that the presumption does indeed provide a ‘protective mantle’ for children who find themselves in the harsh criminal justice system. Criminal trials are often long and complex for children to understand. They are often traumatised by court procedures and not always able to provide their legal representatives with adequate instructions. Thus, the presumption serves as a due process safeguard for children who are not capable of understanding the unlawfulness of their actions, but at
the same, it allows for the conviction of those children who are capable of understanding the unlawfulness of their actions. Together with the additional safeguards proposed in the Bill, the presumption is definitely an advantage for children in conflict with the law.

Even though I am a firm believer of the *doli incapax* rule I still tend to favour the age of 12 put forward by the Child Justice Alliance and Childline South Africa, and argue that the presumption should apply for children between the ages of 12 and 14. Together these two submissions incorporate our domestic legal principles together with the recommendations of the CROC. I am pleased that the Bill will be reviewed within 5 years after the implementation of clause 8 and I am hopeful that over time we will meet our international obligation.

The next and final chapter of this thesis takes a broad overview of the influence of international law and the extent of harmonisation. The main arguments spanning over the whole document will be reiterated and recommendations will further be provided.
CHAPTER 5
CONCLUSION AND RECOMMENDATIONS

This thesis sought to investigate the MACR in the African legal systems of Uganda, Ghana, Kenya, South Africa, Namibia, Lesotho, the Gambia, Ethiopia, Malawi, Mozambique, Sierra Leone and Zambia. Its aims as outlined in the chapter 1 was to assess, compare and analyse the MACR in accordance with the harmonisation of national and international laws, as reflected against the backdrop of 1) recent international standards and 2) African realities.

The MACR has been defined (in chapter 1) as the lowest age at which a State is willing to hold children liable for their alleged criminal acts in any court. Chapter 2 sets out the international frameworks under which this study was conducted, namely the UNCRC and the ACRWC. Both instruments instruct States Parties to establish a MACR below which children will not be held criminally responsible. The Beijing Rules stipulate that the MACR should not be fixed too low with the General Comment No.10 providing a clear chronological age at which the MACR should be set. The General Comment sets this age at 12 years old as an absolute minimum. It further argues that countries practicing a ‘split age’ inherent in the retention of the doli incapax presumption are in violation of their international treaty obligations as the ‘split age’ leads to discriminatory practices. The ACRWC is still in its infancy compared to that of the UNCRC but it is an important document that complements the UNCRC in reflecting children’s realities in an African context such as the lack of

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1 Articles 40(3)(a) of the UNCRC and 17(4) of the ACRWC.
2 Rule 4.1 of the Beijing Rules; CRC/C/GC/10 para 32.
3 CRC/C/GC/10 para 30.
effective birth registrations, scattered statistical data and the arbitrary manner in which criminal responsibility has been assessed. States Parties are encouraged to review their national legislation and policies relating to the MACR and raise it in accordance with international standards.

The General Comment serves as a reference document, combining all the existing issues and standards on juvenile justice and making recommendations, such as developing an appropriate MACR not lower than 12. One of the greatest challenges for countries domesticating the recommendations made in the General Comment into their legal systems is that of implementation. Thus, at present, there is still a variety of MACR’s at international law. I submitted that the CROC will have to be patient with States Parties as many of them have in the last decade reviewed their MACR provisions and raised them. However, the raised MACR’s still fall short of international standards.

Chapter 3 looked at how each country under study reviewed their existing legislation concerning the MACR and undertook child law reform initiatives in an attempt to bring their laws in accordance with the principles of the UNCRC and the ACRWC. The first six countries recapped and followed on from the work of Godfrey Odongo produced in 2005. The other six countries were selected on the basis of availability of information and that their texts were in English. The language barrier of the other countries that could have been selected presented a problem for the writer whose first language is English. It was unfortunate that more than half the countries under study failed to meet their international obligations with regard to the MACR. It was submitted that Kenya, South Africa, Namibia, Lesotho, Ethiopia, Malawi and Zambia
all fell short of the minimum age requirement set by the CROC in General Comment No.10. Uganda, Ghana, Mozambique and Sierra Leone were the only countries whose reform processes measured up to their international obligations by setting a MACR at 12 and above.

Finally chapter 4 took a closer look at South Africa’s legislative reform process as representative of some of the other countries under study who share the same legal system and have retained the ‘discriminatory’ *doli incapax* presumption. It starts with an explanation of the concept of the MACR and the *doli incapax* presumption in the context of South Africa and how the presumption works in practice through case law illustrations. The presumption was inherited as a protection for children who find themselves in conflict with the law and are too immature to understand the unlawfulness of their actions. Many experts in the field commented that the presumption works in theory but not always in practice. The case law discussions provided a clear example of how the presumption is often incorrectly applied by our courts. Thus the presumption does not serve as a protection for younger children in conflict with the law it acts as a legal impediment instead.

South Africa underwent a process of legal reform that started in 1997 up until 2008 with the National Assembly passing the Child Justice Bill. It was a highly collaborative process between government and civil society. The Issue Paper was the result of this process followed by a Discussion Paper accompanied by a draft Bill. In July 2000, a comprehensive Report on Juvenile Justice followed the Discussion Paper marking the end of the structured consultation process. The Report contained many sound arguments by the SALRC favouring the increase of the MACR from 7 to 10
years old and the retention of the presumption for children between the ages of 10 and 14 years old.

The Bill passed by National Assembly increased the MACR from 7 to 10 years old and retained the presumption for children between the ages of 10 and 14 years old. This is contrary to the recommendations of the CROC. Although I am not in favour of the MACR being increased to 10 instead of 12 years old. The Bill, however, included a very progressive clause 8 cross-referenced with clause 96(4) and (5). The clause details the review of the MACR, ‘not later than five years after the commencement of this section’ and the procedures involved in carrying out this review.\(^4\) Within five years an analysis of all the statistical information gathered must be undertaken and recommendations should be made as to whether the MACR should remain at 10 years old or be raised.\(^5\) I submitted that South Africa is still in the infant stages of implementing such reform especially in view of the fact that the Bill has only recently been passed by National Assembly. The CROC should be patient while South Africa carries out implementing its reform in the best possible manner to eventually bring its MACR in accordance with the position advocated by the CROC.

In conclusion I recommend that all the countries under study that have not increased their MACR in accordance with international law should strive toward that end. They should continue to review their laws through the system of State reporting and progressively raise their MACR’s in an attempt to bring their laws in accordance with their treaty obligations. Countries such as Kenya, Namibia, Lesotho and Malawi should consider implementing a similar clause like that of South Africa’s clause 8.

\(^4\) See Appendix 3 clause 8 and Appendix 3(A) clause 96.

\(^5\) See Appendix 3(A) clause 96(4)(e) and (f).
Ethiopia and Zambia need to take legislative reform that is aimed at creating rights and protections for children instead of relying on their Penal codes. Secondly, those countries such as Uganda, Ghana, Mozambique and Sierra Leone who have met their treaty obligations should continue to ensure their laws are being effectively implemented into their legal systems. Finally, South Africa should ensure that they keep proper controls over their statistical data in view of reviewing their MACR in five years time.
APPENDIX 1: Child Justice Bill No. 49 of 2002

Criminal capacity

‘5. (1) A child who commits an offence while under the age of 10 years cannot be prosecuted for that offence.

(2) A child who commits an offence while under the age of 14 years is presumed not to have had the capacity to appreciate the difference between right and wrong and to act in accordance with that appreciation, unless the criminal capacity of the child is proved in accordance with section 56.

(3) If a Director of Public Prosecutions intends charging a child contemplated in subsection (2) with an offence, the Director or his or her delegate must issue a certificate confirming an intention to prosecute.

(4) If the certificate contemplated in subsection (3) is not issued within 14 days after the preliminary inquiry, the Director of Public Prosecutions must be regarded as having declined to institute prosecution.

(5) In issuing a certificate contemplated in subsection (3) the Director of Public Prosecutions may have regard to any relevant information, but must have regard to

(a) the appropriateness of diversion;

(b) the educational level, cognitive ability, domestic and environmental circumstances, age and maturity of such child;

(c) the nature and gravity of the alleged offence;

(d) the impact of the alleged offence upon any victim of such offence; and

(e) a probation officer’s assessment report.

(6) The common law pertaining to the criminal capacity of children is hereby amended to the extent set out in this section.’
Establishment of criminal capacity

‘56. (1) The criminal capacity of a child over the age of 10 years but under the age of 14 years must be proved by the State beyond reasonable doubt.

(2) The prosecutor or the child’s legal representative may request the child justice court to order an evaluation of the child by a suitably qualified person to be conducted at State expense.

(3) If an order has been made by the child justice court in terms of subsection (2), the person identified to conduct an evaluation of the child must furnish the child justice court with a written report of the evaluation within 30 days of the date of the order.

(4) The evaluation must include an assessment of the cognitive, emotional, psychological and social development of the child.

(5) The person who conducts the evaluation may be called to attend the child justice court proceedings and give evidence and, if called, must be remunerated by the State in accordance with section 91 of the Criminal Procedure Act.’
APPENDIX 2: Child Justice Bill (2007 Cabinet Version)

PART 1: APPLICATION OF ACT

Application of Act

4. (1) Subject to subsection (2), this Act applies to any person in the Republic who is alleged to have committed an offence and who, at the time of the commission of the alleged offence, was 10 years or older but below the age of 18 years.

(2) Notwithstanding subsection (1) –

(a) only Part 2 of this Chapter applies to any person who, at the time of the commission of the alleged offence, was under the age of 10 years; and

(b) the Director of Public Prosecutions or a prosecutor designated thereto by the Director may, in exceptional circumstances and in accordance with directives issued by the National Director of Public Prosecutions, in the case of a person who is being charged with a Schedule 1 or 2 offence and who is 18 years or older but under the age of 21 years, at the time of the institution of criminal proceedings against him or her in respect of the commission of an alleged offence, direct that the matter be dealt with in terms of section 11(b) or (c).

(3) (a) The Criminal Procedure Act applies with such changes as may be required by the context to any person contemplated in this section, except in so far as this Act provides for amended, additional or different provisions or procedures in respect of such person.

(b) For purposes of paragraph (a), Schedule 7 to this Act, which is not part of this Act and does not have the force of law, contains an exposition of the interface between the Criminal Procedure Act and this Act.

PART 2: CHILDREN BELOW 10 YEARS OF AGE

Criminal capacity of child below 10 years of age

6. (1) A child who commits an offence while below the age of 10 years does not have criminal capacity and cannot be prosecuted for that offence, but must be dealt with in terms of section 8.
(2) The common law pertaining to the criminal capacity of children below 10 years is hereby amended to the extent set out in this section and section.

Manner of dealing with child below 10 years of age

7. (1) Where a police official has reason to believe that a child suspected of having committed an offence is below the age of 10 years, he or she may not arrest the child, and must immediately but not later than 48 hours take such child to the child’s home and if the child does not have a home, to a placement facility and must inform a probation officer, as prescribed.

(2) A probation officer who receives a notification from a police official in terms of subsection (1), must assess the child in terms of Chapter 5 as soon as possible but not later than seven days after receipt of the notification.

(3) (a) After assessment of a child in terms of subsection (2), the probation officer concerned may -

(i) in the prescribed manner, refer the child to the children’s court on any of the grounds set out in section 51;

(ii) in the prescribed manner, refer the child for counselling or therapy;

(iii) in the prescribed manner, refer the child to an accredited programme designed specifically to suit the needs of children below the age of 10 years;

(iv) arrange for support services to the child;

(v) in the prescribed manner, arrange a meeting, which must be attended by the child, his or her parent or an appropriate adult, and which may be attended by any other person likely to provide information for the purposes of the meeting contemplated in subsection (4); or

(vi) decide to take no action.

(b) Any action taken under paragraph (a) may not, in any way, require a child to be held responsible for the incident that led to the assessment.
(4) The purposes of the meeting convened by a probation officer in terms of subsection (3)(a)(v) are to -

(a) assist such probation officer to establish more fully the circumstances surrounding the allegations against a child who is alleged to have committed an act with serious consequences; and

(b) formulate a written plan appropriate to the child and relevant to the circumstances.

(5) The written plan referred to in subsection (4)(b) must, at least -

(a) specify the objectives to be achieved for the child and the period within which they should be achieved;

(b) contain details of the services and assistance to be provided for the child as prescribed;

(c) specify the persons or organisations to provide such services and assistance as prescribed; and

(d) state the responsibilities of the child and of the parent or appropriate adult.

(6) The probation officer must record, with reasons, the outcome of the assessment and the decision made in terms of subsection (3) in the prescribed manner.

(7) The decision made by the probation officer in terms of subsection (3), including the written plan, if any, must, in the prescribed manner, be submitted to a magistrate in chambers for consideration and for purposes of having the decision, including the plan, if any, made an order of court.

**Assessment of child below 10 years of age**

8. The provisions of Chapter 5 relating to the assessment of children apply in respect of children contemplated in this Part, except-

(a) section 35(b), (c) and (d), dealing with assessment before a preliminary inquiry;

(b) section 40(1)(d) and 41(4), dealing with the acknowledgment of responsibility;

(c) section 41(1), dealing with the recommendations by a probation officer, in
which case the provisions of section 7(3) apply; and

(d) section 41(5), dealing with the submission of the assessment report to the prosecutor.

Criminal capacity of child aged 10 years or older but below 14 years

9. (1) (a) A child who is 10 years of age or older but under the age of 14 years and who commits an offence is presumed to lack criminal capacity, unless he or she is proved to have such criminal capacity in accordance with section 10.

(b) A prosecutor who is required to make a decision in respect of a child referred to in paragraph (a), whether to divert such child as contemplated in section 11(b) or (c) or not, or whether to prosecute such child as contemplated in section 11(e) or not, must take the following factors into consideration:

(i) The educational level, cognitive ability, domestic and environmental circumstances, age and maturity of such child;
(ii) the nature and gravity of the alleged offence;
(iii) the impact of the alleged offence upon any victim of such offence and the implications thereof;
(iv) the interests of the community;
(v) a probation officer’s assessment report in terms of Chapter 5;
(vi) the prospects of establishing criminal capacity in terms of section 10 if the matter were to be referred to a preliminary inquiry in terms of Chapter 7 or to trial in terms of Chapter 8; and
(vii) any other relevant factor.

(c) If a prosecutor decides in respect of a child referred to in paragraph (a) –

(i) that criminal capacity is likely to be proven in terms of section 10, he or she must, in the event of –

(aa) diversion being a possibility, proceed as contemplated in section 11(b) or (c);
(bb) prosecution being a possibility, proceed as contemplated in section 11(e); or

(ii) that criminal capacity is not likely to be proved in terms of section 10 and the matter cannot be diverted or prosecuted on this ground alone, he or she may cause the child to be taken to a probation officer for any further action in terms of Part 2 of this Chapter.
(2) The common law pertaining to the criminal capacity of children aged 7 years or older but below the age of 14 years is hereby amended to the extent set out in this section and section 10.

**Establishment of criminal capacity**

10. (1) The capacity of a child who is 10 years or older but under the age of 14 years to appreciate the difference between right and wrong and to act in accordance with that appreciation at the time of the commission of an alleged offence must be proved by the State beyond a reasonable doubt.

(2) In making a determination regarding the criminal capacity of the child in question, the inquiry magistrate or child justice court must consider the assessment report of the probation officer contemplated in section 41 and all evidence placed before it prior to diversion or conviction, as the case may be, which evidence may include a report of an evaluation referred to in subsection (3).

(3) An inquiry magistrate or child justice court may, on its own accord, or upon the request of the prosecutor or the child’s legal representative, order an evaluation of the criminal capacity of the child referred to in subsection (1), in the prescribed manner, by a suitably qualified person, which must include an assessment of the cognitive, emotional, psychological and social development of the child.

(4) If an order has been made by the inquiry magistrate or child justice court in terms of subsection (3), the person identified to conduct an evaluation of the child must furnish the inquiry magistrate or child justice court with a written report of the evaluation within 30 days of the date of the order.

(5) Where an inquiry magistrate or child justice court has found that a child’s criminal capacity has not been proven beyond a reasonable doubt, such inquiry magistrate or child justice court
may, if it is in the interests of the child, cause the child to be taken to a probation officer for any further action in terms of Part 2 of Chapter 2.
APPENDIX 3: Child Justice Bill (2008 Cabinet Version as approved by the National Assembly)

PART 1: APPLICATION OF ACT

Application of Act

4. (1) Subject to subsection (2), this Act applies to any person in the Republic who is alleged to have committed an offence and—

(a) was under the age of 10 years at the time of the commission of the alleged offence; or

(b) was 10 years or older but under the age of 18 years when he or she was—

(i) handed a written notice in terms of section 18 or 22;

(ii) served with a summons in terms of section 19; or

(iii) arrested in terms of section 20, for that offence.

(2) The Director of Public Prosecutions having jurisdiction may, in accordance with directives issued by the National Director of Public Prosecutions in terms of section 97(4)(a)(i)(aa), in the case of a person who—

(a) is alleged to have committed an offence when he or she was under the age of 18 years; and

(b) is 18 years or older but under the age of 21 years, at the time referred to in subsection (1)(b), direct that the matter be dealt with in terms of section 5(2) to (4).

(3) (a) The Criminal Procedure Act applies with the necessary changes as may be required by the context to any person referred to in this section, except in so far as this Act provides for amended, additional or different provisions or procedures in respect of that person.

(b) For purposes of paragraph (a), Schedule 5 to this Act, which is not part of this Act and does not have the force of law, contains an exposition of the interface between the Criminal Procedure Act and this Act.
Manner of dealing with children who are alleged to have committed offences

5. (1) Every child who is alleged to have committed an offence and is under the age of 10 years, must be referred to a probation officer to be dealt with in terms of section 9.

(2) Every child who is 10 years or older, who is alleged to have committed an offence and who is required to appear at a preliminary inquiry in respect of that offence must, before his or her first appearance at the preliminary inquiry, be assessed by a probation officer, unless assessment is dispensed with in terms of section 41(3) or 47(5).

(3) A preliminary inquiry must be held in respect of every child referred to in subsection (2) after he or she has been assessed, except where the matter—

(a) has been diverted in accordance with Chapter 6;

(b) involves a child who is 10 years or older but under the age of 14 years where criminal capacity is not likely to be proved, as provided for in section 10(2)(b); or

(c) has been withdrawn.

(4) (a) A matter in respect of a child referred to in subsection (2) may be considered for diversion—

(i) by a prosecutor in accordance with Chapter 6; or

(ii) at a preliminary inquiry in accordance with Chapter 7.

(b) A matter which is for any reason not diverted in terms of paragraph (a) must, unless the matter has been withdrawn or referred to a children’s court, be referred to a child justice court for plea and trial in terms of Chapter 9.

(c) A matter in respect of a child referred to in paragraph (b) may, before the conclusion of the case for the prosecution, be considered for diversion by a child justice court in terms of Chapter 9.
Seriousness of offences

6. (1) In order to determine the seriousness of offences for purposes of this Act, the categories of offences are listed in the following order, beginning with the category of least serious offences:

(a) Offences contained in Schedule 1;
(b) offences contained in Schedule 2; and
(c) offences contained in Schedule 3.

(2) In the case of a child being charged with more than one offence which are dealt with in the same criminal proceedings, the most serious offence must guide the manner in which the child must be dealt with in terms of this Act.

(3) In the case of a child being charged with more than one offence which are dealt with in separate criminal proceedings, subsection (2) does not apply.

PART 2: CRIMINAL CAPACITY OF CHILDREN UNDER THE AGE OF 14 YEARS

Minimum age of criminal capacity

7. (1) A child who commits an offence while under the age of 10 years does not have criminal capacity and cannot be prosecuted for that offence, but must be dealt with in terms of section 9.

(2) A child who is 10 years or older but under the age of 14 years and who commits an offence is presumed to lack criminal capacity, unless the State proves that he or she has criminal capacity in accordance with section 11.

(3) The common law pertaining to the criminal capacity of children under the age of 14 years is hereby amended to the extent set out in this section.

Review of minimum age of criminal capacity

8. In order to determine whether or not the minimum age of criminal capacity as set out in section 7(1) should be raised, the Cabinet member responsible for the administration of
justice must, not later than five years after the commencement of this section, submit a report to Parliament, as provided for in section 96(4) and (5).

Manner of dealing with child under the age of 10 years

9. (1) Where a police official has reason to believe that a child suspected of having committed an offence is under the age of 10 years, he or she may not arrest the child, and must, in the prescribed manner, immediately hand the child over—

(a) to his or her parents or an appropriate adult; or

(b) if no parent or appropriate adult is available or if it is not in the best interests of the child to be handed over to the parent or appropriate adult, to a suitable child and youth care centre, and must notify a probation officer.

(2) A probation officer who receives notification from a police official in terms of subsection (1), must assess the child in terms of the provisions of Chapter 5 which are applicable to children under the age of 10 years as soon as possible but not later than seven days after being notified.

(3) (a) After assessing a child in terms of subsection (2), the probation officer may, in the prescribed manner—

(i) refer the child to the children’s court on any of the grounds set out in section 50;

(ii) refer the child for counselling or therapy;

(iii) refer the child to an accredited programme designed specifically to suit the needs of children under the age of 10 years;

(iv) arrange support services for the child;

(v) arrange a meeting, which must be attended by the child, his or her parent or an appropriate adult, and which may be attended by any other person likely to provide information for the purposes of the meeting referred to in subsection (4); or

(vi) decide to take no action.
(b) Any action taken under paragraph (a) does not imply that the child is criminally liable for the incident that led to the assessment.

(4) The purpose of the meeting convened by a probation officer in terms of subsection (3)(a)(v) is to—

(a) assist the probation officer to establish more fully the circumstances surrounding the allegations against a child; and

(b) formulate a written plan appropriate to the child and relevant to the circumstances.

(5) The written plan referred to in subsection (4)(b) must, at least—

(a) specify the objectives to be achieved for the child and the period within which they should be achieved;

(b) contain details of the services and assistance to be provided for the child, as prescribed;

(c) specify the persons or organisations to provide the services and assistance, as prescribed; and

(d) state the responsibilities of the child and of the parent or appropriate adult.

(6) The probation officer must record, with reasons, the outcome of the assessment and the decision made in terms of subsection (3) in the prescribed manner.

(7) In the event of a child failing to comply with any obligation imposed in terms of this section, including compliance with the written plan referred to in subsection (4)(b), the probation officer must refer the matter to a children’s court to be dealt with in terms of Chapter 9 of the Children’s Act.

**Decision to prosecute child who is 10 years or older but under the age of 14 years**

10. (1) A prosecutor who is required to make a decision whether or not to prosecute a child referred to in section 7(2) must take the following into consideration:
(a) The educational level, cognitive ability, domestic and environmental circumstances, age and maturity of the child;

(b) the nature and seriousness of the alleged offence;

(c) the impact of the alleged offence on any victim;

(d) the interests of the community;

(e) a probation officer's assessment report in terms of Chapter 5;

(f) the prospects of establishing criminal capacity in terms of section 11 if the matter were to be referred to a preliminary inquiry in terms of Chapter 7;

(g) the appropriateness of diversion; and

(h) any other relevant factor.

(2) If a prosecutor decides in respect of a child referred to in subsection (1) that criminal capacity is—

(a) likely to be proved in terms of section 11, he or she may—

   (i) divert the matter in terms of Chapter 6 if the child is alleged to have committed an offence referred to in Schedule 1; or

   (ii) refer the matter to a preliminary inquiry as provided for in Chapter 7; or

(b) not likely to be proved in terms of section 11, he or she may cause the child to be taken to a probation officer to be dealt with in terms of section 9.

Proof of criminal capacity

11. (1) The State must prove beyond reasonable doubt the capacity of a child who is 10 years or older but under the age of 14 years to appreciate the difference between right and wrong at the time of the commission of an alleged offence and to act in accordance with that appreciation.

(2) In making a decision regarding the criminal capacity of the child in question—

(a) the inquiry magistrate, for purposes of diversion; or

(b) if the matter has not been diverted, the child justice court, for purposes of
plea and trial, must consider the assessment report of the probation officer referred to in section 40 and all evidence placed before the inquiry magistrate or child justice court prior to diversion or conviction, as the case may be, which evidence may include a report of an evaluation referred to in subsection (3).

(3) An inquiry magistrate or child justice court may, on own accord, or on the request of the prosecutor or the child's legal representative, order an evaluation of the criminal capacity of the child referred to in subsection (1), in the prescribed manner, by a suitably qualified person, which must include an assessment of the cognitive, moral, emotional, psychological and social development of the child.

(4) If an order has been made by the inquiry magistrate or child justice court in terms of subsection (3), the person identified to conduct an evaluation of the child must furnish the inquiry magistrate or child justice court with a written report of the evaluation within 30 days of the date of the order.

(5) Where an inquiry magistrate or child justice court has found that a child's criminal capacity has not been proved beyond a reasonable doubt, the inquiry magistrate or child justice court may, if it is in the interests of the child, cause the child to be taken to a probation officer for any further action in terms of section 9.
APPENDIX 3(A): Chapter 14 General Provisions s96(4) and (5)

Responsibilities, functions and duties of Intersectoral Committee

96. (4) In order for Parliament to review the minimum age of criminal capacity, as provided for in section 8, the Intersectoral Committee must, not later than five years after the commencement of this Act, submit a report to the Cabinet member responsible for the administration of justice, setting out the following:

(a) The statistics of the following categories of children who are alleged to have committed an offence and the offences they are alleged to have committed:
   (i) Children who are 10 years at the time of the commission of the alleged offence;
   (ii) children who are 11 years at the time of the commission of the alleged offence;
   (iii) children who are 12 years at the time of the commission of the alleged offence;
   (iv) children who are 13 years at the time of the commission of the alleged offence;
(b) sentences imposed on the children in the categories referred to in paragraph (a), if they were convicted;
(c) the number of children referred to in paragraph (a) whose matters did not go to trial, as provided for in section 10(2)(b) on the grounds that the prosecutor was of the view that criminal capacity would not be proved and reasons for that decision in each case;
(d) the number of children referred to in paragraph (a) whose matters were dealt with in accordance with section 11, whether expert evidence was led, and the outcome of each matter regarding the establishment of criminal capacity;
(e) an analysis of the statistics referred to in paragraphs (a) to (d); and
(f) a recommendation based on the analysis as to whether the minimum age of criminal capacity should remain at 10 years as provided for in section 7(1) or whether the minimum age of criminal capacity should be raised.

(5) The Cabinet member responsible for the administration of justice must, on receipt of the report referred to in subsection (4), submit the report to Cabinet for approval, and thereafter to Parliament for consideration.
BIBLIOGRAPHY

**Books and Articles**


Melchiorre, A The right to education project: At what age?...are school children employed, married and taken to court? Available at http://www.right-to-education.org/content/age/age.pdf [accessed 11 November 2008].


Sewpaul, O ‘SA Presentation to UN CRC – setting the agenda for transformation’ (2000) 2(2) Article 40 1.


Sloth-Nielsen, J ‘General Comment no. 10 (Children’s Rights in Juvenile Justice) is Released. A new vision for child justice in international law’ (2007) 9(1) *Article 40 9*.


Sloth-Nielsen, J ‘Rebutting the presumption of criminal capacity’ (2003) 5(3) *Article 40 6*.


Case Law

Attorney-General, Transvaal v Additional Magistrate of Johannesburg 1924 A.D 421.

In re Gault 387 U.S. 1 (1967).


C v DPP [1994] 3 WLR 888 (United Kingdom).

Director of Public Prosecutions KwaZulu-Natal v P 2006 (1) SACR 243 (SCA).

R v K 1956 (3) SA 353 (A).

R v Tsutsu 1962 (2) SA 666 (SR).

S v Kwalase 2000 (2) SACR 135 (CPD).

S v M and Others 1978 (3) SA 557 (TKSC).

S v Mbanda and Others 1986 (2) PHH 108 (T).
S v Ngobese and Others 2002 (1) SACR 562.

S v Pietersen and Others 1983 (4) SA 904 (ECD).

S v S 1977 (3) SA 305 (OPA).

S v Van Dyk and Others 1969 (1) SA 601 (CPD).

T v United Kingdom Application no. 27424/94

V v United Kingdom Application no. 24888/94

Committee on Rights of the Child Initial Reports, General Comments and Concluding Observations

Initial Reports to the Committee on the Rights of the Child: Ethiopia
23/05/2000 CRC/C/70/Add.7.

Initial Reports to the Committee on the Rights of the Child: Gambia

Initial Reports to the Committee on the Rights of the Child: Malawi
26/06/2001 CRC/C/8/Add.43.
17/07/2008 CRC/C/MWI/2.

Initial Reports to the Committee on the Rights of the Child: Mozambique
14/05/2001 CRC/C/41/Add.11.

Initial Reports to the Committee on the Rights of the Child: Sierra Leone
03/06/1996 CRC/C/3/Add.43.


Concluding Observations of the Committee on the Rights of the Child:  Ethiopia  
24/01/1997 CRC/C/15/Add.67.  
21/02/2001 CRC/C/15/Add.144.  
01/11/2006 CRC/C/ETH/CO/3.

Concluding Observations of the Committee on the Rights of the Child:  Gambia  
06/11/2001 CRC/C/15/Add.165.

Concluding Observation of the Committee on the Rights of the Child:  Ghana  
18/06/1997 CRC/C/15/Add. 73.  
17/03/06 CRC/C/GHA/CO/2.

Concluding Observation of the Committee on the Rights of the Child:  Isle of Man (United Kingdom of Great Britain and Northern Island)  
20/10/2000 CRC/C/15/Add.134.

Concluding Observation of the Committee on the Rights of the Child:  Kenya  
07/11/2001 CRC/C/15/Add.160.  
19/06/2007 CRC/C/KEN/CO/2.

Concluding Observation of the Committee on the Rights of the Child:  Lesotho  
21/02/2001 CRC/C/15/Add.147.

Concluding Observations of the Committee on the Rights of the Child:  Malawi  
Concluding Observations of the Committee on the Rights of the Child: Mozambique

Concluding Observations of the Committee on the Rights of the Child: Namibia

Concluding Observations of the Committee on the Rights of the Child: South Africa

Concluding Observations of the Committee on the Rights of the Child: Sierra Leone
24/02/2000 CRC/C/15/Add.116
20/06/2008 CRC/C/SLE/CO/2.

Concluding Observations of the Committee on the Rights of the Child: Uganda
21/10/1997 CRC/C/15/Add.80.

Concluding Observations of the Committee on the Rights of the Child: Zambia


**Other Publications: Miscellaneous**


Reports


**Constitutions**


**Statutes/Bills/Draft Bills**

Child Care Act 74 of 1983 (South Africa).

Children’s Act 38 of 2005 (South Africa).

Children’s Act, 1960 (Lesotho).

Children’s Act, 2001 (Kenya).

Children’s Act 560 of 1998 (Ghana).

Juvenile Justice Act 650 of 2003 (Ghana).

The Child Rights Act, 2007 (Sierra Leone).

Children’s Statute, 1996 (Uganda).

Criminal Procedure Act 51 of 1977.

Crime and Disorder Act 1998 (United Kingdom).

Child (Care, Protection and Justice) Bill, 20… (Malawi).


Child Justice Bill No. 49 of 2002 (South Africa).

Children’s Protection and Welfare Bill 2004 (Lesotho).


**Theses and Dissertations**


Kassan, DG (2005) ‘How can the voice of the child be adequately heard in family law proceedings?’ (Unpublished LLM Thesis submitted to the University of the Western Cape, South Africa).


**Treaties, Declarations and United Nations Guidelines**


European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)

International Covenant on Civil and Political Rights (1966)

Universal Declaration of Human Rights (1948)

United Nations Guidelines for Action on Children in the Criminal Justice System (The Vienna Guidelines) 1997


**Websites**

**Website of the African Union:** [http://www.africa-union.org](http://www.africa-union.org)


**Website of the Child Justice Alliance:** [http://www.childjustice.org.za](http://www.childjustice.org.za)


**Website of the Child Rights Information Network:** http://www.crin.org


**Website of Defence for Children International:** http://www.dci.org

Fact Sheet # 2: *Preventing Juvenile Delinquency*. Available at http://www.dci-is.org/db/nl/up_files/GC_10_FactSheet2_Preventing_Juvenile_Delinquency_EN.pdf [accessed 10 May 2008]


Fact Sheet # 4: *Ensuring Appropriate Age Limits of Criminal Responsibility*. Available at http://www.dci-is.org/db/nl/up_files/GC_10_FactSheet4_Ensuring_Appropriate_Age_of_Criminal_Responsibility_EN.pdf [accessed 10 May 2008].
Fact Sheet # 7: Deprivation of Liberty as a Last Resort. Available at http://www.dci-
is.org/db/nl/up_files/GC_10_FactSheet7_Deprivation_of_Liberty_as_a_Last_Resort_ EN.pdf [accessed 10 May 2008].

‘Follow-up to General Comment No.10’. Available at http://www.dci-
is.org/db/nl/up_files/DCI_short_report_panel_event_VF.pdf [accessed 13 June 2008].


The CROC. Available at http://www.ohchr.org/english/about/publications/docs.fs10.htm [accessed 03 May 2008].

The CROC. Available at http://www.ohchr.org/english/bodies/crc/members.htm [accessed 01 May 2008].


Newspaper Reports

‘Ministers promise rehabilitate young offenders as well as punish them’ *Timesonline*, 09 June 2008. Available at http://www.timesonline.co.uk/tol/news/uk/crime/article4093084.ece [accessed 11 November 2008].
