

**The Domestication of International Law Standards on the Rights of  
the Child with Specific Reference to Juvenile Justice in the African  
Context**

By

**ODONGO GODFREY ODHIAMBO**

LL.B Hons (Moi), LL.M (Pretoria)



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the Faculty of Law of the University of the Western Cape, South Africa

Promoter:

**Professor Julia Sloth-Nielsen**

Senior Professor of Law

University of the Western Cape

18 October 2005

**DECLARATION**

I declare that **The Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context** is my work and that it has not been submitted for any degree or examination in any other university. All the sources used or quoted have been duly acknowledged.

ODONGO GODFREY ODHIAMBO

18 October 2005

SIGNED.....



## ABBREVIATIONS

A.G	Attorney General
AU	African Union
CAT	Convention against Torture
CLRC	Child Law Review Committee (Uganda)
CRC	Convention on the Rights of the Child
CROC	Committee on the Rights of the Child
CYFPA	Children Young Persons and their Families Act, 1989 (New Zealand)
DPP	Director of Public Prosecutions
ECHR	European Convention on Human Rights
EU	European Union
GNCC	Ghanaian National Commission for Children
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
INGO	International Non-governmental Organization
KLRC	Kenya Law Reform Commission
NGO	Non-governmental Organization
NICRO	National Institute for Crime Prevention and the Rehabilitation of Offenders
NPA	National Programme of Action for Children
OAS	Organization of American States
OAU	Organization of African Unity
P.I	Preliminary Inquiry
SALC	South African Law Reform Commission

UK	United Kingdom
UN	United Nations
UNAFEI	United Nations Asian and Far East Institute
UNAFRI	United Nations African Institute for the Prevention of Crime and Treatment of Offenders
UNDP	United Nations Development Programme
UN JDLs	United Nations Rules for Juvenile Deprived of their Liberty
UNHCHR	United Nations High Commissioner for Human Rights
UNICEF	United Nations Children's Fund
UNICRI	United Nations Inter-regional Crime and Justice Research Institute
UNOPS	United Nations Office for Project Services
US	United States
USA	United States of America



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## DEDICATION

In loving memory of Dad and Mum



## TABLE OF CONTENTS

Declaration	ii
Abbreviations	iii
Acknowledgements	v
Declaration	vii

### **CHAPTER 1: INTRODUCTION AND OVERVIEW OF STUDY**

1.1 Background of the Study	1
1.2 Statement of the problem	6
1.3 Aims of the study	8
1.4 Methodology	9
1.5 Limitations of study	10
1.6 Outline of the study	11

### **CHAPTER 2: THEORITICAL UNDERPINNINGS OF THE EVOLUTION OF JUVENILE JUSTICE: FROM PARENS PATRIAE TO CHILDREN'S RIGHTS**

2.1 Introduction	16
2.2 The origins of the juvenile justice system	17
2.3 Welfarism as an early dominant theory	20
2.4 The back to justice theory	29
2.5 Practical confluence in the two models and current trends	34
2.6 Dawn of a third juvenile justice model and contemporary jettisoning of theory?	37
2.7 Relevance of the justice-welfare theoretical debate to an African context	39
2.8 The entry of children's rights	45
2.8.1 Children's rights as a model for juvenile justice?	53
2.9 Restorative justice as a theme	57
2.9.1 Is there a congruence or conflict between restorative justice theory and children's rights?	60
2.10 Conclusion	63

### **CHAPTER 3: THE PROCESS OF DEVELOPING NEW JUVENILE JUSTICE LAWS IN SPECIFIC AFRICAN COUNTRIES**

3.1 Introduction	65
3.2 Implementation of the CRC and the place of domestic laws	68
3.3 The CRC in the domestic legal order of the countries under study	72
3.4 A general overview of some child law reform initiatives in Africa in the period 1990 to date	77
3.5 The law reform processes in the three countries	80
3.5.1 The process in Uganda	80
3.5.1.1 The genesis of and impetus for child law reform	80
3.5.1.2 Appointment and composition of the reform body	83
3.5.1.3 The reform process under the CLRC	85
3.5.1.4 Further consultation and review of the draft proposals	90
3.5.1.5 Conclusion of the process and the end product	92
3.5.2 The process in Kenya	94



3.5.2.1	The genesis of and impetus for child law reform	94
3.5.2.2	Appointment and composition of the reform body	95
3.5.2.3	The reform process under the task force	95
3.5.2.4	Seeking the views of children	97
3.5.2.5	The report and juvenile justice issues	97
3.5.2.6	Conclusion of the process and the end-product	98
3.5.3	The process in South Africa	102
3.5.3.1	The genesis of and impetus for juvenile justice law reform	102
3.5.3.2	Inclusion of children's rights in the Constitution	105
3.5.3.3	Appointment and composition of the Project Committee	107
3.5.3.4	The reform process under the Project Committee	108
3.5.3.5	The process of consulting with children on the proposed law	110
3.5.3.6	Children's rights, public opinion on crime and pragmatism	111
3.5.3.7	Conclusion of the process and the end product	113
3.5.3.8	The current status of the Bill	115
3.6	The themes and factors behind the common position emphasizing the centrality of a child rights ideology in juvenile justice law reform processes in Kenya, South Africa and Uganda	116
3.6.1	A re-orientation of the basis upon which juvenile justice systems were earlier predicated, to an approach based on children's rights	117
3.6.2	The role of NGOs and civil society in the reform processes	119
3.6.3	Political will to domesticate the CRC	121
3.6.4	Credibility of the reform bodies through pre-legislative publicity and broad-based consultation in the reform processes	123
3.6.5	Listening to children themselves	126
3.7	Conclusion	127

## **CHAPTER 4: REFORMING ISSUES OF AGE AND CRIMINAL RESPONSIBILITY**

4.1	Introduction	130
4.2	The position in international law regarding the setting of a minimum age of criminal capacity	133
4.2.1	The CRC and the jurisprudence under it	133
4.2.1.1	Lack of a minimum age of criminal capacity	135
4.2.1.2	Unacceptably low minimum ages of criminal capacity	135
4.2.1.3	The abolition of the doli incapax rule is considered a violation of the CRC where its effect is a low minimum age	139
4.2.1.4	Further CRC provisions relevant to the issue of age and criminal capacity	141
4.2.2	Other International law instruments	143
4.2.2.1	The European Convention on Human Rights	143
4.2.2.2	The Human Rights Committee	148
4.3	An African conception of age and criminal responsibility?	151
4.4	The position pre-child law reform in the countries under study	153
4.5	Other African countries and Europe	154
4.6	The approach of the reform countries under study on the upper age of criminal capacity	156
4.7	The doli incapax rule in a comparative light	158

4.7.1	The application	158
4.7.2	Contemporary developments regarding the rule in other jurisdictions	163
4.8	The approach to reform in the countries under study	168
4.8.1	Retention of the <i>doli incapax</i> rule as obtaining before reform	168
4.8.2	Abolition of the doctrine and an increase in the minimum age	173
4.8.3	Raising the minimum age of criminal responsibility and a retention of the presumption of <i>doli incapax</i>	176
4.9	Legislating for children below the minimum age of criminal responsibility or deemed to lack capacity on the application of the <i>doli</i> presumption	182
4.9.1	The approach of the reform countries under study	183
4.10	Conclusion	187

## **CHAPTER 5: DIVERSION IN THE NEW JUVENILE JUSTICE SYSTEMS UNDER STUDY**

5.1	Introduction	191
5.2	Diversion and its origins	192
5.3	Theoretical justifications for and against diversion	194
5.4	The development of diversion options in Western jurisdictions	201
5.4.1	The introduction of legislative measures to regulate diversion	207
5.5	International law and diversion	210
5.6	Diversion in the African countries under study: The position before child law reform in the 1990s	214
5.6.1	South African case law on prosecutorial decisions to divert	220
5.7	Three diverse approaches in the new and proposed laws of the countries under study	224
5.7.1	The Kenyan Approach	225
5.7.1.1	Diversion pilot project in Kenya	228
5.7.2	The approach in the Ugandan and Ghanaian new juvenile justice legislation	231
5.7.2.1	Practical constraints in relation to the Ghanaian and Ugandan approaches	239
5.7.3	The common approach adopted by the draft laws of Lesotho, Namibia and South Africa	240
5.7.3.1	Referral procedures and finding solutions to the highly discretionary character of diversions	242
5.7.3.2	Provision for a range of innovative diversion options	247
5.7.3.3	Legislating for and augmenting procedures for restorative justice oriented diversion options	250
5.7.3.4	Enacting minimum standards and other provisions aimed at regulating diversion	253
5.8	Conclusion	254

## **CHAPTER 6: THE REQUIREMENT RELATING TO SEPARATE PROCEDURES AND COURTS APPLICABLE IN THE PRE-TRIAL AND TRIAL STAGES OF THE JUVENILE JUSTICE SYSTEM**

6.1	Introduction	260
-----	--------------	-----

6.2	International children's rights law on separate procedures and courts at both the pre-trial and trial stages	262
6.2.1	International law requirements regarding arrest and detention at the pre-trial stage	262
6.2.2	International law and the requirement of a separate juvenile justice system	271
6.2.2.1	The CRC requirement regarding separate courts or tribunals	272
6.2.2.2	International law standards applicable to juvenile justice systems	277
6.3	The practice in relation to pre-trial detention and separate juvenile justice systems in the countries under study prior to the law reform processes	281
6.4	The approach in the law reform initiatives in the countries under study	292
6.4.1	Provisions on pre-trial procedures in relation to arrests, detention and release policies	292
6.4.1.1	The new juvenile justice laws of Ghana, Kenya and Uganda	293
6.4.1.2	The provisions in the proposed laws of Lesotho, Namibia and South Africa	300
6.5	Separate procedures	305
6.5.1	The Preliminary Inquiry in the Lesotho, Namibian and South African Bills	305
6.6	Specialised courts in all the laws and proposed laws	310
6.6.1	Jurisdiction, national reach and specialization in these courts	311
6.6.2	Ambiance and procedures of the specialized children's courts	315
6.6.3	Protection of children's rights and due process safeguards in the juvenile justice systems	318
6.6.3.1	The right to legal representation	320
6.7	Conclusion	325

## **CHAPTER 7: SENTENCING AND ALTERNATIVE SENTENCING REGIMES IN THE COUNTRIES UNDER STUDY**

7.1	Introduction	329
7.2	International law in the area of juvenile sentencing	330
7.2.1	International law standards on the aims and principles of juvenile sentencing	331
7.2.2	International law and the prohibition of certain sentences	337
7.2.2.1	The death penalty	337
7.2.2.2	Life imprisonment without the possibility of parole	342
7.2.2.3	Judicial corporal punishment	344
7.3	Sentencing law and practice prior to the law reforms in the countries under study	349
7.3.1	Legal provisions on the imposition of custodial sentences for children prior to recent law reforms	349
7.3.2	Provision for a wide range of alternative sentences in the former laws	354
7.3.3	Sentencing and alternative sentencing practices in the countries under study prior to juvenile justice reforms	356

7.3.4	The lack of a sentencing policy for the imposition of custodial sentences in the countries under study	367
7.3.5	South African judicial responses to the lack of a child sentencing policy in the aftermath of the 1996 Constitution	369
7.4	The position regarding juvenile death penalty and corporal punishment prior to juvenile justice law reform in the countries under study	374
7.4.1	Juvenile death penalty	374
7.4.2	Juvenile corporal punishment	377
7.5	Provisions and proposals in relation to sentencing in the new laws of the countries under study	382
7.5.1	The aims and purposes of sentencing	383
7.5.2	Prohibition of and restriction of certain sentences in the new laws	385
7.5.2.1	Juvenile death penalty	385
7.5.2.2	Life imprisonment	389
7.5.2.3	Judicial corporal punishment	390
7.5.3	The prohibition and restrictions on the use of imprisonment and other custodial sentences	390
7.5.3.1	The Ghanaian, Kenyan and Ugandan laws	391
7.5.3.2	The proposed laws of Lesotho, Namibia and South Africa	394
7.5.4	Alternative sentences	397
7.5.4.1	The Lesotho, Namibian and South African Bills	397
7.5.4.2	The new laws of Ghana, Kenya and Uganda	400
7.5.5	Provisions on the requirement of pre-sentencing reports	402
7.6	Conclusion	404

## **CHAPTER 8: PROSPECTS AND CHALLENGES IN IMPLEMENTING THE NEW LAWS**



8.1	Introduction	408
8.2	Delay in enacting new legislation in Namibia and South Africa and questions on the sustainability of a children's rights approach to juvenile justice	409
8.3	Creating public awareness on the value of a children's rights approach	413
8.3.1	The need for social mobilisation regarding the child's right to individual autonomy	413
8.3.2	Making use of children's protection rights to counter harsh public opinion about crime	415
8.4	Emphasizing the financial feasibility of new juvenile justice laws	419
8.5	The place of juvenile justice 'good practice' within existing legal frameworks	423
8.6	The need to allocate resources	427
8.7	The problem of allocation of resources in the context of socio-economic reform	432
8.8	Training and sensitisation of professionals	439
8.9	Conclusion	442

## **CHAPTER 9: GENERAL CONCLUSIONS AND RECOMMENDATIONS**

9.1	Introduction	449
-----	--------------	-----

9.2	Ensuring a primary role for children’s rights through broad based consultative law-making processes	451
9.3	The role and influence of international children’s rights law in the substantive provisions of the new and proposed juvenile justice laws under study	455
9.3.1	Provisions on the setting of minimum and upper ages of criminal capacity	455
9.3.2	Provisions relating to diversion	461
9.3.3	Provision on a separate juvenile justice system at pre-trial and trial levels	466
9.3.4	Provisions on the new and proposed sentencing and alternative sentencing regimes	470
9.4	Future prospects and challenges to the implementation of the new and proposed laws	473
9.5	Conclusion	478
	<b>BIBLIOGRAPHY</b>	480



## CHAPTER 1

### INTRODUCTION AND OVERVIEW OF STUDY

#### 1.1 Background of the Study

The 1989 UN Convention on the Rights of the Child (CRC)<sup>1</sup> is one of the most universally accepted treaties, if the fact of ratification by States is of any guidance. With the exception of the United States and Somalia, both of who remain signatories to the Convention, the CRC is now ratified by all States.<sup>2</sup> At around the same time as its adoption, these countries (including African countries) also committed themselves to the World Summit Declaration for Children to achieve the goals for child survival, development, protection and participation.<sup>3</sup> In the African context, the regional African Charter on the Rights and Welfare of the Child<sup>4</sup> adopted under the aegis of

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<sup>1</sup>Adopted, 20 Nov. 1989, G.A. Res.44/25, U.N. GAOR, 44<sup>th</sup> Sess., Supp. No.49, U.N.Doc.A/44/49 (1989) (entered into force 2 September 1990). (Hereinafter referred to as “the CRC”).

<sup>2</sup>To date, 192 States have ratified the CRC. The only remaining two States, the United States of America and Somalia, signed the Convention in 1995 and 2002, respectively. For the details and status of ratification of the CRC, see < <http://www.ohchr.org/english/law/crc-ratify.htm> > (last accessed 28 October 2005). The USA’s position rejecting ratification has been discussed as being premised on largely ‘right-wing’ concerns bordering on fears that the CRC’s provisions potentially disempower parents in the upbringing of their children and undermine the family, see Kilbourne, S “United States Failure to Ratify the UN Convention on the Rights of the Child: Playing Politics with Children” (1996) 6 *Transnational Law and Contemporary Problems* 437 for a discussion of, and rebuttals to, these arguments. On the other hand, Somalia’s failure to ratify the CRC may be explained in the fact of the decades old war in that country and the absence of an effective government.

<sup>3</sup>See generally, United Nations World Summit for Children (1990) *World Declaration on the Survival, Protection and Development of Children and Plan of Action for Implementing the World Declaration on the Survival, Protection and Development of Children in the 1990s* New York: United Nations.

<sup>4</sup>Adopted under the auspices of the Organization of African Unity (now ‘the African Union’) OAU Doc. CAB/LEG/24.9/49 (1990), (entered into force 29 Nov 1999). (Hereinafter ‘the African Children’s

the Organization for African Unity (since changed into the African Union) largely mirrors the bulk of CRC's provisions.

By becoming parties to these international treaties, State Parties agree to be bound by their terms and to take all political, legal and administrative steps necessary to implement the core imperatives of the treaties as encapsulated in their Articles. In effect, this means that State Parties are bound both by the procedural reporting requirement as well as the obligation to take legislative steps, among others, to ensuring that children's rights as contained in the treaties are realized and implemented in domestic systems.

This thesis will predominantly be based on a discussion of the CRC (with very minimal reference to the obligations under the African Children's Charter) due to the fact the body in charge of monitoring the African Charter (the African Committee of Experts on the Rights and Welfare of the Child) was formed and started its monitoring work as recently as the year 2001.<sup>5</sup> The African Committee is therefore still in its

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Charter'). As of the time of writing, the Charter had been ratified by 35 of the 53 African Union States.). The status of ratification and the Committee's progress can be followed at < <http://www.africa-union.org/child/home.htm> > (last accessed 28 October 2005).

<sup>5</sup>Murray, R "Children's Rights in the OAU/AU" in Murray, R (2004) *Human Rights in Africa: From the OAU to the African Union* Cambridge: Cambridge University Press at 163-185, 168-173 (pointing out that the first 11-member African Committee was appointed in July 2001 and subsequently the four members vacated their positions which were only filled some time in July 2003. Since then the Committee has thus far "held only three meetings" dealing with formulation and adoption of its rules of procedure, strategies of disseminating the contents and obligations of the Charter and adoption of the guidelines for law reporting). For earlier discussions of the Committee's inaugural stages of work, see Lloyd, A "Evolution of the African Charter on the Rights and Welfare of the Child and the African Committee of Experts: Raising the Gauntlet" (2002) 10 *The International Journal of Children's Rights* 179-198, Lloyd, A "How to Guarantee Credence: Recommendations and Proposals for the African Committee of Experts on the Rights and Welfare of the Child" (2004) 12 *The International Journal of*

inchoate stages of work (and has not examined any Report by States Parties to the Charter).<sup>6</sup> This is in contrast to the CRC in respect of which the monitoring body, the Committee on the Rights of the Child (CROC), has developed considerable jurisprudence through an examination of States Reports, thematic discussions and General Comments. Its work now spans over a decade.

The CRC has revolutionized the area of child law in all its facets with a clear move from the doctrine of *parens patriae* which by and large entrusted parents with rights (rather than responsibilities) over their children, and with the State as the ultimate

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*Children's Rights* 21-40. Any discussion of how the obligations under the African Children's Charter would be interpreted by the African Committee would therefore be speculative. Another reason for focusing on the CRC and the jurisprudence under it relates to the substantial similarity and identical nature of the CRC's juvenile justice provisions (Articles 39 and 40) and the Charter's (Article 17). The African Children's Charter establishes higher standards for children in a number of other respects (including a clear definition of 'a child' as a person below the age of 18 years unlike the CRC which leaves this definition to domestic laws. Unlike the CRC, it also includes a straight prohibition of conscription of persons aged below 18 into the military). However, its juvenile justice provisions are similar to the Charter and in certain respects the CRC provides for more obligations than the Charter, for example the express provision on diversion (Article 40(3)) which is not similarly included in the Charter (article 17). For scholarly evaluations of the normative content of the African Charter, see Chirwa, D.M "The Merits and Demerits of the African Charter on the Rights and Welfare of the Child" (2002) 10 *The International Journal of Children's Rights* 157; Gose, M (2002) *The African Charter on the Rights and Welfare of the Child* Bellville: Community Law Centre; Lloyd, A, "A Theoretical Analysis of the Reality of Children's Rights in Africa: An Introduction to the African Charter on the Rights and Welfare of the Child" (2002) 2(1) *African Human Rights Law Journal* 11; Olowu, D "Protecting Children's Rights in Africa: A Critique of the African Charter on the Rights and Welfare of the Child" (2002) 10 *The International Journal of Children's Rights* 127; Viljoen, F "The African Charter on the Rights and Welfare of the Child" in Davel, CJ (ed) (2000) *Introduction to Child Law in South Africa* Lansdowne: Juta; Viljoen, F "Supra-national Human Rights Instruments for the Protection of Children in Africa: the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child" (1998) 31 *Comparative and International Law Journal of Southern Africa* 199. Chapter 2, section 2.8 further discusses the relevant provisions of the African Children's Charter.

<sup>6</sup>Murray (as above) 168-173; Lloyd (2004) (as above) 32.



guardian of children. Juvenile justice<sup>7</sup> - referring to the set of laws, policies, procedures and institutions put in place to deal with children alleged or accused of committing crimes - is part of this revolution.<sup>8</sup> Children are now a subject of human rights and law rather than an object of it.

Already, prior to the CRC's adoption, the international community had adopted a set of non-binding rules in the juvenile justice sphere. These include three instruments, the United Nations Guidelines for the Prevention of Juvenile Delinquency,<sup>9</sup> the United Nations Standard Minimum Rules for the Administration of Juvenile Justice,<sup>10</sup> and the United Nations Rules for the Protection of Juveniles Deprived of their

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<sup>7</sup>UNICEF adopts an expansive definition of juvenile justice pointing out that 'juvenile justice is an issue that affects not only children in criminal activities but also child victims of poverty, abuse and exploitation including street children and illegal child immigrants [often] treated as criminals..' See UNICEF (2004) *Justice for Children: Detention As a Last Resort: Innovative Initiatives in the East Asia and Pacific Region* UNICEF: New York 4. Also, according to Marie Wernham, 'juvenile justice comprises not only of the treatment of children in conflict with the law (protection), but also the need to address the root causes of offending behaviour and implement measures to prevent such behaviour (prevention)', see Wernham, M (2004) *An Outside Chance: Street Children and Juvenile Justice - An International Perspective* Consortium for Street Children: London 13-14. For the purposes of this thesis, this broad definition will be used in very few instances when this is specified. The narrower definition (by which "juvenile justice" means legislation, norms and standards procedures, mechanisms and provisions, institutions and bodies specifically applicable to juvenile offenders) will be the operative one. The terms 'juvenile delinquents', 'juvenile offenders' and 'children in conflict with the law' refer to every human being under the age of 18 (CRC, Article 1 and African Children's Charter, Article 2) who have or are alleged to have contravened the criminal law.

<sup>8</sup>The basic assumption from which this thesis proceeds is the widespread, indeed universal, appreciation that 'children and adolescents have special needs and limited capacities and hence require distinctive or at least separate treatment from adults.' See Bala, N and Bromwich, R "Introduction: An International Perspective on Youth Justice" in Bala, N *et al* (eds) (2002) *Juvenile Justice Systems: An International Comparison of Problems and Solutions*, Toronto: Thompson. 3.

<sup>9</sup>Adopted by the UN General Assembly 14 December 1990, Resolution 45/112. Also known as the 'Riyadh Guidelines'.

<sup>10</sup>Adopted by the UN General Assembly 29 November 1985, Resolution 40/33. Also known as the 'Beijing Rules'.

Liberty.<sup>11</sup> Some of these rules have now attained binding status by their inclusion in the CRC. The normative content of these instruments will be further considered in Chapter 2 of this thesis.<sup>12</sup>

Predating the ‘child rights-centred’ approach to the issue of juvenile justice, the philosophical underpinning of the idea that children accused of committing offences should be treated differently from adults has been argued from a number of theoretical standpoints. This debate is mainly captured in views in criminology where juvenile justice theory is based on the ‘welfare model’ and the ‘justice model’. This will be considered in detail in Chapter 2. Suffice it to say that the debate on these theories concentrates on western criminal law systems. It will therefore be this thesis’ aim to show the relevance of this debate in an African context drawing examples from a number of African countries.



The point of departure in the thesis is that by acknowledging children as bearers of certain minimum universally agreed standards that have now crystallised as children’s human rights, the CRC and other international norms on the rights of the child stand firmly in the theoretical justification of any issue regarding the child. The subject of juvenile justice is no exception.

The extent to which this is reflected in practice is assessed in light of juvenile justice law reforms in the African context. The analysis in this regard draws examples from African countries that have already engaged in the process of comprehensive law

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<sup>11</sup>Adopted by the UN General Assembly 14 December 1990, Resolution 45/113. Also known as ‘the UN JDL Rules’.

<sup>12</sup> Chapter 2, section 2.8.

reforms that seek to comply with the States' obligations under international law. Starting with the Ugandan example of 1996, there now abound examples of legislative enactments (or Bills that await the process of enactment) in a number of African countries, including the South African Child Justice Bill, the Ghanaian Children's Act (1998) and Juvenile Justice Act (2003), the Kenyan Children's Act (2001), the recent Namibian Child Justice Bill (2003) and Lesotho's Children's Protection and Welfare Bill (2004). The contents of these pieces of legislation (and Bills) differ, including as to the issue whether child care and welfare on the one hand, and juvenile justice on the other, are included in the same legislation. Despite this diversity, the common thread in this thesis will be the premise that all the examples include the subject of juvenile justice as a fundamental part of child law reform.

In engaging in a comparative analysis of these laws, the thesis will remain alive to the problem of comparative studies. Due regard will be had to the premise that even where there may be homogenous legal concepts and common aspects of different legal systems, there remain social, economic and political circumstances of countries that make the task of comparison difficult and at times, inappropriate. Thus due attention will be paid to context.

## **1.2 Statement of the problem**

In carrying out the above assessment, this thesis will therefore directly relate to the question of implementation of the CRC and international standards on juvenile justice. Over a decade since the entry into force of the CRC, focus has now inevitably turned not on the fact of the remarkable formal commitment to the CRC, but on actual

practice in individual member States. According to UNICEF, despite the rhetoric in the international community about the importance of children's rights, monitoring of the CRC shows "the rights, norms and principles involved are regularly ignored and seriously violated virtually throughout the world... on a scale ...unmatched in the field of [human] rights implementation".<sup>13</sup> This study shall therefore endeavor to answer the question of the extent to which the provisions of the CRC have been reflected in the sphere of juvenile justice in some African countries.

The fact that juvenile justice is a subject that has been dealt with by exclusive reference to the justice-welfare models as theories will be central to discussions in the thesis.<sup>14</sup> While appreciating the value of theoretical debates on the underpinning of juvenile justice in these early theories, it will be argued that by placing juvenile justice laws on this continuum, devoid of children's rights discourse, a number of violations of children's rights have been inevitable. A retreat from these theories to a children's rights model is therefore justified. Further, factors that have inhibited the practical effectiveness of juvenile justice systems in these countries will be dealt with. This will be done in each Chapter with examples from the African context. Therefore, the thesis will aim to show that the subject of juvenile justice can now be approached from a children's rights perspective rather than based on earlier theories.

This thesis focuses especially on juvenile justice rights in the CRC primarily because of the neglect by States of their responsibilities in this regard. Juvenile justice has

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<sup>13</sup>UNICEF (1998) *Innocenti Digest No. 3 on Juvenile Justice* Florence: UNICEF 2.

<sup>14</sup>As will be considered in Chapter 2 on Juvenile Justice Theory.

been described as the ‘unwanted child’ of States’ responsibilities.<sup>15</sup> In many cases, young people in the juvenile justice system are generally viewed only in the narrow perspective as law breakers and a threat to the public. The fuller picture is not seen of children who are in need of understanding and assistance and who themselves are often victims of violence and social injustice.<sup>16</sup> That the CROC has repeatedly made recommendations to States to undertake comprehensive reform of their juvenile justice laws and systems (as will be highlighted in the individual Chapters) is illustrative of this point. It is significant that the African countries under study have embarked on the process of juvenile justice reforms against the reality of the general neglect of State responsibilities in the juvenile justice field. Against this background, the thesis will seek to examine the extent to which the proposed juvenile justice laws comply with the CRC and international juvenile justice standards, taking into account the practical situations in the different countries under study.



### **1.3 Aims of the study**

This thesis seeks:

- a. To investigate and compare the trends in juvenile justice law reform in Africa with examples from particular countries.
- b. To investigate the extent to which the juvenile justice law reform processes in the case studies incorporate a child rights-centred

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<sup>15</sup>See Defence for Children International (2001) *Juvenile Justice: the Unwanted Child of State Responsibilities* Geneva: Defence for Children International 1.

<sup>16</sup>Defence for Children International (as above) 3-4.

approach in light of international children's rights law. Particular aspects considered in the individual Chapters include the question of age and criminal capacity; incorporation of diversion both in legislative policy and practice; the requirement of separate laws, procedures and institutions; juvenile courts; due process rights; sentencing and alternative sentencing regimes.

- c. To assess the role and influence of the CRC in the law reform processes, including investigating the role of public attitudes in the reform process and issues of affordability and feasibility of the proposed juvenile justice systems.
- d. To investigate the challenges and constraints to the realisation (in practice) of fair and effective juvenile justice systems in Africa including problems relating to the concept of children's rights in general and the oft-stated scarcity of resources in African countries.

#### **1.4 Methodology**

This thesis places emphasis on an analysis of the relevant available literature on the subject and relies on practical sources of research. In regard to the literature research, the study relies on primary sources including International law instruments, constitutions, child care and juvenile justice legislation, reports of law reform commissions, case law, resolutions, declarations, general comments, State Reports under the various international and regional human rights instruments (particularly the

CRC) and Concluding Observations (mainly of the CROC). The study also places considerable reliance on secondary sources including background papers, books and academic articles. Various internet sites have been consulted for relevant data and information.

At a practical level, the thesis relies on structured interviews, questionnaires and observations during visits to the countries that form the basis of the study. In this context, the study also relies on information obtained from government departments, civil society and other stakeholders in the field of children's rights and juvenile justice both within and outside Africa.

### **1.5 Limitations of study**



The first constraint encountered in this study was that while the subject of juvenile justice has been well researched (as considered in Chapter 2 on Juvenile Justice Theory), in most cases this is not based on a children's rights approach. Although the thesis aims at contributing to the process of bridging this gap, there was scarcity of research sources in relation to a number of specific children's rights issues considered. The thesis makes an attempt at remedying the problem of the dearth of literature by placing reliance on the CROC's emerging jurisprudence. It also considers relevant comparative interpretations on these issues by other UN and regional human rights bodies and domestic courts.

Secondly, all comparative studies of this nature require substantial uniformity in the discussions of the country case studies. While an attempt is made to ensure that the

practical situation obtaining in all the countries is discussed uniformly, there are obvious disparities in relation to the fact that in certain respects there were more resources materials in relation to some countries than was available for others. Particularly significant is the fact that debates on South African juvenile justice have been far more documented and dealt with through past law reforms, judicial decisions, research reports, academic articles and books than the rest of the countries considered in the thesis. This obviously resulted in an imbalance in the sense that in many respects, the South African position is canvassed in more detail in the thesis than the other countries. However, the thesis attempts to limit this imbalance by taking into account information drawn from resource materials (both published and unpublished) that could be obtained in relation to all the countries. These include, field research undertaken by the author (in Kenya and Uganda)<sup>17</sup> and the available research reports from government and non-governmental organizations.



## **1.6 Outline of the study**

The thesis focuses on how the advent of children's rights, in particular the CRC, has impacted on the subject of juvenile justice and embarks on a practical examination of law reform in this regard in an African context. In order to achieve this, focus is placed on a number of African countries that have embarked on or completed child law reform in the aftermath of ratification of the CRC. The case studies in this thesis

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<sup>17</sup>Odongo, G.O (2003) "Report on the Kenyan Juvenile Justice System in light of Best Practice and Challenges"; "Report on the Juvenile Justice System in Uganda in light of Best Practice and Challenges" (Unpublished Reports submitted to the Community Law Centre, University of the Western Cape).



are Ghana (1998-2003), Kenya (1993-2001), Namibia (1994-to date), Lesotho (2003-to date), South Africa (1997-to date) and Uganda (1992-1996).<sup>18</sup>

This chapter (Chapter 1) introduces the study, its aims, approach and scope. Chapter 2 will be dedicated to a historical analysis of the development of the subject of juvenile justice along justice and welfare theories and other models. This discussion is also done in the context of the position obtaining in a number of African countries before the law reform processes commenced and examines whether legislative changes have altered this position. The main argument in this Chapter is that the advent of a children's rights model has ushered in an alternative theoretical lens through which juvenile justice can now be viewed, both in light of the CRC and other 'soft law' derived from juvenile justice instruments.



Following the introduction in Chapter 2 on the international standards on juvenile justice, Chapter 3 will discuss the actual processes of developing the new juvenile justice laws and proposed laws. The common theme in this Chapter will be the role and influence of the CRC and international standards on the actual process of reforms. An important issue highlighted in this Chapter is the extent to which the law reform processes give flesh to the omnibus obligation in Articles 4 and 40 of the CRC directed to States parties to undertake 'legislative measures'. Further, the issue of

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<sup>18</sup>The years in brackets denote the period between the commencement of the law reform processes in these countries and the finalization of the processes (marked by the year of the final draft Bills or the year of enactment of the laws). Issues of the current status of the laws, how and when the law reform processes were started and the nature of the pre-legislative work involved in drafting the laws and Bills in these countries are dealt with in Chapter 3 of the thesis. The laws and draft laws reviewed in this thesis are stated as of the date 18 October 2005.

pragmatism in the proposed juvenile justice systems, the role of public opinion or attitudes towards crime in the reform process, and how these issues relate to a child rights-approach will be of vital interest in this Chapter.

Proceeding from the universally accepted premise that children and adolescents have special needs and limited capacities, Chapter 4 discusses the position at international law on the issue of age and criminal capacity and examines further how this question has been addressed by the law reform efforts. These discussions relate to both the question of the upper age of criminal capacity and more importantly, the vexing issue of setting a minimum age of criminal capacity. In examining this issue in light of the jurisprudence under the CRC, cognizance is taken of African cultural and societal perceptions on childhood and the link between age and criminal capacity.



Following from the Beijing Rules, the CRC has now made diversion practices a binding feature of juvenile justice systems. Diversion, which refers to the process of channeling children away from the formal criminal justice systems at any stage of the criminal procedure, is now universally seen as an integral aspect of the rehabilitative and reintegrative parts of each and every juvenile justice system. The discussion in Chapter 5 examines this subject in the context of the law reform initiatives focused upon. An additional aspect is the extent to which any of these reform endeavors reflect on components of restorative justice programmes, and whether such restorative justice precepts draw from African values.

A 'juvenile justice system' requires the institution of separate laws, procedures and institutions that apply specifically to children as opposed to adults. This is the

requirement of the CRC in Article 40(3). A relevant subject is therefore the extent to which this is reflected in the reform processes. Chapter 6 of this thesis turns to this discussion with a specific focus on pre-trial procedures in relation to arrest and detention of children. The Chapter also focuses on separate procedures at the pre-trial stage and during trial which entail special provisions to ensure that child offenders are treated differently from adult counterparts. This discussion extends to the establishment of specialized courts for juvenile justice, jurisdiction of these courts, their ambiance and procedures and the protection of children's rights and due process safeguards.

The theme of separate procedures and rules which are specifically applicable to children also extends to sentencing and alternative disposition measures. Chapter 7 examines the compliance of the sentencing regimes proposed by the countries under study with international children's rights law in this regard.

Chapter 8 of this thesis examines the challenges that face the implementation of these child rights-oriented juvenile justice systems. This will be done from the premise that the rights of the child in the juvenile justice context are part of an indivisible and interdependent regime of children's rights. Thus questions such as the public attitudes towards crime, the financial feasibility of the new and proposed laws and the social and cultural interpretation of the concept of children's rights are all relevant to the to juvenile justice law reforms. Chapter 8 will argue that these and other issues such as the need to make efforts in the prevention of child offending in the region ultimately impact on the extent to which the aims of the new juvenile justice systems are realized in practice.

The last chapter, Chapter 9 summarises the whole study by drawing conclusions and inferences from the discussions in Chapters 2 - 8.



## CHAPTER 2

### THEORITICAL UNDERPINNINGS OF THE EVOLUTION OF JUVENILE JUSTICE: FROM *PARENS PATRIAE* TO CHILDREN'S RIGHTS

#### 2.1 Introduction

This Chapter will trace the origins of the concept of a juvenile justice system to the practice of states over the years. This practice (started in a number of jurisdictions in the United States and subsequently followed by most Western European States) related to an emphasis on separate institutions (such as the juvenile court) and procedures for children. The development of these institutions and procedures were also marked by child-specific laws.



This Chapter will argue that the early development of juvenile justice law and practice was underpinned by a number of philosophical nuances, predominant of which were the welfarist and justice theories to be discussed in this Chapter.<sup>1</sup> These theories were developed in the absence of a child rights' orientation that was at the time, nominally developing, if not absent altogether.

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<sup>1</sup>These theories have been extensively canvassed in early leading works on juvenile justice and the intention here would be limited to setting out in brief the main thrust of these theories with a view to providing the basis for the Chapter's subsequent discussions. Some of the early works in this regard include Morris, A. and Giller, H (1987) *Understanding Juvenile Justice* London: Croom Helm; Naffine, N "Philosophies of Juvenile Justice" in Gale, F, Naffine, N and Wundersitz, J (eds) (1993) *Juvenile Justice: Debating the Issues* Australia: Allen and Unwin; Cuneen, C and White, R (1995) *Juvenile Justice: An Australian Perspective* Melbourne: Oxford University Press; Muncie, J (1999) *Youth and Crime* London: Sage Publications. For a recent discussion of these theories, see Zimring, F.E "The Common Thread: Diversion in the Jurisprudence of Juvenile Courts" in Rosenheim, M.K, *et al* (eds) (2002) *A Century of Juvenile Justice* Chicago/London: University of Chicago Press.

The discussions in this chapter will therefore trace the development of the juvenile justice discourse in the context of these theories and against the background of the absence of the idea of children's rights. The chapter will make an attempt at illustrating the influence, if any, of these theories in modern day African legal systems.

In light of the above premises, this Chapter will thereafter focus on the period ushering in the concept of children's rights at international law, the subsequent attention accorded to the idea of children's rights and its concomitant influence on children's issues, juvenile justice included. In this regard, this Chapter will seek to discuss the issue whether, and (if in the affirmative), the extent to which juvenile justice can be viewed through the lens of human rights theory, in general, and children's rights in particular.



## **2.2 The origins of the juvenile justice system**

The origins of juvenile justice systems can be traced to recent developments as late as the turn to the 20<sup>th</sup> Century.<sup>2</sup> While the idea of instituting a criminal justice system to set up ways and means of meting out appropriate sanctions linked to the commission of criminal acts may be as old as the dawn of civilization, the notion of a separate system for children accused of committing criminal acts is something of a more recent invention which even stems from the development of criminal justice systems

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<sup>2</sup>Historical discourse suggests this field is recent. In the words of Hoghuhi, "the juvenile delinquent has become the demon of the twentieth century", see Hoghuhi, M (1983) *The Delinquent: Directions for Social Control* London: Burnet Books 13.

generally.<sup>3</sup> Unanimously, there is agreement that the first significant signpost for a separate system of justice for children was the establishment of the first juvenile court in 1899 in Chicago, United States.<sup>4</sup>

From 1945, the presence of juvenile courts was a feature in each and every jurisdiction of the United States. This trend is reflected in countries over the world starting with Western European countries.<sup>5</sup> In Africa, the phenomenon of juvenile courts was largely of colonial import and remains prevalent in a number of countries.<sup>6</sup>

Prior to the juvenile court's invention, the system for controlling juvenile delinquents<sup>7</sup> was contained within the general criminal justice system which meted out to children or adolescents above a certain age the same criminal justice rules or procedures as adults with little or no differentiation or reduction of the applicable punishment measures.<sup>8</sup> At the time, there was only one exception to this omnibus application of the criminal justice system to all and sundry. In a rule that has its genesis in the Roman-Dutch common law system and later reflected at English common law, the

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<sup>3</sup>For a historical discourse, see generally, Naffine (n 1 above), Muncie (n 1 above).

<sup>4</sup>Zimring, F.E. "The Common Thread: Diversion in the Jurisprudence of Juvenile Courts" in Rosenheim, M.K, *et al* (eds) (n 1 above) 142-157, 142; Doek, J "The Future of the Juvenile Court" in Junger-Tas, J *et al* (eds) (1991) *The Future of the Juvenile Justice System* Leuven: Acco 197-210, 198.

<sup>5</sup>See generally Walgrave, L and Mehlbye, J "An Overview: Comparative Comments on Juvenile Offending and its Treatment in Europe" in Mehlbye, J and Walgrave, L (1998) *Confronting Youth in Europe-Juvenile Crime and Juvenile Justice* Copenhagen: AKF Forlaget 21-53.

<sup>6</sup>This further discussed in section 2.7, below.

<sup>7</sup>This thesis nevertheless takes cognizance on the caveat, now recognized even in the official United Nations circles, of the inappropriacy of the terms 'delinquency' and 'delinquents'. The use of these terms will therefore be in line with their widespread usage for the sake of clarity and not in perpetuation of the aspect of stigmatization.

<sup>8</sup>Zimring, (n 4 above) 145.

fact of tender age did play a role in relation to presumption of criminal capacity.<sup>9</sup> According to this rule, persons under the age of fourteen years were presumed not to possess the sufficient criminal responsibility to commit a crime, though the presumption was refutable between the ages of seven and fourteen. Individuals of fourteen years and older were presumed criminally responsible. Without major variations, this rule has been embraced by criminal justice systems all over the world.<sup>10</sup>

The introduction of the juvenile court built on this presumption in part and provided almost exclusive jurisdiction to this court over individuals under a certain age. Though the invention of a juvenile court cannot be said, in and of itself, to have led to the creation of a juvenile justice system. The borders between jurisdictions of the juvenile court and the adult criminal court remained (and remain to date) porous and blurred. The ‘adultification’ of the juvenile justice system worldwide continues to this day. Indeed presently in the U.S., there is a great deal of juvenile justice law reform, mostly in the direction of treating juvenile offenders more severely and more like adult offenders.<sup>11</sup> This development has therefore meant that while one can speak of a juvenile justice system, there remain very few instances where there is evidence of a total bifurcation between juvenile justice rules and procedures on the one hand, and on the other, an adult criminal justice system. In large measure, the juvenile justice system has become to be widely understood as being an appendage of the adult criminal justice system. This is predominantly the case in justice systems in most

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<sup>9</sup>Discussed more fully in Chapter 4 on Age and Criminal Capacity.

<sup>10</sup>See the discussion in Chapter 4.

<sup>11</sup>Jacobs, B.J “The Evolution of U.S. Criminal Law” (2001) 6(1) *Issues of Democracy* 15.



African countries in the period before the CRC's adoption and subsequent child law reforms.<sup>12</sup>

In a wave that characterized the early quest of many European countries to treat child delinquents differently from adults, it is noteworthy that the first few years of the twentieth century saw the enactment of legislation to establish juvenile justice systems. These included Canada's *Juvenile Delinquents Act*, the *Children Act* of England and Wales and the Irish *Children Act* all enacted in 1908, which all created juvenile courts in these jurisdictions. Further separate jurisdictions and penal laws for children were established in the Netherlands (1905) and Belgium and France set up specific Children's Courts in 1912 following on the experiment in Germany from the year 1908.<sup>13</sup>



### 2.3 Welfarism as an early dominant theory<sup>14</sup>

An early and dominant model (mainly visible in the tradition of juvenile justice in the United States in the late 19<sup>th</sup> century and early 20<sup>th</sup> century) is the welfare theory also referred to in some writings as the 'protection model'. By and large this is the theory upon which the early juvenile justice courts in the United States and Western Europe

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<sup>12</sup>The subject of African law reform processes of children's laws, including juvenile justice issues forms the subject of Chapter 3.

<sup>13</sup>Walgrave and Mehlbye (n 5 above) 21.

<sup>14</sup>This theoretical discussion will trace the origins of the juvenile justice system in the United States and the subsequent changes to this system. Since the American juvenile justice system served as a model for other systems in Western and later, Eastern Europe and was in turn applied to other countries like those in Africa by virtue of colonial import, the discussion is of a general relevance. For the relevance of American juvenile justice system to the origins of European systems see, Trepanier, J and Tulkens, F "Juvenile Justice in Belgium and Canada at the Beginning of the Century: Two Models or One?" (1993) 1 *The International Journal of Children's Rights* 189.

were founded and it did provide the rationale for the approach to children deemed to be delinquent.<sup>15</sup>

According to this theory, courts assumed an important role in protecting a child. Welfarism advocated for a separate justice system for juveniles. At the heart of such a system was a social construction of childhood under which children were perceived as immature, both mentally and socially. Indeed, the prevailing philosophy underlying the original idea of a juvenile court was that rather than use criminal punishment to address children's violations of the law, children were to be nurtured and given guidance with a view to making them responsible adults. Thus, welfarism was informed by a desire to be benign as manifested in the general role of the state as *parens patriae*.<sup>16</sup> By this, the juvenile court judge was an instrument of the state for the application of intervention measures in situations that embodied prevailing social inadequacies.




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<sup>15</sup>Zimring (n 4 above) 144-148.

<sup>16</sup>An English law doctrine symbolizing the role of the Monarchy in protecting vulnerable parties in courts of equity. The advent of welfarism saw the extension of this doctrine in English law to children's issues, in which judges assumed wide discretionary powers to forcibly order the removal of children from destitute families. In the realm of juvenile justice, the philosophy of the doctrine meant securing the welfare of the child in the belief that the state must act as a child's parents 'securing needs rather than rights of the offender', see Schissel, B (1993) *Social Dimensions of Canadian Youth Justice* Toronto: Oxford University Press vi. Elizabeth Scott explains that under this doctrine, interpreted as 'parenthood of the State', the State 'has the responsibility to look out for the welfare of children and other helpless members of society. Thus, parental authority is subject to government supervision; if parents fail to provide adequate care, the State will intervene to protect children's welfare.' See Scott, E (2002) "The Legal Construction of Childhood" in Rosenheim, M.K *et al* (eds) *A Century of Juvenile Justice* Chicago: University of Chicago Press 116. In the early 20<sup>th</sup> century one consequence of this approach was that 'children's courts should not be an instrument to punish the child but one that protects and educates', see Bottoms, A and Dignan, J "Youth Justice in Great Britain" in Tonry, M and Doob, A.N (2004) *Youth Crime and Youth Justice: Comparative and Cross-National Perspectives (Volume 31)* Chicago & London: The University of Chicago Press 22.

To accomplish this role, the juvenile court judge was entrusted with powers to extend ‘protection’ measures. The applicable doctrine defined the judicial treatment received by minors in ‘irregular situations’ who included law violators, abandoned or neglected children, those in situations that put their well-being at risk and child orphans.<sup>17</sup> In sum, the categories comprised both children in need of care and protection and delinquent children. For these children in ‘irregular situations’, their cases were to be attended to by an administrative judge who reached the verdict on the proper protection to be extended for the children’s welfare (or ‘best interests’). The verdict would usually entail probation or supervision, authorizing institutionalization in an orphanage or foster home, or sentencing the child to one of the penal institutions that existed then.<sup>18</sup> The ‘best interests’ of the child was thus viewed in light of the paternalistic role of the state in the choice of the best protection measure.



The juvenile court’s reaction to the problem of delinquency was viewed not as ‘punishment’ but as ‘treatment’. In the ideal welfarist situation, an expert juvenile justice judge would be assisted by social service personnel, clinicians and probation officers all playing a role in the juvenile court’s search for a treatment plan best suited for a particular child’s needs. In this regard, the evolution of juvenile justice was directly related to the emergence of a group of philanthropists known as ‘the progressives’ (and ‘child savers’ in the child welfare context)<sup>19</sup> that led a movement

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<sup>17</sup>Scott (as above) 116.

<sup>18</sup>Clement, M (1997) *The Juvenile Justice System: Law and Process* London: Butterworth-Heinemann 18.

<sup>19</sup>In one of the early landmark cases on the due process of juveniles handled by the U.S Supreme Court, *Re Gault* (n 34 below), the child saver movement’s concern was noted by the Court thus: “...They were profoundly convinced that a society’s duty to the child could not be confined to the concept of justice alone. They believed that society’s role was not to ascertain whether the child was ‘guilty’ or ‘innocent’ but ‘what is he, how has he become what he is, and what had best be done in his

of reform which emerged in response to the social problems arising from rapid industrialization, urbanization and modernization in the mid to late 19<sup>th</sup> century and early 20<sup>th</sup> century in the American society.<sup>20</sup> They were acting from the fear that such social problems (of which child offending was the major part for the child saver movement) could overwhelm the traditional stability of the society hence creating new problems of social control.<sup>21</sup> The alleviation of social ills including child offending, the progressives advanced, lay in benevolent state action guided by experts.<sup>22</sup>

Hence, the consequence of a juvenile court's verdict was the 'treatment' of 'needs' and not 'deeds' and the eventual 'rehabilitation' of the child. This was so because the gist of welfarism was that any criminal action on the part of children is attributable to dysfunctional elements in the environment within which they lived.<sup>23</sup> Indeed, at the




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interest and in the state's to save him from a downward career'. .." For a detailed discussion on the child saver movement, see Platt, A (1977) *The Child Savers: The Invention of Delinquency* (2<sup>nd</sup> ed) Chicago: University of Chicago Press.

<sup>20</sup>Breen, C (2002) *The Standard of the Best Interests of the Child* the Hague: Martinus Nijhoff 196. The progressive movement was much broader in its advocacy, namely to improve the living circumstances of the working class and the poor in the wake of the social and economic transition in American society from rural agricultural to urban industrial. Apart from advocating for the institution of the juvenile court, the movement also lobbied, in respect of children, for child labour laws and compulsory school attendance. Jensen, E (2003) "A Historical Overview of Juvenile Justice in the United States" (Unpublished Paper on file) 2.

<sup>21</sup>It is of interest that Platt explains the emergence of the juvenile justice system as coinciding with a time of transition from an agricultural economy to an industrial economy and from a rural to an increasingly urban society (in the United States) with the effect of population explosion, urban-rural migration, social disruptions to family networks and the surge in criminal offending, see Platt (n 19 above) generally. In a way these events may be said to be comparable to social and economic transitions taking place in a number of developing nations today.

<sup>22</sup>Breen, (n 20 above) 196.

<sup>23</sup>For a detailed exposition on the ideological assumptions concerning the causes and 'cures' of juvenile crime, then seen as a malady or disease to be treated rather than punished, see Feld, B.C 'The Juvenile

apex of the ‘rehabilitative ideal’ in dealing with child offending was the requirement that the juvenile court looks at the social and economic background of each juvenile.<sup>24</sup> This presupposed that the court would examine the individual needs of the juvenile in order to determine the best treatment for him or her. Put another way, the juvenile court would involve itself with the issue of ‘what had to be done in the child’s interests’ and not that of guilt in a strict sense.<sup>25</sup> As summed up by Feld,<sup>26</sup> the juvenile court, by virtue of the doctrine of *parens patriae*, placed emphasis on treatment, supervision and control rather than on punishment and allowed the state to intervene affirmatively in the lives of more young offenders.<sup>27</sup>

The main posit of welfare theorists is the premise that due to their immaturity, children could not be regarded as rational or self-determining agents.<sup>28</sup> Welfarism as advanced by the ‘progressive movement’ incorporated the then emerging idea that children should be treated differently due to their youth.<sup>29</sup> It therefore goes without saying that in defining the social construction of childhood at the time, pure welfarism drew heavily on research in criminology and sociology. Of particular value to welfarists was the moral intellectual development theory in criminology, the main

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Court Meets the Principle of the Offence: Legislative Changes in Juvenile Waiver Statutes’ (1978) 78(3) *Journal of Criminal Law and Criminology* 471-533, 475 cited in Breen (n 20 above) 198.

<sup>24</sup>Breen (n 20 above) 195.

<sup>25</sup>Mack, J.W “The Juvenile Court” (1909) 23 *Harvard Law Review* 104-122, 119 (Reprinted in Feld, B.C (ed) (1999) *Readings in Juvenile Justice Administration* New York: Oxford University Press 26)

<sup>26</sup>Feld (n 23 above) 496.

<sup>27</sup>According to Mack, an early proponent of the early juvenile court, the juvenile justice system at the time “required judges who were willing and patient enough to search for the underlying causes of trouble and to formulate a plan through which co-operation, oft times, of many agencies the cure (of offending) may be effected.’ See Mack (n 25 above) 119.

<sup>28</sup>Gale, Naffine and Wundersitz (n 1 above) 236.

<sup>29</sup>Mills, D.L “*United States v Johnson: Acknowledging the Shift in the Juvenile Court System from Rehabilitation to Punishment*” (1996) *De Paul Law Review* 903-941, 904-905.

thrust of which suggests that the younger the actor, the less probable it is that the sense of right and wrong always informs the actor's behaviour.<sup>30</sup> In short, the practical aspects of this social construct of the 'innocent child' was manifested in and expanded upon in law and social theory as the progressives prescribed rational and scientific solutions designed by experts and administered by the State (through the juvenile court).<sup>31</sup>

By virtue of the above precepts, the hallmarks of welfarism included the exercise of judicial powers over a broad class of children including not only those deemed 'delinquent' but also those deemed 'uncontrollable'. The philosophy of the 'innocent child' extended to all children who were deemed to be outside the normal set up of a responsible family thus encapsulating neglected children and those deemed 'uncontrollable'. This premise was used to justify the substitution of State control for parental control under the rationale that the state would act in the child's best interests and would thereby enhance the child's welfare - the very essence of *parens patriae*.<sup>32</sup> Inside the court room (a special children's court), a largely informal atmosphere would be the desired ambiance while giving greater prominence to the role of social workers. The rehabilitative ideal of the court *vis a vis* the child offender was marked by individualized treatment marked by indeterminate dispositions (usually continuing for the duration of the child's minority) that were often disproportional (for their

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<sup>30</sup>See generally, Kohlberg, L (1969) *Stages in the Development of Moral Thought and Action* New York: Holt, Rinehart & Winston.

<sup>31</sup>Feld (n 23 above) 473-474.

<sup>32</sup>Breen (n 20 above) 199.

exclusive focus on the offender only, and not the gravity or petty nature of the offence as well).<sup>33</sup>

However, behind the supposed altruistic vision and rehabilitative rhetoric of the juvenile justice system lay the ugly face of ‘pure welfarism’, in that the children were not allowed the so called due process safeguards of the law. This was in the absence of legal representation and other procedural safeguards like rules of evidence. Secondly, there was extensive reliance on the use of institutionalization, often, for indeterminate periods of time. The criticisms that ensued in these regards were indeed the subject of the now widely acclaimed decision of the U.S Supreme Court in *Re Gault*.<sup>34</sup> The case acknowledged the juvenile’s right to counsel and other due process rights,<sup>35</sup> because, in the famous words of Justice Fortas, “under [the U.S.] Constitution, the condition of being a boy does not justify a kangaroo court”.<sup>36</sup> After a




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<sup>33</sup>Feld (n 23 above) 472.

<sup>34</sup>387 U.S.1 (1967). A majority 8:1 decision of the U.S. Supreme Court. This case involved the police arrest of a boy (Gerard Gault) aged 15 for allegedly using lewd and obscene language in a telephone call to a woman. The boy was subsequently detained in police custody for four days then taken before a juvenile court where the court conducted informal hearings with no records or transcript of the proceedings. The primary witness in the case was not called to confirm that Gault was the one who had made the telephone calls. In addition, no counsel was provided by the court. Gault was subsequently sentenced by the trial court to 5 years at the State Industrial School, hence the case was referred to the Supreme Court.

<sup>35</sup>The Court determined that children appearing in the juvenile court required constitutional safeguards. It mandated that juvenile court hearings must include the basic procedural rights including the right to advance notice of charges, the right to a fair and impartial hearing, the right to counsel which included the right to confront and examine witnesses and the privilege against self incrimination. See *Re Gault* (as above) 31-57. The decision has been criticized as having been narrowly confined to the adjudicatory hearing at which child delinquency was to be determined and that by doing this, it failed to consider the entire procedural apparatus of juvenile justice jurisdiction and its dispositional consequences, see Feld (n 23 above) 479.

<sup>36</sup>*Gault* (n 34 above) 28.

review of the juvenile court's history, the court rejected the rationale for denying procedural safeguards to juveniles stating thus:

“The juvenile court has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure. The absence of substantive standards has not necessarily meant that children receive careful, compassionate, individual treatment...Departures from established principles of due process have frequently resulted not in enlightened procedure, but arbitrariness...”<sup>37</sup>

While noting the wide discretion that juvenile court judges had in line with welfarist views at the time, *Kent*,<sup>38</sup> a case decided at the same time as *Gault*, was unequivocal that such discretion was not a carte-blanche for arbitrary procedure, hence the need for procedural fairness, assistance of counsel, access to records and a statement of reasons for the juvenile court's decision to transfer a case to the adult court.<sup>39</sup>

The essence of *Gault*, *Kent* and other U.S Supreme Court cases<sup>40</sup> in similar vein was therefore the emphasis that, despite the rehabilitative rhetoric of early juvenile courts,

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<sup>37</sup>*Gault*, (n 34 above) 18-19.

<sup>38</sup>*Kent v U.S.*, 383 U.S.541 (1966). The case involved the police arrest and detention of Kent, a boy aged 16, for allegedly breaking into a house, raping a woman who was inside the house and stealing her wallet. He was kept in police custody for 2 days and placed under excessive questioning. He was then placed under incarceration in a detention centre for one week without determination if there was sufficient cause to detain him. He was later transferred to an adult court by the juvenile court before which he had been brought to answer the charges. It turned out that the juvenile court judge had failed to make a full investigation before transferring him to the adult court, nor had the judge given any reason for such transfer.

<sup>39</sup>*Kent* (as above) 553-557.

<sup>40</sup>These include *In re Winship* 397 U.S.358 (1970) and *Re Coyle* 132 Ind. App.217 (1951).



children faced and often received punitive consequences.<sup>41</sup> Thus, as a rights culture developed in various countries, the welfare model of juvenile justice was criticized for its paternalism, violation of rights and potential for discriminatory treatment.<sup>42</sup> As further summarised in the words of Justice Fortas in *Gault*:

“Ultimately....we confront the reality...of the juvenile court process...The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence - and of limited practical meaning - that the institution to which he is committed is called an Industrial School...however euphemistic the title...”<sup>43</sup>

Added to the above concern was that reliance on institutionalization led to another problem altogether. With fear of the negative consequences of institutionalization, the juvenile court judge, for the large part reliant on the social worker’s recommendation, would often release young people who appeared guilty.<sup>44</sup> This resulted in a two-pronged criticism of welfarism. On the one hand, there were overwhelming criticisms about the lack of due process safe guards and the conditions then obtaining in institutions. On the other hand, a perception developed of an over-lenient attitude on the part of the juvenile court.

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<sup>41</sup>Sarri, R and Shook, J (2003) “Human Rights and Juvenile Justice in the United States” (Unpublished Paper on file) 8.

<sup>42</sup>Bala, N and Bromwich, R “Introduction: An International Perspective on Youth Justice” in Bala, N *et al* (eds) (2002) *Juvenile Justice Systems: An International Comparison of Problems and Solutions*, Toronto: Thompson Educational Publishing, Inc. 7.

<sup>43</sup>*Gault* (n 34 above) 27.

<sup>44</sup>Account in Roiron, G.U “Juvenile Justice and the Protection of Children’s Rights in Chile” (2003) 12 *Chronicle* 8.

Despite these criticisms, welfarism remained the dominant theory for almost a whole century. Its dominance was only halted with the decision in *Gault*.<sup>45</sup> *Gault* and kindred decisions of the Supreme Court of the United States are therefore important developments in juvenile justice discourse.<sup>46</sup> In light of the criticisms on the welfare theory, a re-orientation on the philosophical basis for juvenile justice ensued. This culminated in the development of the ‘back to justice’ theory or the justice model as an alternative discourse.

#### 2.4 The back to justice theory

With a clear aim of stripping the juvenile justice discourse of the protectionist policies inherent in the welfare theory, the alternative prominent model became the justice model (taking root in the late 1970s and early 1980s onwards). Rather than emphasizing ‘the treatment’ of child offenders, the justice model came to be recognized, with punishment as the prime ideal. In this theory, children were no longer to be regarded as immature. The justice model deemed children as rational or self-determining. With this point of departure, the justice model differed with the welfarist notions of juvenile justice in that child delinquents were not regarded as victims of the environment within which they lived. Unlike welfarism, justice philosophy dictated that non-criminal behaviour, including the so-called status offences (like truancy, vagrancy and being uncontrollable) should not be dealt with within the remit of the criminal justice system. Rather, the justice model “gave

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<sup>45</sup>It can therefore be said that the very special features of the first juvenile courts, namely their informality and wide discretion, also proved to be the achilles heel of their welfarist philosophy.

<sup>46</sup>Trepanier and Tulkens (n 14 above) admitting the impact of these decisions on juvenile justice policy and law in Europe.

priority to the liberty and agency of its individual citizens”<sup>47</sup> of which children were part and parcel.

The thrust of the “justice model” was that all individuals (including children) are reasoning agents who are fully responsible for their actions and so should be accountable before the law. The proper function of juvenile justice is thus to assess the degree of culpability of the individual child offender and apportion punishment in accordance with the degree of seriousness of the offending behaviour.<sup>48</sup> In so doing, the individual child must be accorded the full rights to due process within the *Gault* spirit. Rather than leave the discretion (of the juvenile court or social worker) wide open as in the welfarist ideal of searching for the appropriate treatment, the justice model placed heavy emphasis on predictability and determinateness. This inevitably meant that the state’s powers, unlike in the welfarist theory, had to be constrained.



The justice model was therefore said to be concerned with the dispensing ‘just deserts’. This reflects a moralizing but individualistic world-view in which the deviant child is perceived of as an independent author of his or her actions, endowed with a degree of free will. If such a conscious and independent deviant actor has contravened a rule, the balance of the scales of justice has been disturbed and can be restored only if the offender is punished.<sup>49</sup> In pursuance of the ideal of determinateness, “the extent

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<sup>47</sup>Naffine (n 1 above) 3.

<sup>48</sup>Gale, Naffine and Wundersitz (n 1 above) 3.

<sup>49</sup>Schulz, S and Hamutenya, M (2004) “Juvenile Justice in Namibia: Law Reform Towards Reconciliation and Restorative Justice?” (Unpublished Paper on file) 2-3.

of the punishment must be proportionate to the extent of the harm done or of the violation of the law”.<sup>50</sup>

In the ‘just-deserts’ worldview, while juvenile justice entails the balancing of two important precepts, that is; the need to protect society against criminal behaviour and the need to pay special attention to the personal circumstances of the child offender, the disposal leaned heavily in favour of protecting society and thus emphasizing retribution as the primary goal. As a result, a juvenile justice system modelled on justice philosophy does not primarily focus on the issue of how to protect the best interests of the child.<sup>51</sup>

Unlike welfarism that sought to respond to a perceived immaturity in the moral development of a child, the justice model placed children and adults on the same plane. Whereas the welfare model sought to give protection through the best interests of the ‘immature’ and ‘innocent’ child for whom the state was responsible (as *parens patriae*), the justice model instead affirmed the capacity of the child (alongside adults) to commit crime and thus bear the consequences of his actions.

In one sense therefore, the thrust of the justice model was to demand like-treatment for child offenders as for adults on the premise that there was no differentiation between the two. In place of the juvenile court’s previous informal conferences, the application of adult criminal justice procedures led to adversarial hearings similar to criminal trials. This was not only true for the trajectory of juvenile justice in the United States but also to developments in juvenile justice elsewhere. Muncie has

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<sup>50</sup>Snyman, C.R (1995) *Criminal Law (3<sup>rd</sup> edition)* Durban: Butterworths 20.

<sup>51</sup>Breen (n 20 above) 199.

remarked with regard to the UK to the erosion in the distinction between adult and youth justice in the past decade.<sup>52</sup>

The prominent catalyzing factor that propelled the dominance of the justice theories from the end of the sixties was no doubt the due-process rights movement that extended a protective gamut of safeguards in the hitherto paternalistic juvenile justice system. Aligned to the due process movement in the redefinition of juvenile justice were the other slogans, namely diversion, de-judicialisation (both reflecting the quest for less intervention by the state) and de-institutionalization (in reaction to the wide spread use of institutionalization at the zenith of welfarism).<sup>53</sup>

On a wider note however, this change reflected the mutation in societal thinking. Traditional psychiatry and the clinical science-approach to resolving issues was challenged due to the realization that child deviance was a product of a number of factors, including economic and cultural transformations which stood alongside the harmful ecological side effects and human alienation.<sup>54</sup> The problem was thus not as simplistic as the welfarists had taken it to be limited to the immediate social

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<sup>52</sup>Muncie, J “Children’s Rights and Youth Justice” in Franklin, B (ed) (2002) *The New Handbook of Children’s Rights - Comparative Policy and Practice* London and New York: Routledge 86. In similar vein see Fionda, J “The Age of Innocence? - The Concept of Childhood in the Punishment of Young Offenders” (1998) 10(1) *Child and Family Law Quarterly* 77 (citing a series of legislative changes and policy reformulations that support this contention with regard to the UK and leading to her assertion that these changes have ‘an almost stubborn blindness’ to welfare principles and the mitigating circumstances of age’).

<sup>53</sup>Walgrave and Mehlbye (n 5 above) 22.

<sup>54</sup>Walgrave and Mehlbye (n 5 above) 22.

environment in which the child lived. The interventionist model on which welfarism was based was therefore seriously contested.<sup>55</sup>

It is useful however to add that the increasing addition of due process to the original juvenile justice court's processes was subsequently halted in developments and cases that followed, with the effect that the juvenile court retained certain of its distinct aspects.<sup>56</sup> Therefore, the juvenile court did not totally mirror its regular or adult counterpart. Hence, to some extent, the protectionist stance of the *parens patriae* doctrine survived the onslaught of due process. The irony is that the failure to fully extend the applicable due process rights to criminal trials of juveniles meant that the range of procedural rights to which children were entitled were limited. This was in contrast to the regular adult courts. One commentator has therefore noted the "paradox of both a paternalistic paradigm of juvenile justice and liberationist posture that [leaves] children enjoying the worst of both worlds".<sup>57</sup>

In sum, by placing heavy emphasis on the weight of the offence rather than the circumstances of the child offender, the justice model watered down the dominance of *parens patriae*.

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<sup>55</sup>Walgrave and Mehlbye (n 5 above) 22.

<sup>56</sup>The case of *Mckeiver v Pennsylvania*, 403 U.S.528 (1971) decided by the U.S Supreme Court firmly refused to accept the right to a jury trial for children appearing in juvenile courts. On the other hand, a number of other cases ruled in favour of juvenile court-ordered preventive detention for children.

<sup>57</sup>Feld cited in Jensen (n 20 above) 8. See also, Krisberg, B (2005) *Juvenile Justice: Redeeming our Children* London: Sage Publications 57 note that the principle set forth in *Gault* and *Kent* cases, "offer only limited procedural safeguards to delinquent youth."

On the other hand, the development of justice philosophy had the effect that it decimated the original intention of the juvenile court and juvenile justice in general. Indeed, it has been stated that the negative effect of *Gault* and the long line of cases thereafter (signalling the start of the dominance of the justice model) was that they abolished the distinctions between the juvenile court, with its focus on the needs of the juvenile, and the adult court with its emphasis on legal guilt.<sup>58</sup>

## 2.5 Practical confluence in the two models and current trends

Theoretically, welfarism thrived for much of the 20<sup>th</sup> century and its centrality was only halted in the period toward the end of the 1960s when the justice model firmly took root. In practical terms however, a world-wide struggle with the welfare-justice balance has ensued.



The dichotomous analysis based on welfare or justice models can be a helpful theoretical construct that captures the salient ideological shifts in the perceptions of the needs, rights and capacities of child offenders at different times in the history of juvenile justice. However, the welfare-justice continuum cannot, even in the extreme, exist in pure forms. As summed up by two scholars, “the welfare model can be understood as one polarity on a theoretical continuum of possible models of regimes of juvenile justice, though in the real world, no justice system exists in one of the pure forms described by analytical models”.<sup>59</sup> The same observation applies in respect of

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<sup>58</sup>Breen (n 20 above) 203, Krisberg (as above) 57-59, Gale, Naffine and Wundersitz (n 1 above) 3.

<sup>59</sup>Bala and Bromwich (n 42 above) 6, Crofts, T “The Rise of the Principle of Education in the German Juvenile Justice System” (2004) 12(4) *The International Journal of Children’s Rights* 401-417, 401

the justice model. Examples abound of the elements of either theories finding expression in systems that could be characterized as symbolizing either of the two. Aspects of both models can be found operating in one juvenile justice system. A handy example is that it remains widely assumed (even in systems emphasizing ‘just deserts’) that under a certain age young people are *doli incapax* (incapable of forming an intention to commit a crime) and should not be held fully responsible for their actions (by and large a welfarist orientation), even though the age at which criminal responsibility is set differs remarkably.<sup>60</sup>

In virtually all countries there are in place special systems to deal with juveniles who commit offences. All are to some extent inspired by a welfare approach with attempts at excluding punishment or adapting punishment to the special needs of young people. Granted that there are major differences in the way all countries elaborate these systems but time and again the struggle with the very difficult combination of a welfare approach in some judicial structure surfaces. Juvenile justice systems “have undergone a great deal of doctoring [with no] satisfactory solution found anywhere”.<sup>61</sup> An example of this is the 1969 English Children and Young Persons Act<sup>62</sup> under which welfarism was employed with children of younger ages being designated as ‘pre-delinquent’ and falling under the social workers’ domain whilst the

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asserting that “most juvenile justice systems are not found at either end of this spectrum but are often a mixture of both models.”

<sup>60</sup> See further discussion on this in Chapter 4 on Age and Criminal Capacity.

<sup>61</sup>Walgrave and Mehlbye (n 5 above) 24 comments on analyses of modern-day juvenile justice systems in Denmark, England and Wales, France, Germany, Italy, the Netherlands, Belgium and Ireland).

<sup>62</sup>Applicable in England and Wales until repeal by the 1989 Children’s Act (which however does not apply to juvenile justice, in respect of which the Crime and Disorder Act, 1998 now applies).



courts continued to mete out punishment for children considered mature.<sup>63</sup> On the other hand, some juvenile justice systems have, on the face of it, appeared to embody a welfarist policy. An example is the Scottish welfare system first established by the now-repealed 1968 Scottish Social Work Act.<sup>64</sup> This system embodies the concept of children's hearings (entailing adjudication by lay courts which were vested with powers to make an order for the child's protection rather than establishment of legal guilt). However, it has been pointed out that Scottish welfare system is reserved only for less serious offences and it is bypassed for a significant minority of child offences deemed to have committed serious offences. This leaves some routes into the adult justice system unchallenged.<sup>65</sup> On the other hand, in Scandinavian countries there are no special courts for handling offences by young offenders as they are dealt with by the adult criminal courts, a signal feature of what may be designated to lean in favour of a justice model. However the policies of handling children in these countries produce less punitive dispositions than adults typically receive.<sup>66</sup>

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<sup>63</sup>Muncie (n 52 above) 82 explains however that, the concept of welfare was, and remains, characteristically narrow and circumscribed. "At best it may allow for an acknowledgement of the reduced culpability of children, but this in turn has been used to justify early intervention against those considered to be 'at risk'. Rarely, if ever, has it meant that they are dealt with more leniently", quoting King, M and Piper, C (1995) *How the Law Thinks about Children*, Aldershot: Ashgate.

<sup>64</sup>The Act applied in Scotland since the date of coming into operation (1971). It has since been replaced by the 1995 Children (Scotland) Act which came into operation in 1997 which by and large retains the child hearing system, see Hallett, C "Ahead of the Game or Behind the Times? - The Scottish Children's Hearings System in International Context" 2000 (14) *International Journal of Law, Policy and the Family* 31.

<sup>65</sup>Muncie (n 52 above) 82-83 (also adding that the hearing system only deals with those under the age of 16 years for whom no penal options apply in contrast with those over the age of 16 years for whom there remains a continuing presence of custodial options far removed from the promotion of welfarism).

<sup>66</sup>See Kyvsgaard, B "Youth Justice in Denmark" in Tonry and Doob (n 16 above) 349-390 and Janson, C "Youth Justice in Sweden" in Tonry and Doob (n 16 above) 391-442.

## 2.6 Dawn of a third juvenile justice model and contemporary developments

The late 1980s witnessed the expansion of diversion and attempts to decrease youth incarceration in many western jurisdictions. With broader shifts in penal policy, the new strategies for diversion<sup>67</sup> were aimed at instilling effectiveness and efficiency in managing delinquency. This was intended to be achieved by allowing for greater administrative decision making, greater sentencing diversity, decentralization of authority, growing involvement of non-judicial and voluntary sector agencies, and at the same time, high levels of containment and control in sentencing programmes.<sup>68</sup> These developments led to views of a third model of juvenile justice-the ‘corporatist theory or corporatism’.<sup>69</sup>

The emergence of corporatism did expose the simplistic nature of justice-welfare models while at the same time documenting the reality that juvenile justice practice had evolved beyond the core essentials of either justice or welfarism (for example in the primacy of diversion). This said, corporatism did not gain much significance as a theory *per se* but rather as a means of bringing to the fore the changes in practice, especially within the UK. In the debates on the philosophical frameworks for juvenile justice, it found little favour outside the UK and has largely been eclipsed even in recent texts there.<sup>70</sup>

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<sup>67</sup>Especially in the UK where heavy reliance was by this time placed on police cautioning as the predominant sanction for police offenders, see Pratt, J “Corporatism: The Third Model of Juvenile Justice” (1989) *British Journal of Criminology* 29.

<sup>68</sup>Sloth Nielsen, J “The Role of International Law in the Development of South Africa’s Legislation on Juvenile Justice (2001) *Law, Democracy and Development* 64.

<sup>69</sup>The main proponent was Pratt (n 67 above) generally.

<sup>70</sup>Sloth Nielsen (n 68 above) 66 (explaining further that corporatism’s limitation as a purported theory “appear to be that it is merely explanatory of existing policy rather than putting forward any particular

In relation to contemporary general penal policy, Garland has remarked that “rehabilitation programmes no longer claim to express the overarching ideology of the [penal] system, nor even to be the leading purpose of any penal measure”.<sup>71</sup> These words are also of relevance to the subject of juvenile justice today as they are to general penal policy. In pursuance of a punitive ideal, it is increasingly becoming clear that the dominant theme is one of crime control particularly in the new juvenile justice systems taking effect in Europe and bearing some semblance to developments in American juvenile justice. This is especially for child offending deemed as serious and violent. In American juvenile justice today, ‘waiver and transfer provisions’ which emphasize preference for adult criminal justice procedures rather than the juvenile court; tough policing; and ‘get tough’ dispositions such as the ‘three-strikes-and you are out’ orders<sup>72</sup>, all indicate examples of punitiveness ostensibly to stem political and public pressures about perceived growth in youth crime.<sup>73</sup> In England and Wales for example, it has been remarked that the ‘new youth justice’ in that country is today characterized by practices that can be “legitimated within the general rubric of crime prevention”.<sup>74</sup>

Tellingly, the role of principles and ideology has been reduced leading to the comment that throughout the development of this ‘new youth justice’, “the goal of

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philosophy as it does not espouse a concept of rationality or choice, give reasons for the causes of delinquency, nor provide any justification for the imposition of punishment”).

<sup>71</sup>Garland, D (2001) *The Culture of Control: Crime and Social Order in Contemporary Society* New York: Oxford University Press 8.

<sup>72</sup>Jensen (n 20 above) 2.

<sup>73</sup> See Lerman, P “Twentieth-Century Developments in America’s Institutional Systems for Youth in Trouble” in Rosenheim, M.K., *et al* (eds) (n 1 above) 73.

<sup>74</sup>Muncie (n 52 above) 91.

securing welfarism, justice or rights for young people has become increasingly obscured”.<sup>75</sup>

## **2.7 Relevance of the justice-welfare theoretical debate to an African context**

An examination of the relevance of juvenile justice theoretical debates in the African context is important in light of the fact that in many cases juvenile justice laws in Africa formed part of colonially inherited laws with the resultant effect that the philosophy of how to manage child offenders reflected the social construction of childhood as conceptualised by the colonizing countries.<sup>76</sup> An inquiry as to the relevance of the juvenile justice theoretical debate in the African context is therefore apt for two reasons. Firstly, the question arises whether the ideals of welfarism and justice models have been reflected in African juvenile justice systems, both in policy and practice, and whether these systems have remained caught in a time warp where they have only mirrored what obtained in the colonizing countries’ legal systems at the time of reception of the laws.

A second reason necessitating this enquiry is related to the ‘time warp’ question raised above. This is the issue whether more recent developments in western countries have found their way into African juvenile justice systems. Socio-economic

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<sup>75</sup>Muncie (n 52 above) 91.

<sup>76</sup> See for example Alemika, E O and Chukwuma, I.C (2001) *Juvenile Justice Administration in Nigeria: Philosophy and Practice* Lagos: Centre for Law Enforcement Education 10 ( tracing the evolution of the Nigerian juvenile justice system between Independence in 1960 and the year 2000 to the British Colonial rule in pre-independent Nigeria, and making the point that the defects in this system reflect the fact that it was part of the colonial legal system that had as its purpose the preservation of the colonial order).

transformations similar to those which shaped the social construction of childhood and by extension the subject of juvenile justice in terms of welfare or justice models in North America and Western Europe in the early 20<sup>th</sup> century have, in recent times, been witnessed in Africa.<sup>77</sup> This is mostly manifest in very fast rates of urbanization reaching an average rate of 5 per cent per annum in the sixteen years between 1980 and 1996.<sup>78</sup> With urbanization comes the strain on basic services and, together with a host of factors such as the whittling down of the traditional family structure and the high prevalence of the HIV/AIDS pandemic, increasing crime rates including youth offending are inevitable.<sup>79</sup>

The above developments lead to the question whether the trajectory of juvenile justice in the African context has been influenced by socio-economic changes. As discussed in the previous sections, this was marked by the dominance of welfarism, then the




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<sup>77</sup>See Petty, C and Brown, M “Urbanisation and Issues of Justice” in Petty, C and Brown, M (eds) (1998) *Justice for Children: Challenges for Policy and Practice in sub-Saharan Africa* London: Save the Children 63 (discussing the relationship between youth crime and urbanisation in the African context in amplification of the general link between urbanisation and increase in crime rate). In section 2.3 above, it was observed that part of the efforts of ‘the progressives’ or ‘child savers’ in fashioning ways of dealing with child deviance arose as a result of increased industrialization and consequent urbanization from which they feared there would result social disruption, including the problem of deviancy.

<sup>78</sup>UNICEF (1998) *State of the World’s Children* Oxford & New York: Oxford University Press (Comparing this with a growth rate of 0.8 per cent over the same period in industrialised countries where the bulk of the population (up to 75%) was already living in urban areas by then).

<sup>79</sup>The consequences of economic restructuring programmes, the impact of debt crisis on social policies and community life are all relevant factors to the general issue of crime in Africa and child offending in particular. It has been further stated that “in Africa as [with the Asian and the Pacific regions], child crime and delinquency are primarily urban phenomena and specifically attributable to hunger, poverty, malnutrition and unemployment which are linked to the marginalization of children in already severely disadvantaged segments of society”, see United Nations (1999) *International Review of Criminal Policy Nos. 48 & 49 (1998-1999)* New York: United Nations 7. For further discussions on poverty as a challenge to juvenile justice reform, see Chapter 8, section 8.5.

justice model and eventually, some elements of a crime control philosophy in the new western juvenile justice systems.

In contrast, a different path for the development of juvenile justice theory in the African context that takes into account the colonial legacy left in these countries is traceable. Thus examples from Kenya,<sup>80</sup> Nigeria,<sup>81</sup> Uganda<sup>82</sup> and Zimbabwe<sup>83</sup> (all former British colonies) reveal that colonially inherited juvenile justice laws tended to mirror the philosophy of their British counterpart - the now repealed 1933 Children and Young Persons Act - with a strong emphasis on welfarist-oriented provisions.

In line with diversity in colonial patterns it goes without saying that welfarist-oriented juvenile justice laws were not the norm in all African countries. In some cases, for




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<sup>80</sup>South Consulting (1999) “Juvenile Justice in Kenya: Project Identification Mission” (An Unpublished Report Commissioned by the Royal Netherlands Embassy). (Discussing the juvenile justice system put in place by the now repealed 1969 Children and Young Persons Act. The Children’s Act of 2001, discussed in subsequent chapters contains the new law on juvenile justice).

<sup>81</sup>Owasanoye, B and Wernham, M (eds) (2004) *Street Children and the Juvenile Justice System in Lagos State* London: Consortium for Streetchildren 27. (Pointing out that the Children and Young Persons Law, 1943, later retained as Chapter 32 Laws of the Nigerian Federation and Lagos State, 1958 had its purpose providing for the welfare of young offenders and the establishment of juvenile courts. The Act covered both children in need of care and protection and children in conflict with the law and made no distinct provisions for the separate treatment in the application of the law for these two groups of children).

<sup>82</sup>Parry Williams, J (1993) “A Case Study of Legal Reform in Uganda as Part of a Strategy for Promoting Community Based Care” (Unpublished paper on file) 30 (The Children’s Statute 1996, which is introduced in Chapter 3 and discussed in the subsequent Chapters of this thesis repealed the Approved Schools Act hitherto applicable).

<sup>83</sup>Kaseke, E “Juvenile Justice in Zimbabwe: The Need for Reform” (1998) 8(1) *Journal of Social Development in Africa* 11-17 (detailing Zimbabwean juvenile justice law (Children’s Protection and Adoption Act (Chapter 33) and the Criminal Procedure and Evidence Act (Chapter 57) that weighs heavily on ‘protecting the child’ and placing consideration on the socio-economic circumstances of the juvenile through an envisaged role for the probation officer).

example in Namibia, juvenile justice law encompassed the major features of what may be described as a ‘justice model’ informed by a theory of ‘just deserts’.<sup>84</sup>

However, while the countries from which African countries inherited their juvenile justice legislation did change their laws in line with the changing social construction of childhood and a host of other factors,<sup>85</sup> the respective juvenile justice systems have remained for a long time caught in a time warp in which they reflect the image of the colonial country’s child at the time of the received laws. As will be discussed in the next Chapter,<sup>86</sup> it is only in recent times (post-1990) that a number of African countries have embarked on the process of juvenile justice law reforms. This has meant that most African juvenile justice systems have remained modelled (until the time of recent law reforms) on the ideology of the justice-welfare model as they existed at the time of reception of these laws.



Indeed Britain, from which a number of these countries inherited their legislation has changed a great deal from the initial welfarist philosophy underpinning juvenile justice with the operational Crime and Disorder Act of 1998 having changed the direction of English juvenile justice to a rather just deserts oriented model with leanings towards crime control mentioned in the last section. In what signalled a

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<sup>84</sup>Schulz and Hamutenya (n 49 above) 2. This was a feature of the received mix of Roman-Dutch law that was inherited in this country.

<sup>85</sup>Taking the example of Britain, juvenile justice legislation has changed quite remarkably with an increasing emphasis on punitiveness. Since the 1933 Children and Young Persons Act, this field has witnessed a number of law reforms including the 1969 legislation going by a similar name and eventually the 1989 Children’s Act now in force (although not applying to juvenile justice issues). The juvenile justice sphere has been affected considerably by the developments in criminal justice legislation as well, including the 1998 Crime and Disorder Act. See Fionda (n 52 above) generally.

<sup>86</sup>Chapter 3 on Child Law Reform Processes.

reduced role for a welfarist orientation in English juvenile justice since the early twentieth century, the Children's Act of 1989 (in force since 1991) ended the dual child care or crime jurisdiction and created separate care jurisdiction in the family proceedings court, leaving the juvenile court to deal exclusively with criminal cases.<sup>87</sup> Hence for African countries (such as Ghana, Kenya, Lesotho and Uganda) where inherited English law applied before recent legislative changes, juvenile justice ideology reflected the position in England which obtained some decades ago.

In systems with a strong emphasis on 'just deserts' and punishment, like in the case of Namibia, it is not surprising that reliance on institutionalization became the predominant emphasis.<sup>88</sup> Ironically even in those jurisdictions where there was a semblance of the welfare model, the expected perceived benign and 'rehabilitative' notions of the juvenile justice system were illusory.<sup>89</sup> Adequate protection of children from the adult system (an ideal of welfarism) was not automatic. One study records that:

"It was found that the Kenyan conceptualization of the criminal justice process for children is generally a benign one, focusing on 'rehabilitation' and 'education' rather than on punishment. This is seen in the fact that even the current law does not use the terms 'conviction' and 'sentence'. Imprisonment is rarely used and children do not get criminal records. These features indicate a leaning towards welfarism in the criminal justice system for children. The danger in this is that in reality the system

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<sup>87</sup>Bottoms and Dignan (n 16 above ) 40

<sup>88</sup>Schulz and Hamutenya (n 49 above) 3, 19.

<sup>89</sup>See the discussion on welfarism, section 2.3 above.



may be far less benign than it seems on paper. Children are not sent to prisons-but alternatives to imprisonment may also be damaging...”<sup>90</sup>

It has similarly been noted that:

“Uganda inherited its colonialists’ belief in the ‘reformation’ and rehabilitation of juvenile offenders through long term training primarily in skills but also in behaviour... [but in practice] the belief in ‘doing good’ to children through this process deprived them of their liberty for years while [totally ignoring] the concept of child rights”.<sup>91</sup>

The same position is recorded as having obtained in Zimbabwe.<sup>92</sup> Thus on the whole, welfarist-oriented systems geared towards ensuring ‘the best interests’ of a child offender, ended up conforming more to the ‘just deserts’ philosophy in practice.



As in the history of juvenile justice in western countries, the development of juvenile justice in the African context was further reminiscent of the protectionist rhetoric best captured in the *parens patriae* doctrine. The fact that these laws were inherited from foreign laws enacted before the recognition of children’s rights (with the adoption of the CRC in 1990) meant that children’s rights ideology was not part of the juvenile justice theoretical debate in Africa. Hence it can be said that the justice-welfare

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<sup>90</sup>South Consulting (n 80 above) 12.

<sup>91</sup>Parry-Williams (n 82 above) 30-31.

<sup>92</sup>Kaseke (n 83 above) 16 (Explaining that in Zimbabwe’s case, the reformatories and other government custodial institutions are under-resourced leaving the institutions’ administrators to grapple with how to meet the institutionalized children’s basic needs of food, clothing and shelter).

theories which were primary to juvenile justice philosophy in Western countries defined African juvenile justice discourse as well.

## 2.8 The entry of children's rights

Children's rights have evolved and developed significantly over time moving from early times when children were perceived not to have any 'rights' of their own and at the zenith of welfarism when they were treated as objects of intervention.<sup>93</sup> The late twentieth century saw the advent of children being perceived as legal subjects, holding rights of their own.<sup>94</sup> With the adoption of the UN Convention on the Rights of the Child in 1989 (CRC),<sup>95</sup> the concept of children's rights revolutionized all issues concerning children and the area of juvenile justice was altered as well.<sup>96</sup> Although



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<sup>93</sup>See Neary, I "The Rights of the Child" 11 (Unpublished Paper on file).

<sup>94</sup>For the developments and efforts at the international level aimed at documenting the rights of the child in an international legal instrument see, LeBlanc, L (1995) *The Convention on the Rights of the Child-United Nations Lawmaking on Human Rights* Nebraska: University of Nebraska Press 3-62.

<sup>95</sup>CRC, introduced in Chapter 1.

<sup>96</sup>Van Bueren, G (1995) *The International Law on the Rights of the Child* Boston/Dordrecht: Martinus Nijhoff at 169 (asserting that children's rights has revolutionized the whole doctrine of "*parens patriae*" including its operation in juvenile justice).

criticized for adopting a weak enforcement mechanism,<sup>97</sup> the CRC is lauded for the comprehensive nature of its provisions.<sup>98</sup>

The Convention's detailed provisions traverse the whole corpus of civil, political rights, economic, social and cultural rights.<sup>99</sup> Many of the Convention's articles reflect the provisions of other, more general human rights instruments.

However, the CRC breaks fresh ground not only with regard to general child-specific versions of existing rights, but also in terms of codification of new rights. The most prominent of these is the symbol of every child's autonomy, the child's right to participation.<sup>100</sup> This right, together with the child's right to life, survival and development in Article 6, the right to non-discrimination in Article 2 and the provisions on the right to the best interests of the child in Article 3, constitute the




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<sup>97</sup>The CRC lacks a system allowing for the filing and adjudication of individual complaints on violations of children's rights. Article 43 of the Convention provides for the establishment of the Committee on the Rights of the Child comprising of 18 independent experts tasked with the duty of examining the progress made by States Parties in achieving the realization of obligations under the Convention, (Art 43(1)). The Committee's work principally entails the examination of state reports documenting the situation of children's rights in individual states. The success of the Committee depends largely on the willingness of national governments to take action on the Committee's criticisms and recommendations. For further discussion, see Balton, A "The Convention on the Rights of the Child: Prospects for International Enforcement" (1990) 12 *Human Rights Quarterly* 120.

<sup>98</sup>McGoldrick, D "The UN Convention on the Rights of the Child" (1991) 5 *International Journal of Law and the Family* 132.

<sup>99</sup>Economic, social and cultural rights include those in Articles 28 and 29 (right to education), Articles 27 and 24 (right to adequate standard of living and health) and Article 30 (the right to play).

<sup>100</sup>CRC, Article 12 (making provision for the child's right to participation generally and specifically in proceedings (administrative, judicial/legislative) affecting him or her).

‘soul’ of the CRC by reflecting the vision of respect and autonomy that the Convention aspires to for all children.<sup>101</sup>

The Convention’s provisions in Articles 37,<sup>102</sup> and its longest and most detailed provision, Article 40<sup>103</sup> are specifically on the subject of juvenile justice.<sup>104</sup> A number

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<sup>101</sup>See Committee on the Rights of the Child (2003) *General Comment No.5* “General Measures of Implementation for the Convention on the Rights of the Child” CRC/GC/2003/5 (Adopted at the 34<sup>th</sup> session on 27 November 2003) Para 12.

<sup>102</sup>Article 37 provides that: “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”.

<sup>103</sup>Article 40 provides that: “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, 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: (i) To be presumed innocent until proven guilty according to law;

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(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;

(v) 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;

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

(vii) 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”.

<sup>104</sup>However a holistic interpretation of the Convention has been emphasized by the monitoring body, see the Committee on the Rights of the Child, General Comment No. 5 (n 101 above) Para 3. This therefore calls for a reading of the juvenile justice articles in the context of the Convention as a whole. The Convention has thus been interpreted in a complementary way that involves the so-called “4 Ps” cluster of children’s rights – participation (in decisions affecting them), protection (of children from discrimination and all forms of neglect and exploitation), prevention (of harm to children) and provision (of children’s basic needs), see Hodgkin, R and Newell, P (2002) *Implementation Handbook of the Convention on the Rights of the Child* New York, Geneva: UNICEF. These are of relevance to juvenile justice as well as other issues on the rights of the child.

of these provisions, particularly the bulk of Article 40, reiterate the civil and political rights in relation to fair trial found in general human rights treaties.<sup>105</sup> The prohibition of torture, cruel, inhuman and degrading treatment is in similar vein.<sup>106</sup> However a number of rights in the juvenile justice articles are unique to the CRC including provisions on setting the minimum age of criminal capacity,<sup>107</sup> diversion,<sup>108</sup> requiring criminal procedures to be sensitive to a child's age, dignity and worth,<sup>109</sup> the desirability of the establishment of authorities and agencies specifically applicable to children,<sup>110</sup> and the reintegration of the child and his assuming a constructive role in society as desired objectives of the juvenile justice system.<sup>111</sup>

While the CRC sets universal binding standards in this sphere, the African Charter on the Rights and Welfare of the Child<sup>112</sup> pursues the same agenda at a regional level. Its




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<sup>105</sup>See the similarities between CRC, article 40 and Article 14 of the International Covenant on Civil and Political Rights (Hereinafter "ICCPR") (adopted 16 Dec. 1966, G.A. Res, 2200 (XXI), U.N. GAOR, 21<sup>st</sup> Sess., Supp.No. 16, U.N.Doc. A/6316 (1966) *entered into force* 23 March 1976).

<sup>106</sup>Article 37(a) CRC reiterates the prohibition of torture in the United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment (adopted 10 Dec.1984, G.A. Res, 39/46) *entered into force* 26 June 1987) and Article 7 ICCPR.

<sup>107</sup>CRC, Article 40(3) (a).

<sup>108</sup>CRC, Article 40(3) (b), (4).

<sup>109</sup>CRC, Article 40(1).

<sup>110</sup>CRC, Article 40(3).

<sup>111</sup>CRC, Article 40(1).

<sup>112</sup>The African Children's Charter, introduced in Chapter 1. The Charter's system of monitoring resembles that of the CRC with a body of experts known as the African Committee of Experts which is in charge of examining state reports (Article 43 of the Charter). Unlike the CRC however, the Charter allows for a system of individual complaints (Article 44 of the Charter). In contrast to the CRC's Committee with a wealth of experience, the African Committee is in the formative stages of its work (as pointed out in Chapter 1) and has not as of yet examined any State Reports or received any complaints on the violation of the rights under the Charter.

provisions on juvenile justice, enshrined in Article 17, apply to all children under the age of 18.<sup>113</sup>

In addition to these binding treaties, three additional sets of rules adopted by the global community provide greater detail on the daily operation of juvenile justice.<sup>114</sup>

These are the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”),<sup>115</sup> the United Nations Rules for the Protection of Juveniles Deprived of their Liberty<sup>116</sup> (“JDL Rules”) and the United Nations Guidelines for the Prevention of Juvenile Delinquency (“The Riyadh Guidelines”).<sup>117</sup>

The more recent United Nations Guidelines for Action on Children in the Criminal Justice System<sup>118</sup> buttress the norms encapsulated in these instruments with the intention of assisting States in the implementation of the CRC and the trio of instruments.<sup>119</sup>



The Beijing Rules, divided into six parts, cover a whole range of issues such as general principles; investigation and prosecution; adjudication and disposition; non-institutional treatment; institutional treatment and research and planning; policy formulation and evaluation of policy. As has been asserted by the United Nations, “it is an oversimplification to conclude that because the Beijing Rules are not a treaty, they are as entire body non-binding rules per se. Some of the rules have become

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<sup>113</sup>Article 17 of the African Children’s Charter mirrors the provisions of articles 37 and 40 of the CRC set out above.

<sup>114</sup>United Nations (n 79 above) 3.

<sup>115</sup>Adopted by the UN General Assembly 29 November 1985, UN. G.A Resln 40/33.

<sup>116</sup>Adopted by the UN General Assembly 14 December 1990, UN.GA Resln 45/113.

<sup>117</sup> Adopted by the UN General Assembly 14 December 1990, UN. G.A Resln 45/112.

<sup>118</sup> UN Economic and Social Council resolution 1997/30, annex.

<sup>119</sup>Paragraph 4(a) of the Guidelines.

binding on States parties by becoming incorporated into the CRC; others can be treated not as establishing new rights but as providing more detail on the content of existing rights”.<sup>120</sup>

To remedy the paucity of detailed international law protecting the rights of children deprived of their liberty, the JDL Rules set out principles that define the specific circumstances under which children can be deprived of their liberty and the conditions under which they should be kept in line with respect for children’s human rights. Its provisions (in particular the principle of detention as a last resort) inspired similar provisions of the CRC.<sup>121</sup>

In contrast with the Beijing Rules which provide for the protection of children already in the juvenile justice system, the Riyadh Guidelines are focused on prevention of child offending by having regard to early preventive interventions especially for children in situations of social risk. As opposed to the other two sets of Rules, the Riyadh Guidelines establish social policies and programmes in this regard. Added to the fact that the Guidelines link “many complex ideas that make it difficult to distil information in a succinct form,”<sup>122</sup> they have not been invoked much in the sphere of legislative reform of juvenile justice law.<sup>123</sup>

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<sup>120</sup> United Nations (n 79 above) 109.

<sup>121</sup> CRC, Article 37(a).

<sup>122</sup> Skelton, A “Developing a Juvenile Justice System for South Africa: International Instruments and Restorative Justice” in Keightley, R (ed) (1996) *Children’s Rights* Kenwyn: Juta and Co 184 (citing Schuler-Springorum, H “The UN Instruments Concerning Juvenile Delinquency” (1992) 2 *Rechten van het kind Lesingen-bundel 2, Universiteit Gent* 52).

<sup>123</sup> For this reason not much reference will be made to the Riyadh Guidelines in the Chapters that will follow.



Regardless of the varying character of these instruments,<sup>124</sup> they are all linked in a children's rights framework. As has been noted, the CRC captures a number of provisions first provided for in the Beijing Rules. The Riyadh Guidelines make reference to the CRC. On the other hand, the Beijing Rules refer to the JDL Rules while the Guidelines for Action on Children in the Criminal Justice System refer to all the set of instruments as providing sources for the international law on juvenile justice. In addition, the practice of the Committee on the Rights of the Child over the years reveals that the Committee has when examining State reports on juvenile justice considered all the instruments together as forming a children's rights framework.<sup>125</sup> The message is thus that "there should not be a duality between human rights and juvenile justice".<sup>126</sup>

With this in mind, the question arises as to whether children's rights can be considered as an alternative theory (to welfarism and justice) on which to place juvenile justice. This is discussed in the next section of this Chapter.

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<sup>124</sup>Cappelaere, G for example describes the Riyadh Guidelines as being "amongst the most advanced within the field of criminology", see "Introduction to the UN Guidelines for the Prevention of Juvenile Delinquency" (1995) 2 *Defence for Children International: Publications on the International Standards Concerning the Rights of the Child* 5.

<sup>125</sup>For example in the CROC, *Concluding Observations: Namibia*, CRC/C/15/Add.14 7 Feb 1994, Para 20 the Committee states that "it is of the opinion that the system of the administration of juvenile justice in the state party must be guided by the provisions of articles 37 and 40 of the CRC as well as relevant standards in this field, including the Beijing Rules, the Riyadh Guidelines and the United Nation Rules for the Protection of Juveniles Deprived of their Liberty..."

<sup>126</sup>United Nations (n 79 above) 8.

### 2.8.1 Children's rights as a model for juvenile justice?

The question whether juvenile justice can now be considered through the lens of a children's rights-based philosophy as opposed to the earlier juvenile justice theories elicits at least three different views.

The first view advances the premise that the CRC and the concept of children's rights have no addition to the theoretical debate on the foundations of juvenile justice. That juvenile justice is still analyzed exclusively on a welfare-justice continuum even after the CRC's prominence is illustrative of this view.<sup>127</sup> Specialists in the juvenile justice field<sup>128</sup> have thus ignored the children's rights debate, just as advocates of children rights have also sidelined juvenile justice issues leading one scholar to comment that juvenile justice remains "the unwanted child of the children's rights movement".<sup>129</sup>

This first view contends that the CRC and the trio of instruments simply document or incorporate some of the welfare and justice precepts.<sup>130</sup>

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<sup>127</sup>See recent texts and writings in this regard for example Tonry and Doob (2004) (n 16 above) and Muncie's chapter in Franklin, B (ed) (2002) (n 52 above).

<sup>128</sup>Abramson, B "The Right to Diversion: Using the Convention on the Rights of the Child to Turn Juvenile Justice Rights into Reality" in Jensen, E and Jepsen, J (2004) *Comparative Juvenile Justice* Copenhagen: Danish Institute for Human Rights (forthcoming) (asserting that "so far, juvenile justice specialists have not been making much use of the CRC").

<sup>129</sup>Abramson, B (2003) "Juvenile Justice: The 'Unwanted Child': Why the Potential of the Convention on the Rights of the Child is Not Being Realized, and What We can Do About it" (Unpublished Paper on file) 1.

<sup>130</sup>See Sebba, L "Juvenile Justice: Mapping the Criteria" in Freeman, M and Veerman, P (eds) (1992) *The Ideologies of Children's Rights* Dordrecht: Martinus Nijhoff Publishers 237-254, 240-241. Sebba adds paradoxically however that the CRC even leads to further confusion as regards the philosophy to be followed in the design of a system. The same concerns seemed to be shared by Walgrave who admits that the Beijing Rules do provide a series of clear statements about minimum standards but that they "reflect a fundamental ambivalence". He illustrates this point by an example to the effect that, "it is easy to state that the judicial reaction 'should be in proportion to both the offender and the offence'

The second view argues that the CRC and UN instruments represent an important function of bringing social human rights into the area of UN criminal justice policy.<sup>131</sup>

The third view elevates the importance of the CRC in the whole debate. The CRC, has increasingly come to supplant “the paternalistic notion of ‘the best interests of the child’ to be protected by the principle that children have a right to express their views and have their wishes taken into account in legal decisions which concern them”.<sup>132</sup>

This has far-reaching implications for the paternalist basis upon which the earlier juvenile justice models were based. Admittedly there may still not be practical realization of the CRC’s ideals of child autonomy and respect,<sup>133</sup> but it is clear that the Convention makes an attempt at straddling the divide between protectionist (paternalist) and participatory rights.<sup>134</sup> Some of the juvenile justice provisions of the




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(according to Rule 5.1 of the Rules), but it is far from evident in practice how to achieve both proportionalities”. He also finds it an irony to provide for principles of fair and just trial (Rule 14.1) while allowing for appropriate scope for discretion at all stages of proceedings (Rule 6.1). See, Walgrave, L “Restoration in Youth Justice” in Tonry and Doob (n 16 above) 548. It is submitted here firstly that the concern voiced by Walgrave relates more to the issue of practicality but that this does not detract from the principles that the CRC and the Beijing Rules attempt to lay down. Secondly, rather than being conflicting, as contended by Walgrave, these rules require a balancing process between mutually reinforcing principles. And thirdly, in relation to other Rules, the dilemma on feasibility may even not feature.

<sup>131</sup>This view is a variant of the first view in the sense that it treats juvenile justice as a separate issue from children’s (human) rights.

<sup>132</sup>Franklin, B “Children’s rights: An introduction” in Franklin (ed) (n 52 above) 4.

<sup>133</sup>Examples of adult-oriented interpretation of children’s autonomy related rights are legion. Franklin (n 52 above) 4 points out for example that “in truth the English Judiciary continue to interpret [the right of the child to participation] conservatively falling back on paternalistic assumptions of children’s incompetence.”

<sup>134</sup>This is the essence of the relationship between the CRC’s provisions on the best interests of the child as a primary criterion on all issues concerning children (Article 3) and the bulk of the CRC documenting protection, provision and prevention rights and the rights to participation (Article 12). For

CRC and the trio of non-binding international juvenile justice instruments (Beijing Rules, UN JDL Rules and Riyadh Guidelines) do represent a blend of both justice and welfare theories.<sup>135</sup> It is, however, submitted in this thesis that the CRC and the trio of instruments offer a new model for considering juvenile justice in light of the overall vision of child autonomy and respect for the child's rights. Indeed in his analysis of juvenile justice systems in modern day Europe, Doek considers the aspect of autonomy of the child as most important in examining whether children's rights have had an impact on juvenile justice in these countries.<sup>136</sup>

Further, the CRC reveals an attempt at a move away from the paternalistic view of juvenile justice (inherent in justice and welfare models) by the emphasis it places on reintegration as the primary objective of the juvenile justice system rather than rehabilitation.<sup>137</sup> Geraldine Van Bueren has noted that during the drafting of Article 40(1) of the CRC, the concept of reintegration into society rather than rehabilitation was included for two reasons.<sup>138</sup> This was, firstly, to address the concern that

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a discussion of this relationship in the context of different cultures see generally, Alston, P (ed) (1994) *The Best Interests of the Child: Reconciling Culture and Human Rights* Oxford: Clarendon Press.

<sup>135</sup>Provisions entrenching diversion in Article 40(3), for example, represent recognition of what may be termed as 'welfarist ideals'. On the other hand, the procedural rights that underlie Article 40 of the CRC are reminiscent of the demand for due process in the informality of the early juvenile court procedures, a key ingredient of what may be termed as a justice model.

<sup>136</sup>Doek, J "Modern Juvenile Justice in Europe" in Rosenheim, M *et al* (2002) (eds) *A Century of Juvenile Justice* Chicago and London: The University of Chicago Press 524 (pointing out that in most of Europe emphasis on children's rights has been limited to the incorporation of certain procedural rights (which are generally in conformity with both the CRC and the European Convention for the Protection of Human Rights and Fundamental Freedoms) into juvenile justice laws. Doek however poses the question whether these adjustments in procedure have given "a child confidence that he or she is being listened to").

<sup>137</sup>Van Bueren (n 96 above) 172-173.

<sup>138</sup>Van Bueren (n 96 above) 173.

rehabilitation may be abused as an undesirable form of social control of children in conflict with the law. Second, it was considered that ‘rehabilitation’ implies that responsibility rests solely with the child offender who is to be ‘treated’, ‘cured’ and then placed back in society. ‘Reintegration’, on the other hand was said to focus upon the child’s social environment and upon the role of the community in helping the child to become a responsible member of society.<sup>139</sup>

In light of the radically novel nature of the CRC, Sloth-Nielsen has contended that “regardless of how enforceable international law may be in any given municipal context the set of human rights rules and principles provides a fresh yardstick against which [juvenile justice] legislation and policies can be measured”.<sup>140</sup> She argues that six entirely new features can be discerned from the CRC which usher in a new normative standard for juvenile justice which was hitherto absent in the earlier theories.<sup>141</sup> These are the provisions in Articles 37 and 40<sup>142</sup> on;

- (a) The establishment of separate laws, institutions and procedures applicable to children accused or alleged of committing crimes;
- (b) The setting of a minimum age of criminal capacity;
- (c) The principle of detention as a last resort and for the shortest period of time;

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<sup>139</sup>The first of these reasons given by Van Bueren illustrates that the CRC’s provisions constitute a challenge to the dominance of paternalism in juvenile justice. The second rationale augments the first one while at the same time correlating with the idea of restorative justice discussed in the next and last section of this Chapter.

<sup>140</sup>Sloth-Nielsen (n 68 above) 67.

<sup>141</sup>Sloth-Nielsen (n 68 above) 68 (relying on an earlier analysis by Fortin, J (1998) *Children’s Rights and the Developing Law* London: Butterworths, which focused on the UK juvenile justice system and its compliance with a children’s rights model of juvenile justice).

<sup>142</sup> Set out in full (n 102 and 102 above).

- (d) The desirability of diversion as a binding obligation on State Parties to the CRC;
- (e) The extent to which procedural guarantees under the CRC and Beijing Rules are accommodated in a juvenile justice framework and;
- (f) The limitation of certain sentences and need for alternative dispositions at the sentencing stage.<sup>143</sup>

## 2.9 Restorative justice as a theme

The concept of restorative justice has become a central theme in the theoretical and policy debates in juvenile justice and criminal justice reform worldwide.<sup>144</sup> The United Nations Economic and Social Council endorsed the UN Basic Principles on




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<sup>143</sup>Denov's recent analysis on whether the new Canadian Youth Criminal Justice Act (2003) (making provision for a new juvenile justice system in Canada) complies with the CRC adopts a children's rights model as a basis for examining juvenile justice. In contrast, however, the analysis is based on an entirely different approach perhaps as a response to issues of special relevance in Canada. Denov's framework includes issues such as the 'variety of dispositions available and sentences'; 'emphasis on the dignity and worth of the child and reintegration'; 'promoting child participation in the youth justice system'; 'non-discrimination and special considerations for aboriginal youth'; 'detention of children and inadequate accommodation of the special needs of youth in custody'; 'emphasis on punishment'; 'child's right to privacy'; 'attention to the principle of the 'best interest of the child''; and interestingly; 'the right to life and maximum survival and development and consideration of social and economic disadvantages'. See Denov, S "Children's Rights or Rhetoric? Assessing Canada's Youth Criminal Justice Act and its Compliance with the UN Convention on the Rights of the Child" (2004) 12(1) *The International Journal on Children's Rights* 1-20. The subsequent discussions in the later Chapters of this thesis on the law reform endeavours in the African context will proceed on a general analysis such as the example of Sloth-Nielsen (n 68 above) and Fortin (n 141 above) as Denov's analysis may be said to be too specific to the Canadian context. A comprehensive discussion of the South African juvenile justice law reform process from a children's rights perspective is done by Sloth-Nielsen, J (2001) "The Role of International Law in Juvenile Justice Reform in South Africa" (Unpublished LL.D Thesis submitted to the University of the Western Cape).

<sup>144</sup>Walgrave (n 130 above) 544.

the Use of Restorative Justice in Criminal Matters in 2002.<sup>145</sup> Although the principles are technically not legally binding, they express generally accepted principles and represent a moral and political commitment by States. The Guidelines can act as a blue-print for states in enacting legislation and formulating policies aimed at giving effect to restorative justice practices.

Restorative justice has been characterized as a form of justice that relies on reconciliation rather than punishment.<sup>146</sup> This has been explained as follows:

“[Restorative justice] argues that when a crime is committed, harm has been caused and that healing or restoration needs to be facilitated. When an incident occurs which upsets the balance of rights and responsibilities, methods must be found to restore the balance so that community members, including the offender and the victim, may come to terms with the incident and carry on with their lives. The underlying principle is that the response to crime cannot be effective without the joint and active involvement of victims, offenders, and the community...”<sup>147</sup>

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<sup>145</sup>E/2002/INF/2/Add.2. The proposal for the Guidelines was made in the aftermath of the Tenth UN Congress on Crime Prevention and Treatment of Offenders that was marked by substantial country interest in restorative justice. In April 2000, the Governments of Canada and Italy had submitted a resolution to the UN Commission on Crime Prevention and Criminal Justice proposing that the UN develop international guidelines to assist countries in adopting restorative justice.

<sup>146</sup>Johansson, K “Children in Trouble with the Law: Child Justice in Sweden and South Africa” (2003) 17 *International Journal of Law, Policy and the Family* 308.

<sup>147</sup>Johansson (as above) 308. For difficulties on a precise definition of restorative justice and the dilemma of various definitions, see Nadeau’s critical analysis of the UN Declaration of Basic Principles on the use of Restorative Justice in Criminal Justice Matters [Untitled] available at < <http://www.pficjr.org/programs/un/nadeau> > (last accessed 01/11/2004).

A restorative justice process entails accountability by the offender for his wrongdoing, family or community responsibility towards the offender, reintegrative shaming of the offender and the offender's eventual reintegration into the society.<sup>148</sup>

Restorative justice has gained prominence in juvenile justice as an alternative discourse which seeks to address the perceived deficiencies inherent in the earlier philosophies. Thus questions on the effectiveness of welfarist-oriented rehabilitative juvenile justice systems; a search for better legal safeguards without greater punitiveness (as in the case of justice theory); the need to halt harsher responses to youth crime (a feature of the crime-control theme) have brought the relevance of restorative justice to the fore. The need to involve victims of youth crime in juvenile justice has been equally important.<sup>149</sup>



Apart from the comprehensive restorative justice-oriented New Zealand juvenile justice system with its reliance on Family Group Conferences, various versions of victim offender mediation, family group conferencing and community service have become a feature of many other western countries' juvenile justice systems.<sup>150</sup> While these countries have shied away from a restorative justice approach for all crimes (mainly due to concerns for public safety in light of serious violent crimes and

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<sup>148</sup>An in-depth analysis is to be found in Zehr, H (1990) *Changing Lenses: A New Focus for Crime and Justice* Scottsdale: Herald Press. See also, Braithwaite, J (1989) *Crime, Shame and Reintegration* Cambridge: Cambridge University Press. For recent articles on modern day restorative justice examples, see (2002) 42 *British Journal of Criminology* (dedicated to this theme in the context of different countries).

<sup>149</sup>Walgrave (n 130 above) 546-550. Chapter 5 on Diversion will deal with these issues in more detail.

<sup>150</sup>See Miers, D (2001) *An International Review of Restorative Justice* Crime Reduction Research Series no. 10. London: Home Office.



recidivist offenders), available data does indicate the feasibility and success of a number of restorative justice programmes.<sup>151</sup>

It has also been argued that restorative justice is not alien to most African cultures.<sup>152</sup> Consedine writes of the value of ‘shaming’ in traditional African adjudication and adds that once the community had expressed its repugnance to a wrongdoer, the next step was to incorporate him back into the community.<sup>153</sup> A detailed discussion of modern day examples of restorative justice precepts in African juvenile justice systems will follow at a later Chapter of this thesis.<sup>154</sup>

### **2.9.1 Is there a congruence or conflict between restorative justice theory and children’s rights?**



The provisions of Article 40 (1) of the CRC that refer to reintegration as the primary objective of the juvenile justice system and the need for the child to assume a

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<sup>151</sup>Walgrave (n 130 above) 564-565 (Recording that in spite of differences in outcomes depending on several variables, victims, offenders and their communities do come together in a number of instances and reach “constructive agreements which are carried out reasonably well”. Walgrave adds that restorative justice programmes have involved parties expressing higher degrees of satisfaction than they do with the formal (retributive) justice system and re-offending risks are mostly lower).

<sup>152</sup>Allot, A.N “The People as Lawmakers: Custom, Practice and Public Opinion as Sources of Law in Africa and England” (1977) 1 *Journal of African Law* 21 (arguing that reconciliation, restoration and a search for harmony were the key ingredients of traditional African adjudication). For a South African perspective see, Skelton, A “Restorative Justice as a Framework for Juvenile Justice Reform: A South African Perspective” (2002) 42(3) *British Journal of Criminology* 496-513. See also, English, R “Ubuntu: The Quest for an Indigenous Jurisprudence” (1997) 13(4) *South African Journal on Human Rights* 641-648.

<sup>153</sup>Consedine, J (1999) *Restorative Justice: Healing the Effects of Crime*. Ploughshares Publications. New Zealand 171-172.

<sup>154</sup>Chapter 5 on Diversion.

constructive role in the society have been said to hint at a more restorative justice approach.<sup>155</sup> Article 17 of the African Children’s Charter<sup>156</sup> is in similar vein. That the African Children’s Charter blends children’s rights with the child’s duty to respect and be accountable to the family and community<sup>157</sup> has been further said to accord well with the concept of restorative justice.<sup>158</sup> Further, the necessity of having a variety of dispositions at hand when sentencing a young offender is stated in article 40 (4) of the CRC which also lends support to the provisions of article 40(3) on diversion.<sup>159</sup> The aim is to avoid institutional care for children, to ensure the well being of the child and to achieve the principle of proportionality in relation to both the circumstances and offence. Restorative justice measures such as mediation, community service, and family group conferences may therefore play an important part in achieving the overall aim of juvenile justice as provided for under the Convention.



Despite these provisions, congruence between restorative justice and international children’s rights law cannot be taken for granted. Doubts have been expressed as to whether the two perspectives can ultimately be totally reconciled.<sup>160</sup> The possible infringement of procedural rights of offenders in restorative justice processes has been raised. It has also been suggested that ideal of both proportionality and frugality in

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<sup>155</sup> See Skelton (n 122 above) 182.

<sup>156</sup> African Children’s Charter, Article 17(3) provides that “the essential aim of treatment of every child during 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.”

<sup>157</sup> African Children’s Charter, article 31, in particular on “duties and responsibilities” of the child.

<sup>158</sup> Skelton, A “Juvenile Justice Reform: Children’s Rights Versus Crime Control” in Davel, C.J (ed) (1999) *Children’s Rights in a Transitional Society* Pretoria: Protea Books 102.

<sup>159</sup> Johansson (n 146 above) 308.

<sup>160</sup> Johansson (n 146 above) 308.

punishment may be sacrificed.<sup>161</sup> Further, it has been contended that the right to legal representation as required by Article 40(2) (ii) of the CRC does not seem appropriate within a restorative justice approach.

In response to these concerns, it is submitted however that the overarching policy put forth by a children's rights model encompasses the values of restorative justice, for example through the provisions on diversion<sup>162</sup> and the overall objective of 'reintegration' aspired to by the CRC.<sup>163</sup> This makes restorative justice theory consistent with a children's rights approach. A conclusion may thus be drawn that just as fears have been raised with regard to the conflicting ideals of a children's rights approach,<sup>164</sup> the potential incompatibility between certain restorative justice precepts and children rights can be overcome by a balancing process within the framework put forth by the CRC.<sup>165</sup>



The close connection between a restorative child (juvenile) justice approach and a children's rights model is evident in the CRC's recognition that diversion should be a

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<sup>161</sup>This is in the sense that a restorative justice adjudicative process may result in harsher punishments which may not reflect the gravity of the offence and any mitigating circumstances. For an in-depth discussion of these concerns see, Braithwaite, J "Setting Standards for Restorative Justice" (2002) 42 *British Journal of Criminology* 563-577.

<sup>162</sup>CRC, Article 40(3).

<sup>163</sup>CRC, Article 40(1).

<sup>164</sup>In this regard, see discussion on the concerns raised by Walgrave (n 130 above) and discussed in the same footnote.

<sup>165</sup>Thus, for example, the setting of minimum standards that diversion programmes should comply with, as will be discussed in the Chapter 5 on Diversion. This may include provisions relating to the guarantee of a child's due process rights including the right to legal representation where this is appropriate.

central feature of each and every juvenile justice system.<sup>166</sup> A substantive discussion of diversion ensues in Chapter 5 of this thesis.

## 2.10 Conclusion

This Chapter has traced the origins of the juvenile justice system to the institution of the first juvenile court. What stands out in the subsequent development of juvenile justice is the shifting social construction of childhood at different points in time leading to ‘justice’ and ‘welfare’ as theoretical constructs that are depicted as representing opposites. The simplistic nature of these theories lies in their failure to capture the practice of juvenile justice systems worldwide that in reality reflect a hybrid of elements of both theories. However, both theories represent, in varying degrees of principle and practice, the ‘protectionist’ view of looking at children through the prism of *parens patriae*. This was the watershed doctrine of the pre-CRC era that the concept of children’s rights sought to revolutionize and limit. The dominance of *parens patriae* was the prevailing position in African countries with the legacy of colonial juvenile justice law. This reflected the absence of the idea of children’s rights in the past juvenile justice laws of the countries under study which were premised on the justice-welfare continuum.

The basic premise that underlies this Chapter is that in light of the deficiencies inherent in the earlier models of juvenile justice, children’s rights not only offers an alternative theory within which to analyze juvenile justice law reform but also one in which the practical constraints of the earlier theories may be addressed. The fact that

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<sup>166</sup>CRC, Article 40(3). Thus diversion has been recognised as one of the elements of a children’s rights oriented juvenile justice system, see section 2.8, above.

novel standards and ideals have emerged on which juvenile justice can be underpinned stands out prominently in support of this premise.<sup>167</sup> In most Western countries, contemporary juvenile justice developments reflect a primary role of a crime control theme.<sup>168</sup> The question arises whether the same position is exhibited in recent juvenile justice law reforms in Africa. It is against this background that the next Chapters of this thesis will analyse the processes and content of new juvenile justice laws in particular African countries in light of the provisions of the CRC and international standards which call for children's rights-oriented juvenile justice systems.



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<sup>167</sup>Discussed in section 2.8 above.

<sup>168</sup>See section 2.6 above.

## CHAPTER 3

### THE PROCESS OF DEVELOPING NEW JUVENILE JUSTICE LAWS IN SPECIFIC AFRICAN COUNTRIES

#### 3.1 Introduction

The requirements of a children's rights oriented juvenile justice system highlighted in the last Chapter<sup>1</sup> and considered substantively in detail in Chapters 4-7 of this thesis, requires legislation. Thus, the starting point for a children's rights-oriented juvenile justice system should be the enactment of domestic legislation and policies recognizing the requirements of the CRC in relation to juvenile justice.



This Chapter examines the processes by which the countries under study (namely, Ghana, Kenya, Lesotho, Namibia, South Africa and Uganda) developed new laws to underpin juvenile justice in the aftermath of their ratification of the CRC.

Sections 3.2 and 3.3 of this Chapter will discuss the provisions of the CRC and international law in general in relation to the obligation of States to put in place domestic laws and policies for the realization of the juvenile justice treaty obligations in the CRC. The sections which follow will then provide a detailed exposition of the law reform processes in three (Kenya, South Africa and Uganda) of the six countries under study with a view to pointing out how these processes sought to enact new laws that give effect to the obligations in the CRC on child rights' oriented juvenile justice

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<sup>1</sup> Chapter 2, section 2.8.1.

systems. The decision to limit this discussion to these three countries (out of the six whose juvenile justice laws will be under study) is mainly informed by the fact that it is only in respect of these three countries that the author was able to access all the detailed materials relating to the law reform processes.<sup>2</sup>

The point of departure in this Chapter will be that all the countries under study had an obligation to put in place domestic laws and policies upon ratification of the CRC. This is discussed in section 3.2. Overall, it will be argued that while this obligation to reform children's or juvenile justice laws may at a first glance be deemed straightforward, the socio-political and legal terrain of a particular country determines the extent to which a State Party to the CRC is able to carry out the instruction implicit in Article 4 and explicitly recognized in Article 40(3) requiring legislation to underpin a (separate) juvenile justice system. The extent to which this obligation is complied with therefore hinges on the particularities in a given State Party to the CRC.

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<sup>2</sup>This was despite the author's efforts to access these materials. The materials which could be accessed are, the Issue and Discussion Papers of the South African Law Commission and the full copies of Reports which document the reform process in Kenya, Uganda and South Africa. However, the final products (enacted laws and proposed Bills) of all the six countries under study were accessed by the author. Further, as will be evident in substantive discussions on the content of the new laws and Bills in this thesis (Chapters 4-7), the Lesotho Child Welfare and Protection Bill (2004) in regard to juvenile justice provisions and the Namibian Child Justice Bill (2002) are substantially similar, and in many respects identical to the South African Child Justice Bill (2002). Hence the relevance of the South African law reform process and debates to the processes of developing juvenile justice laws in Lesotho and Namibia. On the other hand, the similarity between the juvenile justice provisions in the Kenyan and Ugandan Children's Acts (enacted in 2001 and 1996, respectively) on the one hand, and the Ghanaian Juvenile Justice Act (2003), on the other, will be apparent. Hence the relevance of these two countries' law reform processes to the Ghanaian law reform process.

The CRC, although requiring new laws in the aftermath of ratification, does not specifically provide details on how the law-making process is to be conducted. This is indeed the general position of all treaties in international law. Thus, the law-making process is left to the particular contexts of State Parties with the effect that domestic issues such as affordability of the new proposals and, in the juvenile justice context, the issue of public attitudes towards crime must contend with the ideal of giving full effect to the provisions of the CRC.

This Chapter will contend that a common approach emerges in the three law reform initiatives under discussion. This is in relation to the challenge of adopting a child rights philosophy for new juvenile justice legislation against a number of themes the main one being the issue of public attitude towards crime. This common approach is that all the discussed law reform process examples entailed comprehensive and wide reaching consultative processes between the bodies tasked with law reform and the different stakeholders, governments and members of the public (including children). It will be submitted that the aim of these consultative processes was to find a balance between a number of issues (including affordability and public concerns on child offending) and to come up with the best possible proposals in the context of ensuring legitimate and feasible child-rights oriented proposals in the new laws and Bills.

This Chapter will therefore further contend that the practice of these States, as revealed from these law reform processes, gives flesh to the bare bones in the provisions on law reform as an obligation under the Convention.<sup>3</sup>

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<sup>3</sup> This is by virtue of the fact that the relevant CRC provisions, while obliging the process of coming up with new child or juvenile justice laws, do not specifically spell out how to conduct the law-making process.



### 3.2 Implementation of the CRC and the place of domestic laws

The word ‘implementation’ renders itself to diverse meanings in the case of the CRC as with all human rights treaties. The CRC provides for a two-tiered system of implementation; on the first tier is an international norm enforcement mechanism and on the second, obligations at the domestic level.

In regard to the first, each and every State Party to the CRC is required to submit State Reports documenting the domestic efforts aimed at implementing the CRC to the CRC’s treaty monitoring body, the Committee on the Rights of the Child (CROC).<sup>4</sup> The Report is examined in a dialogue between the state representatives and the Committee after which the CROC renders its Concluding Observations that constitute recommendations to the state on how to improve its efforts on implementation.<sup>5</sup>



More importantly, however, is the second tier of implementation - the effect of the CRC at the domestic level. The point has been made that the success or failure of any international human rights treaty should be evaluated in accordance with its impact on

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<sup>4</sup>CRC, Article 44 requires State Parties to submit reports within two years of ratification of the CRC and thereafter periodically every 5 years. The CROC issued the “Guidelines Regarding the Form and Content of Initial Reports to be Submitted by States Parties under Article 44 (1)”, CRC/C/5, 15 Oct 1991; And the revised Version, CRC/C/58, 20 Nov 1996. The first set of guidelines included juvenile justice as part of ‘special protection measures’ in Para 23. The updated guidelines covered juvenile justice issues more comprehensively under ‘children involved with the system of administration of juvenile justice’ in Paras 132-148.

<sup>5</sup>The documents that result from this process; the State or Country Report, List of Issues from the CROC to the States on the issues upon which it seeks clarification, Summary Records of the dialogues with States and the CROC’s Concluding Observations are all available at < [www.unhchr.ch/tbs/doc.nsf](http://www.unhchr.ch/tbs/doc.nsf) > (last accessed 10 December 2004).

human rights practices at the domestic level.<sup>6</sup> The CRC provides the framework within which domestic implementation must be considered. Article 4 of the CRC, by and large similar to provisions in other UN human rights treaties,<sup>7</sup> provides that:

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

The reference to ‘appropriate legislative, administrative and other measures’ implies that only a composite of these different measures will suffice. The Convention is not prescriptive to the extent of listing the ‘administrative measures’ that it requires. This is in keeping with the CRC’s broad and flexible approach which enables the particularities of the legal and administrative system of each state, as well as other relevant considerations, to be taken into account. However, from a reading of the authoritative expositions issued by the CROC through a recent General Comment on ‘general measures’ regarding implementation of the CRC,<sup>8</sup> different mechanisms are

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<sup>6</sup>Heyns, C and Viljoen, F (2002) *The Impact of the United Nations Human Rights Treaties on the Domestic Level* the Hague: Kluwer Law International 1.

<sup>7</sup>Such as common articles 2 of the UN International Covenant on Civil and Political Rights (ICCPR) and the UN International Covenant on Economic, Social and Cultural Rights (ICESCR).

<sup>8</sup>CROC (2003) *General Comment No. 5: “General Measures of Implementation for the Convention on the Rights of the Child.”* CRC/GC/2003/5 (Adopted at the 34<sup>th</sup> session on 27 November 2003). The practice of issuing General Comments has been invoked by virtually all UN human rights treaty monitoring bodies to give further elucidation on the norms and obligations incumbent on State Parties under the respective treaties. These Comments build upon the experience of the treaty bodies in examining state reports and, where applicable, individual complaints. While General Comments do not carry any formal authority to bind States Parties, the status of the Committees under the relevant

called for at the state level. These include<sup>9</sup> the need for a comprehensive national strategy such as a National Plan of Action (NPA) on Children,<sup>10</sup> independent human rights institutions such as children's ombudspersons and national human rights commissions, making children visible in budgets, training and capacity building, international co-operation within a rights-based development assistance approach and local cooperation with civil society, amongst other measures.

Just as with 'administrative measures', reference to 'legislative measures' cannot be regarded as being prescriptive. There is however no doubt that 'legislative measures' refers to the obligation on State Parties to review and reform child laws upon ratification. Indeed, the CROC has made the point that "it believes a comprehensive review of all domestic legislation and related administrative guidance to ensure full compliance with the Convention is an obligation".<sup>11</sup>




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treaties gives them a special claim for attention., see Steiner, H.J "Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee" in Alston, P and Crawford, J (eds) (2000) *The Future of the UN Human Rights Treaty System* Cambridge: Cambridge University Press 52 (Commenting on the General Comments issued by the Human Rights Committee in charge of monitoring the ICCPR. This observation applies in the case of the CROC as well).

<sup>9</sup>Discerned from a general reading of General Comment No.5 (n 8 above) documenting these administrative measures and derived from the Committee's decade of experience in examining States Parties' Reports.

<sup>10</sup>General Comment No. 5 (n 8 above) Para 29 stresses the development of a comprehensive national strategy or NPA for children which is rooted in the CRC. The use of NPAs flowed from the commitment of states following the first World Summit for Children held in 1990, see United Nations World Summit for Children (1990) *World Declaration on the Survival, Protection and development of Children and Plan of Action for Implementing the World Declaration on the Survival, Protection and Development of Children in the 1990s* New York: United Nations.

<sup>11</sup>General Comment No.5 (n 8 above) Para 15.

In regard to juvenile justice, a child-rights orientated juvenile justice system as introduced in the last Chapter has as its first precept, the establishment of separate laws, procedures and institutions to deal with children in trouble with the law.<sup>12</sup> This proceeds from a reading of article 4 set out above and article 40(3) CRC. The latter provision requiring State Parties to establish “laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law,” has been interpreted not only as requiring, at a minimum, that states establish juvenile justice systems but is also increasingly being construed as implying the need for distinct and dedicated legislation in the sphere of juvenile justice upon ratification of the Convention.<sup>13</sup> It will be clear from the discussions on the case studies of the three countries that the interpretation of the obligation to undertake juvenile justice law reform as requiring separate and distinct legislation dedicated to juvenile justice influenced the South African law reform process. It later influenced the juvenile justice law reform process in Namibia in a similar direction. The Ghanaian process also led to distinct (separate) juvenile justice legislation while both Kenya and Uganda undertook juvenile justice law reform within an overall comprehensive reform of all laws relating to children.

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<sup>12</sup>See Chapter 2, section 2.8.

<sup>13</sup>Skelton, A “Developing a Juvenile Justice System for South Africa: International Instruments and Restorative Justice” in Keightley, R (ed) (1996) *Children’s Rights* Kenwyn: Juta and Co 183. Article 40(3) provides that “State Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to juvenile justice” [emphasis added]. It is submitted that while Art 40(3) may also be interpreted as placing the primary obligation on instituting a separate juvenile justice system and not requiring a separate and distinct legislation as such, the philosophy of children’s rights as a concept which gives centrality to a child’s autonomy (as was explained in Chapter 2, section 2.8.1) requires reform of existing juvenile justice legislation and this may be through consolidated children statutes or separate juvenile justice legislation as the practice of states has shown in the examples to be discussed in this Chapter.

The development of consolidated children's rights statutes which can highlight and emphasize the CRC's principles has been encouraged by the CROC. The Committee has, however, stressed that consistency with the CRC's principles and standards is required for all relevant sectoral laws (on education, health, juvenile justice etc).<sup>14</sup> While it is up to each individual State Party to the CRC to decide how implementation of its provisions is to be achieved including through legislation, the passing of laws compliant with the CRC is clearly an obligation, not a matter of choice.<sup>15</sup>

### 3.3 The CRC in the domestic legal order of the countries under study

The impressive ratification of the CRC has been widely lauded.<sup>16</sup> Indeed with the exception of South Africa and Lesotho, all the other countries under study in this thesis - Ghana, Kenya, Namibia, and Uganda, ratified the Convention within the first year of its adoption.<sup>17</sup> Lesotho ratified the CRC three years after its adoption and, in the post-apartheid period, the CRC was the first international human rights treaty to be ratified by South Africa.<sup>18</sup> While the rapid and near universal ratification of the CRC has been affected by a high volume of reservations entered by states in relation to a number of its provisions,<sup>19</sup> these six countries refrained from entering any

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<sup>14</sup>General Comment No. 5 (n 8 above) Para 22.

<sup>15</sup>Veerman, P and Gross, B "Implementation of the United Nations Convention on the Rights of the Child in Israel, the West Bank and Gaza" (1995) 3 *The International Journal of Children's Rights* 296.

<sup>16</sup>As was pointed out in Chapter 1, the CRC is almost universally ratified. Only the USA and Somalia have not ratified the Convention.

<sup>17</sup>The Status of ratification of the CRC is available at < <http://www.unhcr.ch/html/menu2/6/crc/treaties/status-crc.htm> > (last accessed 01 August 2005).

<sup>18</sup>Sloth-Nielsen, J "Ratification of the United Nations Convention on the Rights of the Child: Some Implications for South African Law" (1995) 11 *South African Journal of Human Rights* 401.

<sup>19</sup>Schabbas, W (1995) "Reservations to the Convention on the Rights of the Child" (1996) 18 *Human Rights Quarterly* 473 and Leblanc, L.J "Reservations to the Convention on the Rights of the Child: A

reservations in respect of any of the CRC's provisions at the time of their ratification. This signals the commitment of these countries to be legally bound to the full extent of the CRC's provisions.

One relevant factor in the national implementation of the CRC, and by extension child-rights orientated juvenile justice systems, is the status of the Convention in the domestic legal order. The impact of the CRC on this issue varies greatly depending upon the system of implementation in a given country.<sup>20</sup> Veerman and Gross correctly make the assertion that the impact of the CRC depends on the system applicable for the domestication of international treaties in each and every country.<sup>21</sup> They identify two systems applicable, namely, the monist; by which international conventions are directly incorporated into law, and the dualist system under which treaties can only be incorporated into national law by domestic statute. It is up to each individual state to determine which of the two systems it adheres to. This fact is given endorsement by the CROC's interpretation.<sup>22</sup> To a large extent, the system chosen by a state can be deduced from looking at the state's law and practice with respect to different international instruments.<sup>23</sup>

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Macroscopic view of State Practice" (1996) 4 *The International Journal of Children's Rights* 357. For the texts of reservations and interpretative declarations on the CRC see < <http://www.unhchr.ch/html/menu2/6/crc/treaties/declare-crc.htm> > (last accessed 01 August 2005).

<sup>20</sup>Veerman and Gross (n 15 above) 297.

<sup>21</sup> Veerman and Gross (n 15 above) 297.

<sup>22</sup>General Comment No.5 (n 8 above) Paras 18-20 (Discussing the two systems, monism and dualism and recommending that whichever system is chosen, it must be ensured that the CRC's provisions are given domestic legal effect).

<sup>23</sup>Lindholt, L (1997) *Questioning the Universality of Human Rights: The African Charter on Human and Peoples' Rights in Botswana, Malawi and Mozambique* Aldershot/Vermont: Ashgate/Dartmouth 85.

In line with the most common practice of incorporation among states within the Commonwealth,<sup>24</sup> the dualist system has been the pre-dominant norm in most common law countries of which all the countries under study are a part.<sup>25</sup> This requires the enactment of domestic legislation to give effect to the rights of the child in the CRC.<sup>26</sup> Thus, the CROC, while acknowledging the need for all State Parties to ensure by all appropriate means that the CRC's provisions are given legal effect within their domestic legal systems, has encouraged the formal adoption of the CRC in national law and the need to clarify the extent of applicability of the CRC where a

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<sup>24</sup>Brownlie, I (1995) *Principles of Public International Law* (4<sup>th</sup> edition) Oxford: Clarendon Press 43.

<sup>25</sup>For example, Kenya in its Initial State Report on the CRC presented to the CROC and examined at the Committee's 27th session in the year 2001 clarifies that "The Constitution of Kenya does not specify the methods for transforming international treaties into municipal law. Kenya's practice follows the English one whereby for a treaty to apply, Parliament must pass an enabling Act to give effect to it". See CROC *Kenya Initial Report to the CROC* CRC/C/3/Add.62, 16 February 2001, Para 46 (hereinafter, 'Kenya Initial Report'). The South African position with regard to the relationship between the CRC and domestic law has been stated to conform to what happens in the "UK, Canada or Australia, [which] seems to suggest that on the face of it, judges can happily ignore the CRC, except where its principles have expressly been included in legislation in the municipal system", see Sloth Nielsen, J "Children's Rights in the South African Courts: An Overview Since Ratification of the UN Convention on the Rights of the Child" (2002) 10 *International Journal on Children's Rights* 138. In South Africa's case, international law is further given a special status in judicial interpretation as is explained on the discussion on the South African reform process section 3.5.3.2, below. For the other countries, it is submitted that the Namibian position is similar to the South African position due to the commonality of the Roman-Dutch law common system to both these countries and hence the need for the passing of domestic laws to give effect to international law. This is the case for Lesotho and Uganda where the position is similar to Kenya's due to a shared colonial link with Britain and an English common law system.

<sup>26</sup>The CROC has emphasized this in General Comment No. 5 (n 8 above) Para 20 which also states that "Incorporation [of the CRC] should mean that the provisions of the Convention can be directly invoked before the courts and applied by national authorities and that the Convention will prevail where there is a conflict with domestic legislation or common practice. Incorporation by itself does not avoid the need to ensure that all relevant domestic law, including any local or customary law, is brought into compliance with the Convention..."

country conforms to the monist system.<sup>27</sup> The discussion of the new laws in this thesis will therefore be with a view to assessing the extent to which these new laws were aimed at giving domestic effect to CRC's provisions particularly in relation to juvenile justice.

It has been recorded that the practice in the African context reveals a dismal record in relation to giving legal effect to human rights treaties in domestic legal orders, irrespective whether a state is monist or dualist.<sup>28</sup> While the absence of domesticating legislation can be more glaring in traditionally dualist countries as in the case of countries under study, monist states have fared no better in regard to giving effect to international law in their domestic legal order in most African countries.<sup>29</sup>

It seems, however, that the CRC has followed a different path in relation to the issue of incorporation particularly in light of evidence pointing to the enactment of enabling legislation. A recent general survey on the impact of the CRC in 62 State Parties records that the Convention has been incorporated into the national legal framework of most countries.<sup>30</sup> Such incorporation, the survey notes, has been through automatic

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<sup>27</sup> General Comment No. 5 (n 8 above) Para 19.

<sup>28</sup>See generally, country reports in Heyns, C (ed) (2004) *Human Rights Law in Africa* (Vol 2) The Hague: Martinus Nijhoff and An-Na'im, A (ed) (1999) *Universal Rights, Local Remedies: Implementing Human Rights in the Legal Systems of Africa* London: Interights.

<sup>29</sup>See discussions in An-Na'im, A (ed) (2003) *Human Rights under African Constitutions: Realizing the Promise for Ourselves* Philadelphia: University of Pennsylvania Press.

<sup>30</sup>UNICEF Innocenti Research Centre (2004) *Summary Report on the Study on the Impact of the Implementation of the Convention on the Rights of the Child* Florence: UNICEF. (The study includes sample countries from each and every region of the world with particular focus on countries which have had, or are in the process of having, two State Reports examined by the CROC. It includes 10 African countries. Only one country under study in this thesis - South Africa - is included). This view is



integration by existing constitutional principles, constitutional reform or through national law by legislation specifically adopted for that purpose.<sup>31</sup> Regarding the six countries under study in this thesis, Ghana, Namibia, South Africa and Uganda had child-rights provisions in their constitutions which already included some of the principles contained in the CRC before the recent enactment or proposal of new children's or juvenile justice laws, discussed in section 3.4 that follows below.<sup>32</sup> However in all the cases, a dualist system of incorporating international law treaties necessitated the adoption of specific national law.<sup>33</sup>

The countries under study in this thesis have either engaged in or are in the process of child law reform, with juvenile justice as an independent or substantial part of these endeavours.<sup>34</sup> Whether the products of these law reform endeavours conform to a child- rights - orientated juvenile justice system as required by the CRC is the subject of subsequent substantive chapters (4-7) of this thesis. At this point what is to be

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backed by an earlier study of the impact of the CRC in 4 countries, Woll, L (2000) *The Impact of the Convention on the Rights of the Child* London: Save the Children, UK.

<sup>31</sup>UNICEF (as above) 3.

<sup>32</sup>The cases of Uganda and South Africa are discussed in sections 3.5.1 and 3.5.3 respectively. Section 28 of the Constitution of the Republic of Ghana, 1992 is a child rights clause which enacts a number of children's rights including the right to the best interests of the child, the right to participation, a number of civil, political, economic, social and cultural rights and in respect of juvenile justice, the rule requiring the separation of children from adults while in detention. Section 15 of the Constitution of the Republic of Namibia is rather limited, making provision for the right to birth registration, protection from child labour and the prohibition of detention for children under the age of sixteen.

<sup>33</sup>In South Africa's case, however, international law may be given an enhanced status through provisions in the South African Constitution which require judicial reference to international law in court decisions, especially in cases involving the interpretation of the Bill of Rights. See section 39 of the South African Constitution, Act No. 8 of 1996. This is further discussed in the context of juvenile justice in section 3.5.3.2, below.

<sup>34</sup>Discussion on the law reform processes in these countries follows in sections 3.4 and 3.5 of this Chapter.

noted is the striking phenomenon that states have matched the overwhelming ratification of the Convention with an equal vigour at attempting its domestication through the avenue of unique law reform processes.<sup>35</sup>

### **3.4 A general overview of some child law reform initiatives in Africa in the period 1990 to date**

For a number of African countries, ratification of the CRC and the African Children's Charter<sup>36</sup> provided a climate within which to re-examine child laws.<sup>37</sup> Statutory child law reform examples from Africa include those of Ghana, Kenya, Namibia, Lesotho, South Africa, and Uganda which resulted in new or proposed laws to be considered in the next Chapters of this thesis.



The pioneering law reform project is that of Uganda.<sup>38</sup> The product of the reform initiative is the Children's Statute of Uganda<sup>39</sup> under which both child social welfare and juvenile justice issues are covered. In Ghana, reform efforts saw the promulgation of the Children's Act of 1998<sup>40</sup> dealing mainly with issues of child social welfare but

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<sup>35</sup>Heyns and Viljoen (n 6 above) generally highlights that this is a rarity in relation to UN human rights treaties. Country reports in Heyns (n 28 above) demonstrate this problem in the African context.

<sup>36</sup>African Children's Charter, referred to in Chapter 2, section 2.8.

<sup>37</sup>Sloth-Nielsen, J and Van Heerden, B "New Child Care and Protection Legislation for South Africa? Lessons from Africa" (1997) 3 *Stellenbosch Law Review* 266.

<sup>38</sup>Child Law Review Committee (Uganda) (1992) *Report of the Child Law Review Committee of the Ministry of Labour and Social Welfare* 3 (hereinafter 'CLRC (Uganda) Report').

<sup>39</sup>Children's Statute of Uganda, Act No.8 of 1996. In this thesis, 'Ugandan Act or Statute'.

<sup>40</sup>Act No. 560 of 1998.

excluding juvenile justice. A separate and dedicated Bill on juvenile justice was passed by Parliament in 2003.<sup>41</sup>

Soon after Kenya's ratification of the CRC in July 1990 a child law reform process was started and the resultant product was the Children's Act of 2001<sup>42</sup> that was passed into law in March 2002. Like the Ugandan Statute, the Kenyan Act serves as an umbrella statute applying to both matters of child social welfare on the one hand and juvenile justice on the other.

The search for new comprehensive children's statutes began in South Africa before the ratification of the CRC in June 1995. The early 1990s was marked by the clamour for a new South African juvenile justice system to be underpinned by new legislation. The process of juvenile justice law reform was formally started with the formation of South African Law Commission's Project on Juvenile Justice in 1996 (discussed in section 3.5.3, below) led to the Child Justice Bill<sup>43</sup> (currently before Parliament). The Bill seeks to provide for a dedicated juvenile justice system in South Africa. Further to this, a new Children's Bill<sup>44</sup> dealing with matters of child social welfare has now been passed by the National Assembly.<sup>45</sup>

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<sup>41</sup>The Juvenile Justice Act No. 650 of 2003. In this thesis, 'Ghanaian Act'.

<sup>42</sup> Chapter 586 Laws of Kenya. In this thesis, 'Kenyan Act'.

<sup>43</sup>The Child Justice Bill No.49 of 8 August 2002. In this thesis, 'South African Bill'.

<sup>44</sup>The Children's Bill (August 2003).

<sup>45</sup>On 22 June 2005 and now awaiting approval by the National Council of Provinces before coming into force. This thesis will, however, exclusively deal with the Child Justice Bill which is dedicated to juvenile justice issues.

The Namibian child law reform process started in 1992 and culminated in the Child Care and Protection Bill of 1996 that provides for matters of child social welfare, care and protection. The search for juvenile justice legislation remains high on the Namibian reform agenda with the recent redrafting of the Child Justice Bill (which at the time of writing awaits introduction into Parliament) considered in subsequent Chapters of this thesis alongside the other countries' new juvenile justice laws.<sup>46</sup>

Lesotho's reform process has so far led to the first draft Bill, The Children's Protection and Welfare Bill (2004)<sup>47</sup> which seeks to reform the whole area of child law in Lesotho. Like the Kenyan and Ugandan examples, this Bill includes both child social welfare and juvenile justice issues.

Child and juvenile justice law reform endeavours have been recorded in a number of other African countries including Nigeria, Malawi and Mozambique.<sup>48</sup>

Section 3.5 of this Chapter will turn to detailed expositions of the law reform processes in three (Uganda, Kenya and South Africa) of the six countries under study.<sup>49</sup> The discussions will highlight the origins of the law reform processes, some

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<sup>46</sup>Revised Child Justice Bill (2002) in this thesis, 'Namibian Bill'.

<sup>47</sup>In this thesis, 'The Lesotho Bill'. As of the time of writing, this Bill is not officially approved yet and is still the subject of debate in the Lesotho reform process.

<sup>48</sup>See, Gallinetti, J "Child Justice Reform in Nigeria" (2003) 5(3) *Article 40* 10; DeGabrielle, D (2004) "Juvenile Justice in Malawi" (Unpublished Paper presented at the Pre-Planning Workshop on the establishment of an Eastern and Southern Africa Regional Juvenile Justice Network held at University of the Western Cape, Cape Town on 11-12 November 2004); and Gallinetti, J and Sloth-Nielsen, J (2004) "Report on the Reform of Child Law in Mozambique" (Unpublished Report of the Community Law Centre commissioned by UNICEF-Mozambique).


<sup>49</sup>As already pointed out in this Chapter's introductory section 3.1 above, the choice of these three countries is taken as illustrative of the six law reform process examples. The motivation for the choice

of the factors behind the reform efforts, the consultative manner of the reform processes and some of the competing themes in the law reform debates. The discussion of these three examples will be done with a view to demonstrating how the obligation to undertake law reform under the CRC has been dealt with in these countries.

### **3.5 The law reform processes in the three countries**

#### **3.5.1 The process in Uganda**

##### **3.5.1.1 The genesis of, and impetus for, child law reform**

Of the countries under study, Uganda  was the first to engage in comprehensive child and juvenile justice law reforms. The Ugandan process has therefore been used as a reference point by other African countries engaging in child and juvenile justice law reforms in the aftermath of ratification of the Convention.<sup>50</sup> The first attempt to

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of the three countries is mainly that it is only in respect of these three countries that the author was able to access the complete documentation relating to actual law reform process; the Issue and Discussion Papers in respect of the South African process and the Reform Commission Reports in respect of all three processes. Further, as will be evident in substantive discussions on the content of the new or proposed laws in this thesis (Chapters 4-7), the Lesotho Bill in regard to juvenile justice provisions and the Namibian Bill are substantially similar, and in many respects identical to the South African counterpart, hence the relevance of the debates in the South African process to these two. Provisions in the Ghanaian Act are also similar to juvenile justice provisions in Kenyan and Ugandan Acts.

<sup>50</sup>At the time of the completion of the research phase for a new child law in Uganda, “governments in many African states were aware of the need to address the shortcomings in their (colonially inherited) child legislation and some had already embarked on the process of comprehensively reforming the laws concerning children, although none of the bodies set up to do this had [as at the time] yet presented their proposals to government with the exception of Uganda”, see Parry-Williams, J “Legal Reform and

reform laws relating to children in Uganda pre-dated the CRC and go back as far as 1964.<sup>51</sup> Subsequent attempts to reform child law resurfaced later when the then Ministry in charge of children's matters drafted the Children's and Young Persons Bill which was brought forward as a draft decree in 1973 and 1977 but never enacted despite efforts to this end up to 1981.<sup>52</sup> In spite of these early attempts, however, reform of the laws concerning children was at the time "a very low issue politically and further to this, it was not seen in the international proactive context of the rights of the child but rather as reactive to an internal problem."<sup>53</sup>

Up and until the country's ratification of the CRC therefore, Uganda was "like many developing countries saddled with old colonial laws written when the belief in the rights of the child were at a very early stage".<sup>54</sup> The laws relating to children were aplenty<sup>55</sup> but with regard to juvenile justice, the now repealed Approved Schools Act modelled on the British Children and Young Persons Act, 1933, made provisions for dealing with children under the age of 16 both as offenders and as in need of care and protection. It has been argued that the lobby for reform was in recognition of the

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Children's Rights in Uganda - Some Critical Issues" (1993) (1) *International Journal of Children's Rights* 49.

<sup>51</sup>Mulenga, J (1998) "The Law of Uganda in Relation to the Child" (Unpublished paper) cited in Parry-Williams, J (1991) "An Account of the Child Law Review Committee, Uganda 1989-1991: The Process and Considerations in Establishing the Committee and in Compiling its Proposals" (Unpublished MSc Dissertation submitted to the University of Lancaster) 24.

<sup>52</sup>Mulenga, J (1988) "Opening Speech" (Paper delivered at Conference on 'Juvenile Justice in Present day Uganda' held at Law Development Centre, Kampala, Uganda in 1988) cited in Parry-Williams (n 51 above) 24.

<sup>53</sup>Parry-Williams (n 51 above) 24.

<sup>54</sup>Parry-Williams (50 above) 49.

<sup>55</sup>It was noted that not less than ten (10) pieces of legislation and numerous pieces of subsidiary legislation dealt in one way or another with children's issues before the process of reform, see CLRC (Uganda) Report) (n 38 above) 38.

deficiency of such laws and the inappropriacy of the old colonial mechanisms for their administration.<sup>56</sup>

The UNICEF-convened national seminar of 1988 held in Kampala on the rights of the child was a landmark occasion that further catalysed the lobby for reform. During this occasion, attended by individuals and organizations in the government and non-government sector, both the Minister of Justice and Attorney General spoke about the need for child law reform in light of the inappropriacy of colonially inherited laws and the then impending international obligations of Uganda as the CRC was, at the time, in its final process of the drafting. The recommendations of the Seminar were later to prove far reaching in the implementation of children's rights in Uganda.<sup>57</sup> In the period that followed various government leaders, government departments and agencies as well as many other persons spoke out on the need for law reform. No lesser political figure than Uganda's Head of State made a number of speeches in support of these calls. During the 1988 Seminar, President Museveni noted that "as important as the need for human rights is, even more important is the need to

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<sup>56</sup>Parry-Williams (n 50 above) 49 (explaining that the whole of Uganda's child law before the eventual reforms after ratification of the CRC comprised of inherited English colonial legislation and most of the applicable concepts reflected English rather than Ugandan societal realities).

<sup>57</sup>See UNICEF (Uganda) (1988) "Report on National Seminar on the Convention" (Unpublished Report on file). This seminar called for the need to highlight and raise awareness on the concept of child rights and the CRC (then being drafted) in government, amongst top education officials and in NGO circles. The Seminar's report also recommended that the Ugandan government ratify the CRC and simplify the CRC into local languages when adopted. It further stressed the need to update some of the national laws on children to ensure consistency with the CRC, incorporate children's rights into the Constitution and motivated that the government set up a national committee to follow up on the implementation of the CRC.

recognize and protect the special rights of children who are the most vulnerable members of our society”.<sup>58</sup>

There was thus a partnership between government and non-government persons in the lobby for reform. While at this stage (1988-1990) the CRC was yet to be adopted, it was clear that the CRC’s imminent adoption at the time was central to the lobby for reform albeit even if actual knowledge of the CRC’s gestation was confined to a select few.<sup>59</sup> There was therefore an urge at the time to meet the expectations of an impending universal children’s rights treaty.

Therefore an interplay of a number of factors, including the recognition of a deficiency of the inherited child laws, the high-level governmental support, the partnership between government and civil society and the anticipation for the need to reflect the provisions of the CRC motivated the initiation of the Ugandan child law reform process. Thus, it has been pointed out that the eventual formal start of the Ugandan child law reform process “should not be regarded as the result of any single influence but instead as a complex interaction of pressures.”<sup>60</sup>

### **3.5.1.2 Appointment and composition of the reform body**

While law reform would normally have fallen under the Law Reform Commission’s mandate, the fact that the Commission was under-resourced and inactive meant that when it fell to a reform-minded minister in charge of children’s welfare to formally

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<sup>58</sup>CLRC (Uganda) Report (n 38 above) 59-60.

<sup>59</sup> Parry-Williams (n 51 above) 24.

<sup>60</sup> Parry-Williams (n 51 above) 32.



start the reform process, he constituted an independent Child Law Review Committee (CLRC).<sup>61</sup> In selecting the CLRC's members in the early part of 1990, the minister took considerable guidance from a child-rights NGO that had been calling for reform and was to later maintain a key influence in the CLRC's deliberations.<sup>62</sup>

The Committee's original membership of 12 proposed members represented all relevant government ministries and areas outside government including the fields of law, sociology, psychiatry, social work, the church and the NGO sector and child care agencies.<sup>63</sup> A subsequent increase in the membership from 12 to 14 retained this balance which in addition has been stated as having represented 'a fair spectrum of age, regional and gender balance.'<sup>64</sup> The CLRC was chaired by a person of "national distinction and who had been a judge of the country's highest court".<sup>65</sup> The CLRC further gained by involving six (6) outside consultants from within Africa and Europe who helped set the CLRC's work in a broader context.<sup>66</sup>

The CLRC was inaugurated in June 1990 some three months before Uganda's ratification of the CRC. Its terms of reference broadly included the review of the then existing laws concerning child welfare in relation to international and other

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<sup>61</sup>CLRC (Uganda) Report (n 38 above) 62.

<sup>62</sup>The NGO, Save the Children Fund (UK) had been active in the child social welfare sector at the time, particularly in the context of child soldiers and child victims of wars as a result of the war in Uganda. For a detailed description of the organisation's influence in the genesis of and actual reform process, see Parry-Williams (n 51 above) 32-37.

<sup>63</sup>CLRC (Uganda) Report (n 38 above) 66.

<sup>64</sup> CLRC (Uganda) Report (n 38 above) 66. The CLRC's membership was expanded so as to include two more representatives to take on board representation of two more disciplines that had been earlier left out of the original 12 members.

<sup>65</sup>Parry-Williams (n 50 above) 55.

<sup>66</sup>CLRC (Uganda) Report (n 38 above) 71.

documents on the rights of the child and “to propose appropriate legislation which shall be beneficial to children who are disadvantaged and in conflict with the law”.<sup>67</sup>

Over the next one and half year (17 months), the CLRC embarked on the task of researching and consulting on the proposed new child legislation. The broad terms of reference meant that the scope of the reform process included as many issues as possible. The scope of the CLRC’s work thus traversed the whole corpus of child law with issues of child social welfare at the state and family level being considered alongside juvenile justice issues. The Committee divided its work into 3 areas, namely; ‘young offenders’, ‘child care’ and ‘domestic relations’, which when taken together confirm the broad remit of the reform endeavour.<sup>68</sup>

### 3.5.1.3 The reform process under the CLRC



The CLRC adopted a highly consultative and publicised reform process as will appear in the subsequent discussion of the process it followed.

The first stages of the CLRC’s work involved a series of workshops held within a span of several months in mid-1990. Following these workshops, a sub-committee comprising of CLRC’s members was appointed. With the aid of newly appointed researchers, this sub-committee embarked on an analysis of existing legislation, international standards, comparative legislation from elsewhere and research articles on child law reform.

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<sup>67</sup>CLRC (Uganda) Report (n 38 above) 3-4.

<sup>68</sup>CLRC (Uganda) Report (n 38 above) 67-68.

A series of further workshops followed in late 1990 in which broad proposals for reform were adopted under the various topics mainly using the CRC as a reference point. For example in relation to juvenile justice, under the subject 'young offenders', proposals on increasing the age of criminal capacity, separating child welfare jurisdiction from juvenile crime jurisdiction, probation issues and the debate on the abolition or retention of corporal punishment were included among the broad proposals. In addition to identifying issues requiring further research such as how best to engage in public debate, the reach of the reform process and the desired number of laws to be enacted, the CLRC's three researchers embarked on a preliminary field research study carried out in seven different parts of the country.<sup>69</sup> Apart from attempting to answer these issues, these research visits also provided vital information on people's attitudes towards law reform in light of their customary practices.<sup>70</sup>



The CLRC held numerous internal meetings to explore the issues and collate the proposals from the above consultative process. It also held meetings with a number of stakeholders including relevant ministries like the justice ministry with a view to lobbying for some of its proposals.

In September 1990 the Committee convened its most seminal workshop attended by the CLRC members, top government representatives and members of the civil society. As a result of this meeting which coincided with the end of the first United Nations World Summit for Children held in September 1990 in New York, U.S, the process of

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<sup>69</sup>CLRC (Uganda) Report (n 38 above) 71-72.

<sup>70</sup>Parry-Williams (n 50 above) 50.

drafting Uganda's National Plan of Action for Children was started.<sup>71</sup> The purpose of the 5-day CLRC workshop was to further brainstorm the need for child law reform, debate some of the broad proposals and chart the way forward for the process. A comprehensive report on the workshop followed and on the basis of its proposals, 4 additional members to act as representatives for the departments of police, prisons and welfare and one political party representative were added bringing the total CLRC membership to 18.<sup>72</sup>

To undertake the issue of publicising the CLRC's work, a full time public relations officer was appointed. The public relations officer proved useful to the CLRC by popularising the law reform process through many articles, commentaries and correspondence he sent to the mainstream press.<sup>73</sup>



The above workshop's recommendations regarding further research in relation to the work of children's courts, and the plight of children in reform institutions, was also taken up.<sup>74</sup>

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<sup>71</sup>This was partly due to the fact that Uganda had sent a delegation led by the country's Head of State to the Summit. One of the most important resolutions of the Summit was the unanimous agreement by countries to adopt National Plans of Actions to facilitate the realization of children's rights, particularly those relating to children's welfare such as health, education and basic nutrition.

<sup>72</sup>CLRC (Uganda) Report (n 38 above) 66. This was further to ensure that as many stakeholders as possible were represented in the CLRC with the aim of assuring legitimacy of the proposals.

<sup>73</sup>CLRC (Uganda) Report (n 38 above) 75-76. The CROC has stated that "...the media - both written and audiovisual - are highly important in the efforts to make reality the principles and standards of the Convention...", see CROC "General Discussion on 'The Child and the Media' " 13<sup>th</sup> Session, 7 October 1996 CRC/C/50 Annex IX; CRC/C/DOD/1, 53.

<sup>74</sup>CLRC (Uganda) Report (n 38 above) 71-72.

Most significantly, the CLRC reached consensus (after considerable debate) on the adoption of ten broad underpinning principles which it agreed should guide its work.<sup>75</sup> At the heart of these principles were a number of CRC provisions including the best interests of the child principle (article 3), the right to participation (article 12) and the principle of detention as a last resort and if unavoidable, for the shortest period of time' (article 37(b)). One of the principles required the CLRC to ensure that the "CRC, the African Children's Charter and other relevant UN Rules shall be the guide in legislating for children."<sup>76</sup>

Subsequently, the CLRC, with the support of a number of child rights organizations and individuals, submitted a memorandum to the Uganda Constitutional Commission, which from early 1990 was engaged in the process of writing a new Constitution for Uganda. Partly on account of these efforts, the final Ugandan Constitution of 1995 included an elaborate children's rights clause in which a number of the CRC's provisions relevant to juvenile justice are included.<sup>77</sup>

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<sup>75</sup> CLRC (Uganda) Report (n 38 above) 68-70.

<sup>76</sup> Principle 10 of the 'Broad guidelines', CLRC (Uganda) Report (n 38 above) 70.

<sup>77</sup> Section 34 of the 1995 Constitution of the Republic of Uganda includes the principle of the best interests of the child and the rule requiring children to be separated from adults while in detention among a number of children's rights. This 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.

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

The CLRC divided its work among 3 internal task groups with the mandate that the three groups consider and draft appropriate proposals under the three different areas but drawing inspiration from the CLRC's broad principles.<sup>78</sup> The task group on 'young offenders' was charged with considering issues of diversion, the court process, disposals, custodial institutions and other juvenile justice issues while the other two groups, on 'domestic relations' and 'child care' dealt with the issues falling under the ambit of child social welfare, care and protection.

Before embarking on their tasks, the CLRC members undertook field visits to courts, children's homes, reformatory and approved schools, remand homes, prisons, police stations and probation offices, not only in urban areas but remote and rural areas as well.<sup>79</sup> The aim of these visits was to assess the practical situations in these places and engage with persons in charge of the criminal justice and child social welfare systems.<sup>80</sup>



Further discussions took place within and between the different task groups in the course of four (4) months (between October 1990 and February 1991) during which they also provided regular reports back to the full CLRC meetings on progress achieved. After considerable internal debates within the task groups and in the CLRC meetings, legislative drafts in relation to the three different areas were presented to groups of lawyers outside the CLRC and to the CLRC's consultants for scrutiny.

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(6)A child offender who is 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.

<sup>78</sup>CLRC (Uganda) Report (n 38 above) 71.

<sup>79</sup> CLRC (Uganda) Report (n 38 above) 71-72.

<sup>80</sup>CLRC (Uganda) Report (n 38 above) 72.

### 3.5.1.4 Further consultation and review of the draft proposals

In January 1991, the CLRC embarked on specific public sensitization on the ‘rights and responsibilities’ of the child that were proposed for inclusion in the new legislation by printing 1000 copies of a leaflet on these proposed rights and responsibilities.<sup>81</sup> These were distributed countrywide. At the same time, copies of a questionnaire regarding the inclusion of rights and responsibilities of the child were sent to targeted individuals - Ministers, Parliamentarians, District Administrators, representatives of international agencies, civil servants, members of the public, teachers and non-governmental organizations (NGOs) accompanied by copies of the leaflet.<sup>82</sup> A significant number of the responses expressed support for the concept of “children’s rights” and “duties of the child”.<sup>83</sup>



While most of the written responses pointed to a number of difficulties in achievement of the ideals of rights and responsibilities of a child (relating to affordability, poverty, cultural values) there appeared to be unanimity on the need for their inclusion in the proposed legislation.<sup>84</sup>

At the CLRC’s fourth workshop held in February 1991 a review of the three drafts was undertaken with some of the proposals undergoing alteration, simplification and major revisions. These three drafts were then compiled into one composite piece of draft legislation.

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<sup>81</sup>CLRC (Uganda) Report (n 38 above) 76.

<sup>82</sup>CLRC (Uganda) Report (n 38 above) 76.

<sup>83</sup>See generally, Eguny-Asemo, F (1992) “An Analysis of Reports of Meetings with Opinion Leaders” in CLRC (Uganda) Report (n 38 above) Annex 7.

<sup>84</sup>Egunyu-Asemo (as above) in CLRC (Uganda) Report (n 38 above) Annex 7.

The composite draft subsequently informed the CLRC's further consultation with specific target groups including district and local committee representatives (on whom some aspects of implementation of the proposed draft legislation had been placed),<sup>85</sup> selected opinion leaders, and probation and social welfare officials. This targeted consultation was in search of responses as to whether these groups had participated in the CLRC's workshops, whether they supported the philosophy of the CLRC's draft statute, and agreed to its feasibility in light of their roles in the proposed law's implementation.<sup>86</sup>

The responses elicited from these groups revealed general support for the CLRC's proposals while cautioning on the issue of practicability. There were fears expressed by a number of role players with regard to some juvenile justice issues, most particularly in relation to raising the age of criminal capacity where it was felt that such a raise would not receive unanimous public support.<sup>87</sup> This reveals the point that it cannot be taken for granted that children's rights ideologies would always be readily acceptable as a guide to children's issues, juvenile justice included.<sup>88</sup> It is submitted that children's rights ideologies will always come up against a number of other competing interests. It is only through a careful balancing of these interests with children's rights and through information dissemination of this balancing process that a desirable result may be achieved.

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<sup>85</sup>Such as lay adjudicators presiding over local council committee courts vested with jurisdiction in criminal and civil matters relating to children.

<sup>86</sup>An analysis of these groups' responses generally in support of the CLRC draft legislation is contained in Parry-Williams (n 51 above) 79-87.

<sup>87</sup>CLRC (Uganda) Report n 38 above) 114.

<sup>88</sup>Parry-Williams (n 51 above) 82 (recording on an apparent lack of consensus on the issue of age and criminal capacity).



To further assess the issue of the practicability of the CLRC draft, the CLRC appointed its fourth task group namely, ‘the administrative, management and resource implications task group’. The purpose of this task group was to undertake practical research through field visits and make recommendations regarding a number of issues. These issues included the costs of providing adequate probation and social welfare services, increase in court officers’ workload, the number of and conditions in government institutions, service delivery, the need for and affordability of putting up more care or reception centres and such other issues.<sup>89</sup> As a result of an examination of this issue of pragmatism, the CLRC’s proposals emphasize what its report characterizes as “a choice for local solutions to local problems, through empowering village committees rather than an over-emphasis on the formal (official) system”.<sup>90</sup> This approach is partly evidenced in the juvenile justice provisions which provide for an increased role for village committee courts dealing with child offenders.<sup>91</sup>



### **3.5.1.5 Conclusion of the process and the end product**

The final workshops held towards the end of 1991 considered the final drafts. These workshops also set the stage for the writing of the CLRC’s final report, a task that was given to the CLRC’s legal and social work researchers.

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<sup>89</sup>See Eggunyu-Asemo, F “An Analysis of Meetings with District Development Committees and Resistance Committees” in CLRC (Uganda) Report (n 38 above) Annex 6.

<sup>90</sup> Eggunyu-Asemo (as above) in CLRC (Uganda) Report (n 38 above) Annex 6.

<sup>91</sup>Considered in Chapter 5 on Diversion.

The CLRC handed its final report to the relevant ministry in the 1992 and this marked the formal end of the CLRC's work. After a couple of years, the draft Bill produced by the CLRC and further worked upon by drafters attached to the Ministry of Justice was introduced for debate in Uganda's National Assembly. It was subsequently enacted in 1996 as the Ugandan Children's Statute.<sup>92</sup>

The Act makes provision for the whole spectrum of child law in Uganda traversing both public and private law issues and includes within its ambit and including provisions on family care and children in need of care and protection, adoption and foster care. Detailed and comprehensive provisions on juvenile justice form part of the Act.<sup>93</sup>

The Act goes as far as making all the rights in the CRC and the African Children's Charter part of Uganda's domestic law by including the provision that "in addition to all the rights set out in [the Statute and its Schedules]... [a child] shall have a right to all the rights set out in the CRC and the [African Children's Charter]".<sup>94</sup>

The Statute's provisions relating to juvenile justice, the motivating factors behind them and implementation thus far will form part of the discussion in the subsequent chapters of this thesis.

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<sup>92</sup>Act No. 8 of 1996, (n 39 above) and discussed in this thesis.

<sup>93</sup>Part X of the Act read in light of the guiding principles of the Act (section 4 and the First Schedule).

<sup>94</sup>Section 4 of the Act and the First Schedule of the Act on 'guiding principles in the implementation of the Statute'.

### 3.5.2 The process in Kenya

#### 3.5.2.1 The genesis of and impetus for child law reform

Although the Kenya Law Reform Commission had, as far back as 1984, embarked upon a review of laws relating to children, the process was hastened by Kenya's ratification of the CRC on 30 July 1990. The early 1990s saw an increasing presence of child rights oriented non-governmental organisations (NGOs) who called for child law reform.

A number of factors motivated the lobby for reform.<sup>95</sup> Firstly, the desire to take into account the principles of the CRC served as an important backdrop to the reform of child law. Second, the need to repeal or substantially revisit colonially inherited pieces of legislation was a relevant factor. Thirdly, there was the need to centrally place children's rights as a concept in the applicable laws. Research noted that while laws concerning children were numerous, the child's position as a subject of these laws was largely tangential and incidental.<sup>96</sup> The need for law reform was made more fundamental in light of the absence of provisions in the current Kenyan Constitution on the rights of the child. This also led to the recommendation in the aftermath of child law reform to the effect that "the 'fundamental rights' chapter of the

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<sup>95</sup>As discussed at various sections of Kenya Law Reform Commission (1993) *A New Law on Children: Report of the Child Law Task Force* (Hereinafter "KLRC Report").

<sup>96</sup>KLRC Report (as above) 23 (also noting that no less than 66 statutes had provisions applicable to children).

Constitution should be reviewed and reformed so as to more squarely address the concerns of the CRC”.<sup>97</sup>

### **3.5.2.2 Appointment and composition of the reform body**

Urged by the calls for reform, the Kenyan Attorney-General (A.G) formally kick-started the process by directing the Law Reform Commission to review the existing laws concerning the welfare of children and make recommendations for improvement so as to give effect to the Convention.<sup>98</sup> The Commission acted by setting up a task force to undertake the process. The task force’s membership of 13 persons comprising of government officers, children’s rights advocates, experts and representatives of key child welfare organizations and academics reflected an inter-disciplinary approach.<sup>99</sup>

This team embarked on its study from March 1991.



### **3.5.2.3 The reform process under the task force**

The terms of reference of the team were very broad, calling for a comprehensive study on all issues affecting the rights and welfare of children with a view to developing a single consolidated piece of legislation.<sup>100</sup> Such legislation was required to ‘bring together all crucial laws affecting children, which [were at the time] scattered in

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<sup>97</sup>KLRC Report (n 95 above) 22. The present Kenyan Constitution, Act No. 5 of 1969 (as amended), contains no specific provisions on the rights of the child and the rights of the child are coterminous with the general traditional civil and political rights provided for each and every person in Kenya.

<sup>98</sup>Kenya Initial Report (n 25 above) Para 47.

<sup>99</sup>KLRC Report (n 95 above) 12-13

<sup>100</sup> KLRC Report (n 95 above) 14.

scores of statutes, into a single well conceived Bill.<sup>101</sup> In addition, the Law Reform Commission's mandate to the team was that the Bill takes into account the prevailing circumstances of the country and international law on the rights of the child.<sup>102</sup>

With the task force's broad remit in mind, it is not surprising that the law reform process in Kenya (as with the Ugandan example) did not pursue dedicated research on juvenile justice as a discrete area of reform divorced from other child law issues. Thus the reform process did not strike a distinction between child social welfare on the one hand, and juvenile justice on the other, as in the case of South Africa (considered below). Rather, the whole rubric of child law (public and private law issues alike) was covered, with juvenile justice reform forming part of the whole process.

The task force's work started with extensive research on literature.<sup>103</sup> The subsequent approach of the task force was highly consultative. Information from official administrators and the general public was elicited through public meetings during provincial visits. The team invited the submission of memoranda from organisations and individuals, and exchanged views with experts and practitioners from outside Kenya. In addition to the country-wide visits, the task force had the opportunity to benefit from comparative experience by undertaking a visit to Egypt in order to enlighten itself on the interaction between Islamic law and children's rights on a number of issues including adoption and affiliation.<sup>104</sup>

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<sup>101</sup> KLRC Report (n 95 above) 14.

<sup>102</sup> KLRC Report (95 above) 14.

<sup>103</sup> The Task Force's methods of Inquiry as set out in KLRC Report (n 95 above) 14-16.

<sup>104</sup> KLRC Report (n 95 above) 16.

At different various stages, the task force resorted to seminars and panel discussions for the purpose of further discussion. The above consultative process served as a backdrop for the writing of the task force's report.

#### **3.5.2.4 Seeking the views of children**

In order to take into account the views of children in the law reform process, a school essay competition was conducted to obtain some opinions of children regarding their 'rights, duties and welfare'. As stated in the task force's final report, the purpose of the essay exercise was mainly to get the direct input of children for "a law that should be their law rather than a law about them."<sup>105</sup> The emerging essential points from these essays, generally in support of protection of children's rights, were synthesised and incorporated in the report.<sup>106</sup>



#### **3.5.2.5 The report and juvenile justice issues**

While the task force's report is positively comprehensive in its reach to child law issues, it is submitted that it does not address a number of juvenile justice issues in great detail. Thus the report only engages in a brief discussion of the juvenile justice system at the time and ignores a number of juvenile justice issues which are considered in the CRC.<sup>107</sup> In mitigation, this lacuna may be attributed to the ambitious

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<sup>105</sup> KLRC Report (n 95 above) 14.

<sup>106</sup> KLRC Report (n 95 above) 16.

<sup>107</sup>The failure to directly address the issue of minimum age of criminal capacity (considered in Chapter 4) and diversion (Chapter 5) are just but two examples at hand.

nature of the reform endeavour as evidenced in the task force's wide terms of reference. This militated against delving in detail in specific areas.<sup>108</sup>

In addition, the overall placing of the whole reform debate influenced the drafters of the new law to include a number of principles drawn from international child rights law in relation to juvenile justice provisions. This is demonstrated in regard to provisions on the ideal of a separate juvenile justice system, indirect provisions which enable diversion and provisions for new sentencing and alternative sentencing regimes. These are considered in more detail in subsequent Chapters of this thesis (Chapters 4-7).

### **3.5.2.6 Conclusion of the process and the end-product**



The task force's report was submitted to the government in May 1994. One of the key recommendations was the enactment of a Children's Bill and the amendment of other relevant statutes not codified under this Bill.<sup>109</sup> As a result a Children's Bill was presented in Parliament in February 1995. However, on its first reading there was wide dissatisfaction with many regarding it as insufficient. Once again, the non-governmental lobby group was at the forefront of the reform process this time by identifying the weaknesses and omissions in the Bill. NGOs criticised the Bill as falling short of the provisions and spirit of the CRC. They cited a number of anomalies including the absence of a sensitivity to religious concerns in the Bill's provisions, a number of missing children's rights including social security, free and

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<sup>108</sup>This is illustrated in the broad approach that the Task Force's Report (n 93 above) takes on the issues discussed under it.

<sup>109</sup>Kenya Initial Report (n 25 above) Para 48.

compulsory education, the right of child refugees and displaced children, of lack of attention to the problem of children accompanying their mothers to jail and, of inadequate protection of the girl child from a variety of disadvantages.<sup>110</sup> Of direct relevance to juvenile justice were the concerns, firstly, that the Bill failed to address particular issues such as the homelessness of street children.<sup>111</sup> A second concern was to the effect that certain individual provisions of the Bill portrayed child offenders as criminals in need of punishment.<sup>112</sup>

The criticisms on the first draft Bill led, once again, to consultations between various interest groups, including NGOs. The Attorney General then urged the task force to reconsider the Bill with a view to redrafting it so that it addressed the anomalies.<sup>113</sup>

This process dragged on between 1994 until 2001 when the final draft Children's Bill was presented to Parliament and eventually enacted in the next year as the Children's Act.<sup>114</sup>




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<sup>110</sup>Kenya Initial Report (n 25 above) Para 50.

<sup>111</sup>Human Rights Watch (1997) *Juvenile Injustice: Police Abuse and Detention of Street Children in Kenya* New York: Human Rights Watch at 102-103. These deficiencies were also recorded in Kenya Initial Report (n 25 above) Paras 48 and 50.

<sup>112</sup>Human Rights Watch (as above) 102-103.

<sup>113</sup>Kenya Initial Report (n 25 above) Para 52.

<sup>114</sup>The seven year gap has been described as “frustratingly long from the point of view of the rights of the child”, see Odongo, G.O “The Domestication of International Standards on the Rights of the Child: A Critical and Comparative Evaluation of the Kenyan Example” (2004) 12(4) *The International Journal on Children's Rights* 419-430 at 420. The reasons for this long delay are not clear. However, it may be speculated that they entail a number of factors including the process of incorporating the concerns of different parties on the Bill's weaknesses, a waning enthusiasm on part of the government on the commitment to put in place a new children's law, technical parliamentary procedures dealing with re-introduction of and debate on Bills, and a congested legislative calendar, among other factors.



The Act repeals three pieces of legislation namely, the Children and Young Persons Act,<sup>115</sup> the Adoption Act<sup>116</sup> and the Guardianship of Infants Act.<sup>117</sup> The Act has been described “as an ambitious attempt”.<sup>118</sup> On the one hand, it consolidates the previous laws dealing with child care, protection, maintenance, guardianship and adoption. On the other hand, it contains novel provisions relating to the rights of the Kenyan child, the establishment of child care institutions, children's courts, particular provisions on juvenile justice and the establishment of new statutory institutions tasked with the implementation of the Act. The aspiration of the Act is stated as follows:

An Act of Parliament to make provision for parental responsibility, fostering, adoption, custody, maintenance, guardianship, care and protection of children; to make provision for the administration of children's institutions; to give effect to the principles of the CRC and the African Children's Charter and for connected purposes.<sup>119</sup>



The philosophy of the Act entrenches the concept of the rights of the child in Kenya depicting the child as autonomous and as a bearer of a range of rights, civil, political, economic, social and cultural.<sup>120</sup>

It is also significant that the enactment of the Act and lobbying by child rights activists was later to inform the inclusion of a comprehensive child rights clause in the

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<sup>115</sup>Chapter 141 Laws of Kenya (that dealt with selected issues on child care, protection and piecemeal provisions on juvenile justice).

<sup>116</sup>Chapter 143 Laws of Kenya (that governed the legal regime on child adoption).

<sup>117</sup>Chapter 144 Laws of Kenya (that made provisions for issues of custody and guardianship).

<sup>118</sup>Odongo (n 114 above) 420.

<sup>119</sup>Children's Act (n 42 above), Preamble [Emphasis added].

<sup>120</sup>Part II of the Act.

new draft Kenyan Constitution (2004)<sup>121</sup> which at the time of writing is in its last stages of enactment to replace the current Constitution which neither includes a children's rights clause nor provisions which are specific to children.<sup>122</sup>

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<sup>121</sup>Clause 47 of the Draft Constitution details a number of children's rights including the principle of the best interests of the child, a number of civil, political, economic, social and cultural rights including juvenile justice provisions in relation to the principle of detention as a last resort and for the shortest period of time and the principle requiring separation of children from adults while in detention. The text of clause 47 is as follows:

“**47** (1) Children hold a special place in society.

(2) It is the duty of parents, the family, society and the State to nurture, protect and educate children so that they can develop in a safe and stable environment in an atmosphere of happiness, love, respect and understanding and be able to fulfil their full potential in all respects, physically, intellectually, psychologically and spiritually, for the benefit of themselves and society as a whole.

(3) All children, whether born within or outside wedlock, are equal before the law and have equal rights under this Constitution.

(4) A child's best interests shall be of paramount importance in every matter concerning the child.

(5) A child's mother and father, whether married to each other or not, have an equal duty to protect and provide for the child.

(6) Every child has a right to –

- (a) a name and a nationality from birth and to have their birth registered;
- (b) parental care, or to appropriate alternative care when the child is separated from its parents;
- (c) free and compulsory basic education;
- (d) be protected from discrimination, harmful cultural rites and practices, exploitation, neglect or abuse; be protected from all forms of exploitation and any work that is likely to be hazardous or adverse to the child's welfare;
- (e) adequate nutrition, shelter, basic health care services and social services;
- (f) be free of corporal punishment or other forms of violence or cruel and inhumane treatment in schools and other institutions responsible for the care of children;
- (g) not take part in hostilities or to be recruited into armed conflicts and to be protected from situations of armed conflict;
- (h) not be arrested or detained except as a measure of last resort, and when a child is arrested or detained to be treated in a manner that promotes the child's dignity and self-worth and that pays attention to the child's rights, including but not limited to the right to –
  - (i) be so detained only for the shortest appropriate period of time;
  - (ii) be kept separate from adults in custody;
  - (iii) be accorded legal assistance by the State; and

The Act's provisions on juvenile justice,<sup>123</sup> the motivations behind their enactment and the extent of compliance with international children's rights law will be the subject of the next Chapters of this thesis.

### 3.5.3 The process in South Africa

#### 3.5.3.1 The genesis of and impetus for juvenile justice law reform

Starting in the late 1980s leading to the time of South Africa's ratification of the CRC in 1995, there was an overwhelming concern for the plight of children as a result of

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(iv) be treated in a manner, and to be kept in conditions that take account of the child's disability, if any, gender and age;

(i) have a legal practitioner assigned to the child by the State and at State expense in proceedings affecting the child, if injustice would otherwise result; and

(j) know of decisions affecting the child, to express an opinion and have that opinion taken into account, taking into consideration the age and maturity of

the child and the nature of the decision.

(7) Children with special needs, including girls, orphans, children with disabilities, nomadic children, refugee children, and homeless children, are entitled to the special protection of the State and society.

(8) The State has the obligation to take steps to implement in law and administration the provisions of this Constitution and of international instruments and standards on the rights of the child".

The Draft awaits the process of a public referendum to be held in November 2005. See Draft Constitution (2004) available at < [www.kenyaconstitution.org](http://www.kenyaconstitution.org) > (last accessed 01 August 2005). Since the present Kenyan Constitution (n 97 above) contains no children's rights clause, it is arguable that the child law reform process and the eventual enactment of a new children's legislation had a domino effect in the inclusion of an extensive children's rights clause in the proposed draft Kenyan Constitution (2004).

<sup>122</sup> Kenyan Constitution, n 97 above.

<sup>123</sup> Part XIII of the Act and the Rules in Schedule 5 to the Act (read in light of the whole Act particularly Part II on 'Rights of the Child').

apartheid.<sup>124</sup> These concerns remain ongoing and the legal recognition of children's rights has been recognized as crucial in the overall reconstruction of the South African society.<sup>125</sup>

The harsh consequences of apartheid were (and still remain) replete in all sectors characterised by widespread ill-treatment of children through abuse, neglect, child labour on farms, the spectre of street children and disintegration of families as a result of migrant labour, high infant mortality rates and the creation of separate inferior education regimes for race groups other than white, to give some examples. Of specific relevance to juvenile justice was the high rate of imprisoned children who in the days of apartheid were mostly political detainees and were subject to arbitrary arrests, detention without trial and sometimes torture.<sup>126</sup>



During the 1980s the struggle in opposition to apartheid had extended the spotlight on politically detained children with calls for their release.<sup>127</sup> The problem of pre-trial detention was earmarked for particular attention in light of the burgeoning number of children, at the time, mostly detained in prisons and police cells without trial. With the move towards democratic rule from the early 1990s, this focus slowly disappeared

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<sup>124</sup>See Mosikatsana, T.L. "Children's Rights and Family Autonomy in the South African Context: A Comment on Children's Rights under the Final Constitution" (1998) 3 *Michigan Journal on Race and the Law* 341 cited in Sloth-Nielsen, J. "The Juvenile Justice Law Reform process in South Africa: Can a Children's Rights Approach Carry the Day?" (1999) 18(3) *Quinnipiac Law Review* 469.

<sup>125</sup>Sloth-Nielsen, J. "The Contribution of Children's Rights to the Reconstruction of Society: Some Implications of the Constitutionalisation of Children's Rights in South Africa" (1996) (4) *The International Journal on Children's Rights* 323, 327-328.

<sup>126</sup>See Mosikatsana cited in Sloth-Nielsen (n 124 above) 469.

<sup>127</sup>In reference to the role of children in the struggle against apartheid, see Wilson, F and Ramphele, M. "Children in South Africa" in UNICEF (1987) *Children on the Frontline: The Impact of Apartheid, Destabilization and Warfare on Children in Southern and South Africa* New York: UNICEF.

and the campaign broadened to cover the general situation of children in conflict with the law.

The need to address these concerns resulted in a number of legislative enactments dealing with children. In this section however, focus will be placed only on the developments in relation to the comprehensive juvenile justice law reform process and the children's rights clause in the South African Constitution (1996).

In the period-late 1980s and early 1990s, there was an emergence of a strong child rights movement in South Africa.<sup>128</sup> With this development a lobby of children's rights oriented NGOs launched campaigns to focus public attention to children who were in detention for offences not linked to the struggle.<sup>129</sup> The thrust of these campaigns was mainly fixed on the release of children from prisons and police custody - a feature that led to a number of legislative enactments aimed at limiting pre-trial detention of children.<sup>130</sup> The commitment to address pre-trial detention would later prove to be a dominant theme in the South African juvenile justice law reform process.<sup>131</sup>

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<sup>128</sup>Skelton, A "The South African Child Justice Bill: Transition as an Opportunity" in Jensen, E and Jepsen, J (2004) *Comparative Juvenile Justice* Copenhagen: Danish Institute of Human Rights (forthcoming).

<sup>129</sup>Sloth-Nielsen (n 125 above) 470.

<sup>130</sup>The most prominent of these was the Correctional Services Amendment Act (No. 17 of 1994) that was formulated to halt the then largely rampant practice of detaining children in adult prisons pending trial (discussed in Chapter 6, section 6.3). The enactment was later to prove unsuccessful thanks to ambivalence on the part of different role players in government and the lack of proper provisioning. For a discussion of the origins, intention and the failed implementation of this enactment, see Chapter 6, section 6.4.1.2.1.

<sup>131</sup>Discussed in Chapter 6, section 6.4.1.2.1.

Most significantly, the early 1990s further witnessed the origins of calls for a separate and new juvenile justice system especially in light of the position that the applicable legal framework for children accused of crimes did not differ in any material respect from that applicable to adults.<sup>132</sup> NGOs continued to advocate for a separate juvenile justice system underpinned by separate legislation through a number of campaigns. The lobby organised a number of seminars and conferences of which the 1993 “International Seminar on Children in Trouble with the Law” and numerous others were of significant relevance to the campaign for new legislation.<sup>133</sup>

### 3.5.3.2 Inclusion of children’s rights in the Constitution

Parallel to the lobby for juvenile justice reform, the presence and voice of children’s rights activists ensured the inclusion into the 1993 Interim South African Constitution<sup>134</sup> and later, the Final Constitution of 1996,<sup>135</sup> detailed clauses on children’s rights with juvenile justice provisions modelled on the CRC forming a part of these clauses.<sup>136</sup> The children’s rights clause in the Constitution meant that

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<sup>132</sup>Sloth-Nielsen (n 125 above) 469-477; The Drafting Consultancy (1994) *Juvenile Justice for South Africa: Proposals for Policy and Legislative Changes* Cape Town: Allies Printers 2.

<sup>133</sup>The Conference was organised by Community Law Centre, University of the Western Cape and attended by a number of individuals concerned with juvenile justice including government representatives, see Community Law Centre (1993) *Report on the International Seminar on Children in trouble with the Law* Bellville: Community Law Centre 8-9.

<sup>134</sup>Act 200 of 1993, section 30.

<sup>135</sup>Act 108 of 1996.

<sup>136</sup>Section 28 of the South African Constitution, 1996 makes provision for a number of children’s rights, civil, political and economic, social and cultural. A number of the rights relate to juvenile justice, the main ones being the best interests of the child principle and the right to the principle of detention as a last resort and for the shortest ‘appropriate’ period of time. The full text of section 28 provides: “28 (1)Every child has the right:

(a)to a name and a nationality from birth;

important international child rights law principles already found themselves in the domestic South African legal order before the process of domesticating the CRC's provisions had been started.<sup>137</sup> Thus in addition to the attempts to incorporate the CRC's provisions on juvenile justice through the process of law reform as is described below,<sup>138</sup> this 'constitutionalisation' of children's rights also amounted to incorporation of international law.

The rights of the child that have been encapsulated in the constitution are justiciable in South African courts. Further, the CRC is significant for South African domestic courts by virtue of specific provisions of the Constitution which require courts to


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- (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 right 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 to 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."

<sup>137</sup>The CRC (ratified by South Africa on 16 June 1995) was the first international human rights treaty to be ratified by post-apartheid South Africa.

<sup>138</sup>Sections 3.5.3.3 - 3.5.3.6, below.

consider international law in their deliberations.<sup>139</sup> It is thus unsurprising that the CRC's provisions have been behind a number of important judicial decisions based on children's rights.<sup>140</sup> A number of these decisions have dealt with juvenile justice, including the abolition of judicially imposed sentence of whipping by the constitutional court,<sup>141</sup> decisions on the need to limit the duration of incarceration of juveniles,<sup>142</sup> and decisions affirming a constitutional imperative to restrict the use of life imprisonment for persons under 18 years of age.<sup>143</sup>

### 3.5.3.3 Appointment and composition of the Project Committee

In December 1996 the Minister of Justice appointed a project committee on Juvenile Justice to come up with recommendations for a dedicated child justice statute for South Africa. The appointment of the  Committee was done under the auspices of the

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<sup>139</sup>The South African Constitution (n 134 above) section 39(1) (b) provides that a court, tribunal or forum 'must consider' international law when interpreting the Chapter of the Constitution that constitutes the Bill of Rights. Section 39(1) (a) requires that in such interpretation, a court, tribunal or forum must 'promote the values that underlie an open and democratic society based on human dignity, equality and freedom'.

<sup>140</sup>Discussed in Sloth Nielsen (n 25 above) 137-156.

<sup>141</sup>*S v Williams and Others* 1995 (3) SA 632 (CC) (declaring judicial corporal punishment unconstitutional and drawing from the CRC provisions on the right to protection from cruel, inhuman and degrading treatment in Article 37). The case is discussed in greater detail in Chapter 7, section 7.4.2.

<sup>142</sup>*S v Kwalase* 2000 (2) SACR 135 (CPD), *S v J and Others* 2000 (2) SACR 310 (C) are examples on point considering the CRC provisions regarding detention (Art 37) and the 'soft law rules' on juvenile justice regarding the principle of detention as a last resort. The cases are considered in detail in Chapter 7, section 7.3.5.

<sup>143</sup>The recent 5-judge decision of the South African Supreme Court of Appeal, in *Brandt v S* [2005] 2 ALL SA 1 (SCA), is an example. The decision considers the validity of the imposition of life imprisonment on persons under 18 within the framework of a minimum sentence legal regime in South Africa, and in light of the South African Constitution, CRC and the 'soft law' instruments on juvenile justice (the case is discussed in detail in Chapter 7, section 7.3.5).



South African Law Commission (SALC) (now known as South Africa Law Reform Commission) which, being the statutory body in charge of law reform in South Africa, oversees processes of law reform. The appointment of a project committee was in part based on SALC's practice of using such committees, comprising of members with expertise and knowledge on a particular field of proposed law reform.

The Committee comprised of six members drawn from civil society and government and was assisted by a secretary and a consultant to the SALC.<sup>144</sup> These members had different backgrounds in terms of their fields of expertise drawing from law, social work and sociology.

It is a testimony to the monumental role that members of civil society played in the process of lobbying for juvenile justice law reform that the membership of the Committee largely drew from its ranks. It has been stated that the Minister appointed individuals from civil society "whom he knew had been part of the NGO lobby group calling for substantial reform to the juvenile justice system".<sup>145</sup>

#### **3.5.3.4 The reform process under the Project Committee**

As with the Kenyan and Ugandan examples, the Committee adopted a highly consultative process. The South African example followed a three tier process, first

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<sup>144</sup>It is of note that this membership was much smaller than that of the reform bodies in Kenya and Uganda. It is submitted however that irrespective of its relatively thin membership, any reservations regarding the multidisciplinary scope of the Committee's work is dispelled in light of the highly consultative procedure it adopted as described in this section.

<sup>145</sup>Skelton (n 128 above) 5.

producing an Issue Paper for public debate.<sup>146</sup> The Issue Paper proposed, for the first time, a distinctive child justice system based on separate legislation. The Paper set out the shortcomings of the current juvenile justice system. It also provided for the proposed areas of juvenile justice reform and presented broadly framed issues in respect of which respondents were invited to comment. The Issue Paper noted that, as a point of departure, the “South African Constitution and international instruments provided an outline of what should be included in a future South African juvenile justice system”.<sup>147</sup>

The release of the Issue Paper was followed by a process of wide consultation with welfare, justice and prison officials and with individuals and organisations. No less than 13 workshops and briefings were convened by the committee, which also advised the SALC to host a well-attended international drafting conference to discuss the feedback received. Extensive deliberations by the Committee on the views regarding the Issue Paper then ensued.

At the second stage, the SALC released, in December 1998, a lengthy Discussion Paper drafted on the basis of consultations regarding the Issue Paper.<sup>148</sup> The Discussion Paper contained a draft Bill and these two documents formed the basis for subsequent country-wide consultation in the course of 1999. The Discussion Paper was a much more comprehensive document than the Issue Paper, and in addition to

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<sup>146</sup>South African Law Commission (1997) *Juvenile Justice: Issue Paper on Juvenile Justice*.

<sup>147</sup> South African Law Commission *Issue Paper* (as above) Para 5.

<sup>148</sup> South African Law Commission (1998) *Discussion Paper on Juvenile Justice*.

including a draft Bill, it gave motivation and rationale for the content of the Bill besides reviewing existing law, available literature and foreign comparative law.<sup>149</sup>

The release of the Discussion Paper was followed by further consultation with relevant government departments, NGO representatives and parliamentary portfolio committees through workshops.<sup>150</sup>

### **3.5.3.5 The process of consulting with children on the proposed law**

Mirroring the Kenyan example, the Project Committee of the SALC adopted a strategy of consulting with children in order to obtain their views on the proposals to be incorporated in the intended juvenile justice legislation. This was done by the commissioning of a consultative report based on research with children themselves so as to elicit their views on the shape of the proposed legislation.<sup>151</sup> This research went further than the Kenyan example in obtaining the views of children in the juvenile justice sphere by its specific objective of consulting children who had had experience with the juvenile justice system.<sup>152</sup> Thus, apart from a control group of senior school children who had no prior contact with the criminal justice system, all the children in the research had had direct experience of juvenile justice - as participants in a

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<sup>149</sup>The Ugandan law reform process was one of the examples considered.

<sup>150</sup>South African Law Commission (2000) *Juvenile Justice Report* Para 1.5.

<sup>151</sup>Kassan, D "Participation by Children" in Sloth-Nielsen, J and Gallinetti, J (eds) (2004) *Child Justice in Africa: A Guide to Good Practice* Community Law Centre, Bellville: UWC 58-59.

<sup>152</sup>In section 3.5.2.4, above regarding consultation with children in the Kenyan process, the general nature of the consultation was inherent in the fact that the process entailed the writing of an essay by school children on the concept of children's rights. As regards juvenile justice therefore, such consultation can be said not to have been specific to the experience of children who had undergone through the juvenile justice system.

diversion programme, in various forms of residential care after sentencing by criminal courts, or were children in prison either awaiting trial or serving sentences.<sup>153</sup> A number of valuable insights were gained from children's views on a number of issues ranging from what they considered to be a reasonable duration of incarceration and the desirable minimum age for imprisonment, to the issue of life imprisonment, and their views on the right to legal representation. These views found their way into the SALC final Report.

Consultation with children on the drafting of the South African Child Justice Bill has been described "as one of the striking examples of the eagerness with which South Africa has sought to follow the precepts of international best practice".<sup>154</sup>

### 3.5.3.6 Children's rights, public opinion on crime and pragmatism



In the period of the Committee's work, a number of social, economic, political and legislative shifts obviously occurred. The influence of these factors within the desire to locate the new 'child' justice system firmly under a child's rights banner was

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<sup>153</sup>Sloth-Nielsen, J and Van Heerden, B "Politics, Processes and Pressures of Legislating for Children in South Africa" in Dewar, J and Parker, S (eds) (2003) *Family Law: Politics, Processes and Pressures* London: Hart Publishing 571-587, 579-580.

<sup>154</sup>Stout, B and Wood, C "Child Justice and Diversion: Will Children's Rights Outlast the Transition" in Dixon, E and Van der Spuy, E (2004) *Justice Gained? Crime and Crime Control in South Africa's transition* Cape Town, UCT Press 117 (referring to the child rights to participation in the CRC, Article 12 considered in section 3.6.5, below). For a documentation of the views of children, see Community Law Centre (1999) *What the Children Said: A Consultation with Children on the Draft Child Justice Bill (1998-9)* Bellville: Community Law Centre.

expressly noted by the committee.<sup>155</sup> These factors included an ever increasing public concern about crime, which was acknowledged by the Report thus:

“Increasingly, however, during the three year investigation into Juvenile Justice by the Commission, a further influence has been brought to bear, and that is the deep concern in South African society about the high levels of crime. The public have expressed the need for a system of justice which deals effectively with serious violent criminals. This factor too has shaped the process of law reform.... [although it] was not originally envisaged by the Commission in the early stages of the investigation...”<sup>156</sup>

The second factor relates to the issue of fiscal constraints, and hence, the need to provide for a juvenile justice system that is affordable within the parameters of existing resources.<sup>157</sup> The Project Committee’s approach to this issue was to request the SALC to commission a group of experts to subject the proposed system to a process of costing by economic experts.<sup>158</sup> The costing exercise was aimed at determining how the implementation of the proposed system would fare in terms of cost when compared to what is spent in implementing the current juvenile justice system. The Committee’s other response (which is also related to the costing exercise) to the issue of fiscal constraint was the approach of adopting creativity and

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<sup>155</sup>South African Law Commission *Report* (n 150 above) Paras 1.1, 1.9 - 1.15.

<sup>156</sup>South African Law Commission *Report* (n 150 above) Paras 1.18 - 1.19

<sup>157</sup>South African Law Commission *Report* (n 150 above) Para 1.16.

<sup>158</sup>See Barberton, C and Stuart, J (1999) *Costing the Implementation of the Child Justice Bill* Research Monograph 14, Cape Town: Applied Fiscal Research Centre (AFReC) (described as ‘unique’ since it was the first law reform project to be subjected to costing of its proposals. The point has been made that “the drafters were conscious of the need to propose a new child justice system that would be possible for the state to implement.” See Sloth-Nielsen (n 124 above) 478).

innovativeness in the sense that rather than recommend the setting up or creation of new structures or categories of employees to discharge duties in the juvenile justice system, the Committee opted for what the SALC report terms “a high degree of imaginative conceptualisation”.<sup>159</sup> The SALC report elaborates upon this with examples as follows:

“...Whilst the Draft Bill requires the designation of “child justice courts”, this will not in fact involve the establishments of new courts, nor for the most parts, the employment of additional personnel. The increased specialisation of child justice courts [will be] linked not to such courts being housed in separate buildings, but rather to the personnel of such courts being properly selected and trained...[Similarly] although increased workload may mean that additional probation officers will need to be appointed for the full implementation of the [proposed] legislation, this is far less expensive than creating new categories of employees to undertake tasks such as assessment [of children] and the setting up of the [proposed] family group conferences.”<sup>160</sup>

### **3.5.3.7 Conclusion of the process and the end product**

The views received from the entire consultative exercise and further written submissions resulted in the committee’s final report released under SALC’s name in 2000.<sup>161</sup> The Report includes a draft Child Justice Bill, with motivations behind each and every provision in the Bill. The final report of the Commission's Committee on Juvenile Justice was handed to the Minister of Justice in August 2000. The handing

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<sup>159</sup>South African Law Commission *Report* (n 150 above) Para 1.16.

<sup>160</sup> South African Law Commission (n 150 above) Para 1.16.

<sup>161</sup>South African Law Commission *Report* (n 150 above).

over of the Report to the Minister of Justice after a period of three and a half years of the committee's work marked the end of the third tier of the process and with it, the end of SALC's formal involvement in the law reform process. The draft Bill was then scrutinised by the Directorate of Parliamentary Legislation, and was approved by Cabinet in November 2001.

The Bill was further redrafted by the Justice Department and the resulting draft was the Child Justice Bill of 2002.<sup>162</sup> Its Preamble states the purpose of the Bill in part thus:

“To establish a criminal justice process for those children accused of committing offences so as to protect the rights of children entrenched in the Constitution and provided for in international instruments...”



The Bill's objects clause and the clause on general principles expressly refer to a number of human rights entrenched in the CRC including the child's right to dignity, right to child participation, and the right to contact with the family. They also make express reference to a number of CRC principles on juvenile justice such as the principle of detention as a last resort and for the shortest period of time.<sup>163</sup> The clause also refers to the aim of “supporting reconciliation between the child offender, victims and communities through a restorative justice response”. The attempt at a balance between children's rights ideology and public concerns about crime is further reflected in the objects clause, which calls for the protection of children's rights as contemplated in the South African constitution while “reinforcing children's respect

<sup>162</sup>No. 49 of 2002 (n 43 above).

<sup>163</sup>CRC, Article 37(b). See Sections 2 and 3 of the Bill on ‘Objects of the Act’ and ‘General Principles’.

for human rights and fundamental freedom of others by holding children accountable for their actions and safeguarding the interests of victims and society”.<sup>164</sup>

The Bill is one of three examples of the juvenile justice laws analysed in this thesis where juvenile justice has been considered as a discrete area requiring its own underpinning legislation (separate from the sphere of child care, protection and welfare issues).<sup>165</sup> It provides for a new separate juvenile justice system in South Africa by making detailed provisions for separate criminal justice procedures and measures from the moment of a child’s arrest to the eventual disposition of a case.

### **3.5.3.8 The current status of the Bill**

The Bill was eventually introduced in Parliament in November 2002 with the first of several public hearings (by the Parliamentary Portfolio Committee on Justice) subsequently being held on diverse dates from February 2003. The Bill currently awaits conclusion of the parliamentary committee’s hearing and deliberation process before it can be tabled for enactment by the National Assembly.<sup>166</sup>

Citations of the Bill’s provisions in this thesis will be with reference to the Bill as introduced in Parliament, as the Child Justice Bill No. 49 of 8 August 2002. Since the

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<sup>164</sup>Section 2 (a) & (b) (ii).

<sup>165</sup>Two other examples to be discussed in this thesis, the Namibian Bill (n 46 above) and Ghanaian Act (n 39 above) mirror this approach of formulating separate and distinct legislation to underpin juvenile justice. The other Bill to be discussed, Lesotho Bill (n 47 above) is on the other hand similar to the Ugandan and Kenyan Acts (both substantively discussed in this thesis) in that it adopts a single consolidated piece of legislation that traverses the whole field of child law, with juvenile justice forming a part of the legislation.

<sup>166</sup>Skelton (n 128 above) generally.



on-going parliamentary debates and deliberations have been followed in the course of the research for this thesis, the substantive discussions of the Bill will take cognisance of any proposed changes in respect of the different provisions of the Bill during the course of parliamentary hearings.<sup>167</sup>

A detailed discussion of the individual components of the new juvenile justice system that the South African Bill proposes will follow in subsequent chapters (Chapters 4-7) of this thesis. This discussion will review the South African Bills in comparison to the other juvenile justice laws.

### **3.6 The themes and factors behind the common position emphasizing the centrality of a child rights ideology in juvenile justice law reform processes in Kenya, South Africa and Uganda**



The discussion of the reform examples in this Chapter has shown that different and unique factors can be cited as motivations behind each of the three law reform examples. However, the desire to establish new juvenile justice systems founded on the ideals of the CRC is common to all three examples. This last section of the Chapter discusses some of the factors and themes that have meant that all the three country examples are similar in the acceptance of the CRC as the basis for the provisions of the new laws or Bills despite the different societal realities and other competing pressures in these three countries.

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<sup>167</sup>Some of the debates in the parliamentary process on the provisions of the Bill are discussed in Skelton (n 128 above) generally and in Odongo, G “Public Hearings by the Portfolio Committee on Justice on the Child Justice Bill” (2003) 1(1) *Article 40* 1-3. The minutes of the Parliamentary public hearings and deliberations are also available at < [www.pmg.co.za](http://www.pmg.co.za) >.

### **3.6.1 A re-orientation of the basis upon which juvenile justice systems were earlier predicated to an approach based on children's rights**

Chapter 2 discussed that the juvenile justice systems of most African countries were predicated on colonially-inherited legislation.<sup>168</sup> It was argued that, since such laws were developed in an era predating the much more recent concept of children's rights, juvenile justice was considered along the welfare-justice continuum of theory discussed in that Chapter.<sup>169</sup> This had the effect that children's rights were prone to abuse and were actually violated in the juvenile justice systems. Such abuse or potential for abuse proceeded from the premise that before the recent law reform processes, juvenile justice in the countries discussed did not recognize children as bearers of human rights in their own right.<sup>170</sup> The need to reform legislation inherited from colonial or previous regimes was a key theme in the reform examples discussed in this Chapter. In the juvenile justice sphere, this has entailed a re-orientation of the basis upon which these inherited laws were based, that is, whether upon justice or welfare theories or upon a blend of the components of both theories.<sup>171</sup>

As a pointer to the dominance and influence of the notion of children's rights over and above theories of welfarism and justice, this Chapter has shown the absence of debates based on these theories in the reform processes.<sup>172</sup> Further, while debates on

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<sup>168</sup>Chapter 2, section 2.7.

<sup>169</sup>Chapter 2, section 2.7.

<sup>170</sup>Chapter 2, sections 2.7 and 2.8.

<sup>171</sup>See Chapter 2, section 2.8.1.

<sup>172</sup>This premise questions the assertion by Parry-Williams in relation to Uganda to the effect that "with a clear understanding of and support for the justice model some of the inconsistencies within the [juvenile justice] proposals were resolved", see Parry-Williams (n 51 above) 74. A discussion on the compliance of the substantive provisions of the new laws and Bills with the requisites of a children's

'public concerns about crime' formed part of the reform debates (especially pronounced in the Ugandan and South African processes), the end products of the reform processes have avoided an approach characterised by the issue of "how to handle juvenile crime". Thus all the draft Bills resulting from the three reform processes placed children's rights as their central theme from which issues such as public attitudes and affordability should not detract (even though these factors did influence the general outcome of new or proposed laws).<sup>173</sup> This is also evident in the draft laws or Bills from the Ghanaian, Lesotho and Namibian reform processes that will also form the basis of substantive discussions in this thesis.<sup>174</sup>

It is submitted that the law reform processes discussed in this Chapter reflect a move away from considering juvenile justice along the welfare-justice continuum very much predominant in the inherited legislation that the processes sought to repeal. This is notable especially in light of the observation in Chapter 2 to the effect that a number of juvenile justice law reforms initiatives in some western juvenile justice systems have been marked by an increasingly dominant emphasis on crime control as a theme.<sup>175</sup> Although the discussed African examples also mirror a retreat from justice-welfare debates, they however show a different starting point for juvenile

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rights-oriented juvenile justice represented by the CRC and international law forms the basis of the Chapters 4 - 7 of this thesis.

<sup>173</sup>For example the quest for cost effective or affordable child justice courts (by emphasizing specialization and training of officials rather than putting up new court buildings in the South African Law Commission process and in the Ugandan process, the use of local courts). This theme is considered in detail in respect of all six countries in the discussion on the individual components of the new juvenile justice systems as discussed in Chapters 4 - 7.

<sup>174</sup>Discussed in Chapters 4 - 7.

<sup>175</sup>See Chapter 2, section 2.6.

justice reform – one that is placed emphasis on a children’s rights approach while taking into account factors such as public concerns about crime and pragmatism.

### **3.6.2 The role of NGOs and civil society in the reform processes**

NGOs’ active presence and the work of children’s rights lobby groups throughout the CRC’s drafting, adoption and ratification is well documented.<sup>176</sup> NGOs and civil society’s interest in the process of implementing the CRC has continued unabated. For example, an elaborate network of organizations has seen the establishment of national child rights coalitions which have retained an influential role in the Convention’s reporting procedure.<sup>177</sup> The active role of NGOs at the international level has filtered into national contexts. A recent study on the CRC’s impact in 62 countries records that civil society engagement in developing and implementing law has been important to promoting behavioral change and creating a “culture of human rights for children”.<sup>178</sup> The three law reform processes discussed in this Chapter are further illustrative of this role of civil society.

Thus, the efforts of the Kenyan NGO lobby group, the monumental role played by South African child rights NGOs and the lead of a number of NGOs in Uganda were key factors in child and juvenile justice law reform in these countries. It is important that the NGO - lobby for juvenile justice reform in these countries has been carried

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<sup>176</sup>Cohen, S.P “The Role of Non-governmental Organizations in the Drafting of the Convention on the Rights of the Child” (1990) 12 *Human Rights Quarterly* 137. See also, Hart, N.S and Theytaz-Bergman, L “The Role of Non-governmental Organizations in Implementing the Convention on the Rights of the Child” (1996) 6 *Transnational Law and Contemporary Problems* 373.

<sup>177</sup>See Woll (n 30 above) generally.

<sup>178</sup>UNICEF (n 30 above) 1-2.

out under the banner of the Convention and the concept of children's rights. This has ensured that ideologies of children's rights were used from the beginning of the reform processes as the main reference point in developing new child and juvenile justice laws. The withdrawal of Kenya's Children's Bill from Parliament to take into account some of the concerns (such as the plight of street children and stigmatization of child offenders)<sup>179</sup> raised by the NGO lobby group which maintained a presence throughout the process, is an example in hand.

In spite of the role of NGOs, it is no gainsaying that the implementation of human rights treaties is a political affair which firmly puts national governments in the driving seat of the process of domesticating international law.<sup>180</sup> The CRC is not an exception, and thus the commitment of political leaders in these particular countries was highly important, as was evident in the political commitment of the first South African government of national unity (illustrated through the ratification of the CRC as the first international human rights treaty to be ratified in post-apartheid South Africa and subsequently, the initiation of the law reform process), the top level political support for child law reform in Uganda and equally witnessed in the initial enthusiasm of Kenya's A.G in the reform process on behalf of the government of the day. Support from the relevant government departments in charge of various aspects of administration was a common denominator in all the reform processes, as evidenced by participation of relevant government representatives in the formulation of the new laws.

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<sup>179</sup>Discussed in section 3.5.2.6, above.

<sup>180</sup>Discussion in section 3.5 above points out the high-level political support and commitment from top governmental officials of these countries regarding the domestication of the CRC. In the case of Uganda and South Africa, the support of the respective Heads of States in these countries at the initiation of the law reform processes was noted.

### 3.6.3 Political will to domesticate the CRC

As pointed out above, a partnership between government and civil society can also be said to have accounted for the common attempt in the different countries to domesticate the CRC. This fact is all the more remarkable when viewed against the general official (governmental) reluctance to pass domestic legislation to give effect to human rights treaties generally.<sup>181</sup> On the other hand, the reasons for the impressive political will that goes against this general reluctance to domesticate treaties are not self evident however. So what can be cited as the reasons for this development?

Some of the explanations appear to be rooted in the perceived nature of children's rights.<sup>182</sup> It has been observed that overwhelming political support for children's




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<sup>181</sup>An-N' aim (n 29 above) generally and the study by Heyns and Viljoen (n 6 above) generally. In Kenya, the CRC is the first main human rights treaty to be given domestic legal effect through a comprehensive statutory enactment.

<sup>182</sup>The arguments here draw from the views of Sloth-Nielsen (n 125 above) 327-328. Sloth-Nielsen considers the influence of children's rights in the official government decisions regarding children in South Africa in the post-apartheid period. The author's arguments on this point adopts, as a point of departure, the premise that the political elites or government would lend support to the cause of children's rights with the expectation that it is a politically popular cause to support and that these rights may not entail much resource allocation. She points out however that realization of children's rights (as with all other human rights) is resource intensive and may involve displeasing the popular political cause. Children's rights relating to child welfare such as basic health, education, etc will no doubt involve substantial allocation of resources by any government. At the same time, guaranteeing a number of children's (juvenile justice) rights such as a child's right to be diverted from the criminal justice system to diversion programmes (discussed in Chapter 5), will pit the governmental policy and legislation against the public perception on the need to fight crime and the protection of society. Another area for a competing ideology is the paternalistic view by which adults (and by extension governments) may look at children's autonomy. According to the author, it is when children's rights come against pressures (such as allocation of resources or public pressure on crime) (and not the public pronouncements or rhetoric of political figures) that a government's true political commitment to the concept of children's rights may be tested.

rights may draw from the perception that children are amongst the most vulnerable groups in the society who are worthy of protection. Under this perception of the “child-as-victim”, political unanimity on children’s rights may not be based on a genuine belief in children’s rights ideology but may have more to do with rhetoric.<sup>183</sup> This is related to the second view that the concept of children’s rights does not render itself vulnerable to political controversy by offending any voting constituency. Rather, the concept carries with it “a powerful positive and moral force attracting it to all sectors of society and can act both as a ‘vote winning’ and ‘non-vote alienating’ cause to espouse.”<sup>184</sup>

From the foregoing discussions, it is clear that where children’s rights are likely to carry high political costs, there may well be a retreat in political commitment to support the concept of children’s rights.<sup>185</sup> Indeed the fact that juvenile justice law reform involves a number of competing pressures challenges the perception that children’s rights are apolitical in nature. The issue of public attitudes *vis a vis* crime and most governments’ efforts to be seen to be getting tough on crime including child offending has been documented.<sup>186</sup> The reality that the administration of juvenile

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<sup>183</sup>Sloth-Nielsen (n 125 above) 327-328.

<sup>184</sup>Sloth-Nielsen (n 125 above) 328. The author terms this the ‘chicken soup’ theory of children’s rights in the sense that while support for the concept gives one the moral high ground, such support “does not entail any potentially compromising action, duty or commitment”, at 328.

<sup>185</sup>A fact acknowledged by Sloth-Nielsen (n 125 above) 328.

<sup>186</sup>For a recent discussion on the delicate balance between affirming children’s rights *vis a vis* public attitudes towards crime, see Hamilton, C and Harvey, R “The Role of Public Opinion in the Implementation of International Juvenile Justice Standards” (2003) 11(4) *The International Journal of Children’s Rights* 369-390 (also emphasizing the importance of children’s rights ideology due to the potential for manipulations of ‘public opinion’ through the media to reflect a harsh attitude towards child (juvenile) crime). The role of public opinion in juvenile justice reform is considered in detail in Chapter 8, section 8.7.

justice involves the allocation of resources by governments is also another pressure. It is therefore crucial that the law reform processes discussed in this Chapter took this into account, firstly through the mechanism of undertaking reforms within a broad-based approach that is not exclusive to but inclusive of political (governmental) influence. Second, it is important that the debates in the reform processes were not exclusively based on children's rights ideology but also included other pressing concerns such as public attitudes and the issue of cost. The result of this balancing process as reflected in the provisions of the new Bills or laws will be the subject of discussion in the subsequent chapters of this thesis (Chapters 4-7).

#### **3.6.4 Credibility of the reform bodies through pre-legislative publicity and broad-based consultation in the reform processes**



It has been asserted that the concept of human rights generally faces a legitimacy problem in Africa on two accounts. First, there is the charge that human rights are western or euro-centric in their evolution. Second, there is an apparent tension between certain cultural and religious traditions, on the one hand, and some human rights norms, on the other.<sup>187</sup> These concerns are relevant to the concept of children's rights as part of the wider human rights regime and thus affect the extent to which a child rights model can be said to underpin new legislation on juvenile justice.

It is submitted that the process of developing legislation underpinned by children's rights is as important as the legislation itself. To guard against claims of illegitimacy

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<sup>187</sup>An-Na' im, A "Introduction" in An-Na' im (n 28 above) 9-10 (asserting that "proponents of human rights in Africa should take challenges to the legitimacy of human rights in African societies very seriously").



of laws especially in the African context (of which all the countries under study are a part), it is necessary that such new legislation undergo a process of wide consultation with the public through representatives such as elected politicians and civil society. It is in this regard that both the broad-based nature of the bodies charged with the task of reforms and the highly consultative nature of the reform processes discussed are relevant. It was considered important in all the reform processes discussed in this Chapter that the reform bodies are broadly representative to enable not only a wide basis for representing varied interests, but also to allow for a comprehensive interdisciplinary scope for debate.<sup>188</sup> The broad composition of the reform bodies suggests the acceptance that the debate in reforming various aspects of child law (of which juvenile justice is a part) entails a consideration of a range of issues going beyond legal issues. The composition of the reform bodies can be said to have influenced the shape of the debates that took place and this enabled the discussion of the CRC's ideals within concrete contexts and not as abstract legal formalism.<sup>189</sup>

Further, in raising awareness through processes of public consultation, these law reform endeavours made a considerable step in the direction of changing and moulding new positive attitudes towards the relevance of children's rights and thus

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<sup>188</sup>For this conclusion on the 'broad composition of the reform bodies' see the respective discussions on the appointment and composition of three different bodies, see above sections 3.5.1.2, (on Uganda); 3.5.2.2 (on Kenya) and 3.5.3.3 (on South Africa).

<sup>189</sup>The law reform bodies in Kenya and Uganda had thirteen and eighteen persons as members respectively. Despite the relatively lean membership of the South African Juvenile Justice Project Committee (composed of six members), its highly consultative approach to coming up with the new proposals ensured a multidisciplinary debate of the issues.

partly addressing the issue relating to legitimacy.<sup>190</sup> Indeed the Ugandan law reform process was inaugurated even before the country's ratification of the CRC, in anticipation of Uganda's treaty obligations once it became party.<sup>191</sup> The inauguration of the reform process and subsequent publicity accorded to it were therefore significant tools in the introduction and dissemination of knowledge about the content of the CRC and child rights.<sup>192</sup>

This publicity accorded to the concept of children's rights is of further relevance in Africa against the backdrop of paternalism in relation to children that pertains in these countries and everywhere else.<sup>193</sup> By introducing the concept of children's rights for public debate, the reform processes probably did go some way in attempting to shape views regarding the challenges the concept posed for the traditional parent or state-child relationship and concomitant need to accord 'rights' to the child.<sup>194</sup>




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<sup>190</sup>Parry-Williams, J *et al* (1993) "A Case study of Legal Reform in Uganda as Part of Promoting Community Based Care" (Unpublished paper) on file with author) 24 (Commenting on the approach of the Uganda law reform process of subjecting the formulation of the new law to national debate).

<sup>191</sup>See this discussion in section 3.5.1.1, above.

<sup>192</sup>As an insider of the Ugandan law reform process, Parry Williams has noted that "further it was our belief that the process of researching, informing, debating, explaining and publicising the issues, concerns and ideas with which the [reform committee] was to grapple would be important in themselves as the passing of the law itself...By raising public awareness of the issues and concepts we would be going some way to change and mould new positive attitudes." See Parry-Williams (n 190 above) 24.

<sup>193</sup>Chirwa, D.M "The Merits and Demerits of the African Charter on the Rights and Welfare of the Child" (2002) 10 *The International Journal of Children's Rights* 169 (pointing out the predominance of the paternalistic view that 'a child has no rights of his or her own' in so far as recognition of the concept of child autonomy is concerned in many African countries).

<sup>194</sup>The success of such a dissemination process in impacting on paternalism is no doubt subject to dedicated research in this regard. Chapter 8, section 8.3, further considers the role of information dissemination on the concept of children's rights.

### 3.6.5 Listening to children themselves

In recognition of the child's right to participation in the CRC,<sup>195</sup> it is of note that attempts were made in the reform processes in Kenya and South Africa to obtain the views of children on the drafting of the new statutes. In contrast, it has been pointed out that while child participation stands at the heart of the CRC, children were not part of the process of the Convention's drafting.<sup>196</sup> Two of the three law reform processes discussed in this Chapter (Kenya and South Africa) provide evidence of a welcome attempt at giving effect to this principle.<sup>197</sup>

The South African process is particularly instructive to debates on juvenile justice since it specifically took into account the specific views and experiences of children in the juvenile justice system.<sup>198</sup> Obtaining children's views, particularly of those who have experienced a juvenile justice system, may be of further significance to retaining

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<sup>195</sup>The CRC provides in article 12 thus: 12(1)“States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given weight in accordance with the age and maturity of the child”; 12(2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.” Article 13 provides: “The Child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.

<sup>196</sup>Lloyd, A, “A Theoretical Analysis of the Reality of Children's Rights in Africa: An Introduction to the African Charter on the Rights and Welfare of the Child” (2002) 2(1) *African Human Rights Law Journal* 15-16 (also adding the drafting process of the African Children's Charter did not feature the participation of children).

<sup>197</sup>See section 3.5.2.4 above, on Kenya and section 3.5.3.5 above, on South Africa. Although not discussed in this Chapter, it is of note that the law reform process in Lesotho similarly entailed a consultation with children in the criminal justice system regarding their views on the need for reform, see Kimane, I (2004) “The Children's Law Reform Process in Lesotho” (Unpublished Paper on file) 2.

<sup>198</sup> See section 3.5.3.5 above.

a child rights philosophy against the background of other equally pertinent concerns such as the issue of public concerns relating to crime. In the South African example, it has been recorded that the SALC's Project Committee on Juvenile Justice "suspected that the children's experiences of the present criminal justice system, and the realism of their views, might lend a balance to the harsh sentiments on youth crime that are the media diet of the day".<sup>199</sup>

### 3.7 Conclusion

The discussion on the law reform processes of the three countries discussed in this Chapter demonstrates that state practice can give considerable substantive meaning to the formal provisions of international law treaties. The CRC provision (article 4) which obliges State Parties to enact domestic legislation and reiterated in article 40(3), have been significantly defined by the three law making processes discussed in this Chapter. The Chapter's discussions illustrate that the process of researching, informing, debating and publicising the intended law reform is as important as the law itself. The Chapter has therefore contended that the process of moulding positive attitudes regarding a child rights' oriented juvenile justice system starts at the law reform process stage, as the examples of Kenya, Uganda and South Africa show. Thus, it is submitted that in this way, international human rights law (the CRC) is invigorated by state practice through the mechanism of law reform. The words of one commentator describing the consultative South African law reform process best capture the theme of this Chapter:

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<sup>199</sup>Sloth-Nielsen and Van Heerden (n 153 above) 579.

“Law reform is too important to be left to lawyers. They are only one sector which has an interest in law reform....The South African Law Commission’s process is generally an open, participatory process of law reform...[The process of developing] the Child Justice Bill was exemplary. This represented a process where law reform [was] both a learning and a teaching tool, learning from those whose interests are affected; but often also teaching, giving a greater understanding of the need for change [and] the imperatives of reform.”<sup>200</sup>

This Chapter has contended that the need for change in the case of the countries whose processes were discussed was premised on developing new child or juvenile justice laws to replace the old ones which had been inherited from colonial or past regimes. These old laws were therefore divorced from the contemporary context of the countries under study. A further imperative for reform was the fact of ratification of the CRC and hence the obligation to develop new laws that reflect the provisions of the CRC.

This Chapter, has however, discussed that although the obligation on State Parties to the CRC to develop new laws may at first glance appear straightforward, the practice of the countries under study reveals that ensuring that children’s rights underpins the products of the law making process entails a significant commitment to this concept on the part of both government and civil society. Further, this Chapter has shown, in the case studies discussed, that the presence of such commitment was characterised by a partnership between government and civil society. Thus civil society’s efforts in

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<sup>200</sup>Asmal, K “Human Rights and the Administration of Criminal Justice: Law Reform in the Age of Globalism” (Speech to the International Society for the Reform of Criminal Law, Johannesburg Thursday, 7 December 2000) 4-5.

lobbying for and participating in the law reform process was backed by political will in all three countries.

In examining the reasons for this political commitment for the cause of children's rights, this Chapter discussed that the realization of children's rights (in the juvenile justice context) entails a number of competing pressures of which issues of affordability and public attitudes towards crime are two of many examples.<sup>201</sup> It is therefore vital that the law-making process must contend with these pressures to ensure the legitimacy and credibility of child rights' oriented legislation.<sup>202</sup> In the three law reform processes discussed in this Chapter, the approach was to mediate these pressures through broad-based consultative debates and the public nature of the processes.<sup>203</sup> In the Kenyan and South African contexts, this also entailed seeking the views of select groups of children so as to ensure the participation of children in the two processes. In addition, in the South African and Ugandan context, issues of affordability of some of the proposals were specifically dealt with, through costing and research on feasibility, respectively.

The subsequent Chapters of this thesis (Chapters 4-7) will discuss substantively the extent to which the products (laws and Bills) of the countries under study reflect the requirements of a child rights-oriented juvenile justice system as outlined in the provisions of the CRC.

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<sup>201</sup> See section 3.6.3, above.

<sup>202</sup> See section 3.6.4, above.

<sup>203</sup> The reform bodies were also representative of diverse interests.

## CHAPTER 4

### REFORMING ISSUES OF AGE AND CRIMINAL RESPONSIBILITY

#### 4.1 Introduction

Chapter 2 identified the issue of age and criminal capacity as one of the elements of a child rights-centred juvenile justice system.<sup>1</sup> It has long been accepted that childhood is relevant to the general consideration of criminality. The view that young children are slow to develop mental capacity and an acknowledgement that the criminal justice system is an inappropriate place to deal with their misbehaviour finds reflection in the concept of an age of criminal capacity. This concept is reflected in nearly all jurisdictions of the world throughout history. The CRC's provisions on this issue thus simply follow on this historical recognition, as do other CRC provisions which evince recognition of children's rights arising from their status as minors. The position is thus a paradoxical one of a competent, autonomous child imbued with capacity, while at the same time lacking in capacity in various regards. This has been expressed as follows:

“...[E]ven though children have [now] been recognized [by virtue of international law] as having rights, the contradiction lies in the continuing conception of childhood

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<sup>1</sup>Chapter 2, section 2.8.1.

as lacking in maturity and judgement and hence the [legitimate] denial of legal capacity, even by international human rights instruments on children.”<sup>2</sup>

That the CRC leans strongly toward protection rights is not hard to explain due to the vulnerability of children.<sup>3</sup> This premise may be reminiscent of the traditional notion of children as objects of protection rather than as bearer of rights. As a consequence it may signal a haunting legacy of the *parens patriae doctrine* discussed in Chapter 2. However it is instructive that the protection rights sit within the scheme of other rights relating to participation, prevention, and provision in the CRC as introduced in Chapter 2 of this thesis.<sup>4</sup> Vulnerability due to childhood therefore stands at the centre of a number of CRC provisions, of which the provision relating to age and criminal responsibility is just but an example.



The discussions in this Chapter will firstly review the issue of age and criminal responsibility<sup>5</sup> at international law. Thereafter, the positions obtaining in the countries

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<sup>2</sup>Ncube, W “The African Cultural Fingerprint? The Changing Concept of Childhood” in Ncube, W (ed) (1998) *Law, Culture, Tradition, and Children’s Rights in Eastern and Southern Africa* Dartmouth/Ashgate: Aldershot 16.

<sup>3</sup>LeBlanc, L (1995) *The Convention on the Rights of the Child-United Nations Lawmaking on Human Rights* Nebraska: University of Nebraska Press 123.

<sup>4</sup>See Chapter 2 section 2.8.

<sup>5</sup>The issue of age and criminal responsibility relates to two distinct set of issues as explained by Bottoms, A and Dignan, J “Youth Justice in Great Britain” in Tonry, M and Doob, A.N (2004) *Youth Crime and Youth Justice: Comparative and Cross-National Perspectives (Volume 31)* Chicago & London: The University of Chicago Press 121. The first set relates to the age at which children are deemed to have the mental capacity to commit a crime; the second relates to the age at which it is appropriate to render them liable to prosecution and formal sanctions. This Chapter will invoke the term ‘age of criminal responsibility’ in the first sense, that is, the mental capacity of children (cognitive and connative) to commit crimes with children below this age (the minimum age of criminal responsibility) being considered as lacking the capacity to commit crimes. This is also in line with definitions by scholars who define the ‘age of criminal responsibility’ as referring to “the age at which



under study on the issue of age and criminal capacity in the period before recent child law reforms introduced in the last Chapter will be highlighted. The Chapter will then examine how the age question has been dealt with in law reform in these countries. This examination will include the debates that underpinned the eventual law reform proposals. These discussions will relate both to the question of an upper age of criminal capacity and more importantly, the vexing issue of setting a minimum age of criminal capacity.

The central thesis in this Chapter will proceed from the premise that the setting of an upper or minimum age of criminal responsibility is an intricate issue that is vulnerable to diverse moral and political considerations in any given society. It will be contended, however that emerging international law is gradually distilling standards which are of guidance to States. Thus, following an examination of these standards, it is the contention in this Chapter that State practice in setting the upper and minimum age of criminal responsibility can be tested against these emerging international law standards.

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a person is considered capable of discernment (the capacity to distinguish right from wrong) and therefore bearing the responsibility for his criminal acts. It is the age from which the child is judged capable of contravening the criminal law". See Cappelaere, G, Grandjean, A and Naqvi, Y (2005) *Children Deprived of Liberty: Rights and Realities* Amsterdam: Defence for Children International 26. On the other hand, the age at which a person becomes liable to the adult criminal justice system (with the full procedures and penalties of the ordinary criminal law being considered applicable) will be treated as the upper age of criminal responsibility.

## 4.2 The position in international law regarding the setting of a minimum age of criminal capacity

### 4.2.1 The CRC and the jurisprudence under it

As pointed out in the introduction, international law acknowledges the link between age and criminal capacity. The most direct reference to this is found in Article 40 (3) (a) of the CRC requiring state parties to establish ‘a minimum age below which children shall be presumed not to have the capacity to infringe the penal law’. This obligation is reiterated in the African Children’s Charter which is worded in similar terms.<sup>6</sup> However, these provisions fall short of prescribing such an age, a clear illustration of the lack of an international standard on the age at which criminal capacity should be imputed. A scrutiny of the CRC’s *travaux préparatoires* reveals that during the drafting stages of the Convention there was no specific discussion on the issue of age and criminal responsibility. The only reference was to recognition by States of “the right of children accused or recognised as being in conflict with the penal law not to be considered criminally responsible before reaching a certain age”.<sup>7</sup>

A comparison of the minimum ages of criminal capacity set by different States (even those within relatively homogenous social and economic status) show disparities. This further explains the absence of an international standard in an area where notions

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<sup>6</sup>African Children’s Charter, Article 17(4).

<sup>7</sup>See Detrick, S (1992) *The United Nations Convention on the Rights of the Child: A Guide to the Travaux Préparatoires* Dordrecht: Kluwer Law 492-494.

concerning the age at which children are able to understand the consequences of their actions differ widely across cultures, and even within a given society.<sup>8</sup>

Despite the discretion accorded to states, some guidance is provided in the Beijing Rules to the effect that that the minimum age should not be fixed at too low an age level, bearing in mind the facts of a child's emotional, mental and intellectual maturity.<sup>9</sup> The official Commentary on this provision states that:

“The minimum age of criminal responsibility differs widely owing to history and culture. The modern approach would be to consider whether a child can live up to the moral and psychological components of criminal responsibility; that is, whether a child, by virtue of her or his individual discernment and understanding, can be held responsible for essentially antisocial behaviour. If the age of criminal responsibility is fixed too low or if there is no lower age limit at all, the notion of criminal responsibility would become meaningless.”<sup>10</sup>

The attempt at providing a guideline while still affording discretion to states has led to a situation in international law where the setting of a minimum age of criminal capacity is something of paradox. Hence, while the choice of a minimum age would always be considered an arbitrary decision (in the absence of actual research on child development) the choice of such an age must not be arbitrary.<sup>11</sup>

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<sup>8</sup>Freeman, M “The James Bulger Tragedy: Childish Innocence and the Construction of Guilt” in Freeman, M, (1997) *The Moral Status of Children - Issues on the Rights of the Child* The Hague: Martinus Nijhoff Publishers 235-253.

<sup>9</sup>Beijing Rules, Rule 4(1).

<sup>10</sup>Official Commentary, Beijing Rules, Rule 4.

<sup>11</sup>Van Bueren, G (1995) *The International Law on the Rights of the Child* Dordrecht/Boston/London: Martinus Nijhoff Publishers 173.

Since the adoption of the CRC there have been significant developments in relation to how the CROC has interpreted this obligation on the part of States. The CROC's jurisprudence has been three-pronged. This is considered in the sub-sections that follow below.

#### **4.2.1.1 Lack of a minimum age of criminal capacity**

Firstly, the Committee has been unequivocal that failure to establish a minimum age of criminal capacity is a violation of the CRC. This has been the CROC's message to States which have submitted their implementation reports and appeared before the Committee without ever having set such an age. Criticisms in the Concluding Observations to the initial State Reports of Guatemala, Micronesia, Panama and Senegal are illustrative of this stance.<sup>12</sup>



#### **4.2.1.2 Unacceptably low minimum ages of criminal capacity**

The second prong of the CROC's interpretation has considered certain minimum ages set by States as astonishingly low and hence a violation of the CRC. In its eight-year examination of State reports submitted between 1993 and 2000, the Committee expressed disapproval of the minimum age of criminal responsibility set by 35 states

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<sup>12</sup>As pointed out by Abramson, B (2001) "An Analysis and Commentary on Issues of Juvenile Justice in the Concluding Observations of the Committee on the Rights of the Child" in *Defence for Children International: Juvenile Justice: the Unwanted Child of State Responsibilities* Geneva: Defence for Children International 3.

and found these states in violation of the treaty, while recommending that they review their criminal responsibility laws for CRC compliance.<sup>13</sup>

Cantwell, in his 1998 study on juvenile justice, notes that the Committee was, at the time, consistent in its criticism of countries that have set the minimum age of criminal capacity at 10 years and below.<sup>14</sup> Other studies,<sup>15</sup> including more recent research on the Committee's jurisprudence in this regard, record that while still not recommending a specific age, the Committee has tended to criticise the setting of minimum ages set at 12 years or less.<sup>16</sup>

The double-edged criticism of the CROC regarding a lack of a minimum age of criminal capacity on the one hand, and a low minimum age, on the other should clarify the varying interpretations regarding the nature of the obligation in Article 40(3) (a) of the CRC that requires of States to set a minimum age. For example the view of the Scottish Law Reform Commission in its recent report argues that:

“Article 40(3)(a) [when] read in the context of other provisions of the Convention, especially article 3(1) [on the general standard of the best interest of the child] and Article 40(3)(b) [requiring that children below the age of criminal capacity be dealt

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<sup>13</sup>See Abramson (as above) 3.

<sup>14</sup>Cantwell, N “Juvenile Justice” in UNICEF (1998) *Innocenti Digest No. 3 on Juvenile Justice* Florence: UNICEF 3.

<sup>15</sup>For example JUSTICE (1996) *Children and Homicide - Appropriate Procedures for Juveniles in Murder and Manslaughter Cases* London: JUSTICE, cited in Urbas, G (2000) “The Age of Criminal Responsibility” in Australian Institute of Criminology *Trends and Issues in Crime and Criminal Justice Series No.181* 2.

<sup>16</sup>Abramson (n 12 above). This study, which was specifically on the CROC's jurisprudence on juvenile justice, was conducted some 3 years after Cantwell's study in UNICEF (n 14 above).

with other than judicial proceedings] , [relates to] the types of legal process appropriate for dealing with children who offend...this does not suggest that age of criminal responsibility [capacity] must be used solely in the sense of capacity to commit crimes.<sup>17</sup>

This view tallies with the interpretation that the setting of a minimum age is not an obligation under the CRC. It proffers instead that the obligation relates to how children below or above such an age are treated by the criminal (or juvenile) justice system and that accepted norms guide their situation.<sup>18</sup> Such an interpretation seems to be the approach adopted by the European Court of Human Rights in the *T v UK* and *V v UK* cases<sup>19</sup> discussed below.<sup>20</sup>

It is submitted however that in the overarching framework of a children's rights-orientated juvenile justice system, the setting of a minimum age of criminal capacity assumes a prominent place in light of the very essence of acknowledging vulnerability of children.<sup>21</sup> It has been correctly asserted that "an inappropriately low age for criminal responsibility shows that the State does not have a clear idea of what the

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<sup>17</sup>Scottish Law Commission (2002) *Report on Age of Criminal Responsibility* Para 2.28 [Emphasis added]. This view was motivated by the desire to strengthen the Scottish children's hearings system which heavily leans in favour of avoiding criminal trial processes for children. Para 3.4 of the Report states that "[The Commission's] objective is for Scots law to use a concept of age of criminal responsibility which is appropriate for a system in which the vast majority of child offenders are not processed through the criminal courts but are dealt with by the welfare-oriented system of children's hearings."

<sup>18</sup>Cantwell in UNICEF (n 14 above) 4 (is an example of this view).

<sup>19</sup>Application Nos. 24724/94, and 24888/94 reported in (2000) 30 *EHRR* 121.

<sup>20</sup>See Section 4.2.2.1, below.

<sup>21</sup>Chapter 2, section 2.8.1.

criminal law can achieve with young children, and does not appreciate the harm it can cause”.<sup>22</sup>

According to the CROC, as acknowledged by its criticism of low ages of criminal responsibility, a re-examination of the minimum age of penal responsibility upon ratification of the CRC is vital. This is in light of the standard of the best interests of the child and viewed against the entire purpose of the juvenile justice system. Such re-examination has been embraced by a number of law reform efforts, including the study of the Hong Kong Law Reform Commission<sup>23</sup> in this regard and similar efforts in Australia<sup>24</sup>, Britain<sup>25</sup> and the six African countries under study in this Chapter. While these efforts differ in their various approaches on the setting of a minimum age of criminal capacity, all take the view of the CROC that it is a requirement of the CRC that a legal system contains provisions on the minimum age of criminal responsibility in the sense of capacity to commit crime.<sup>26</sup>

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<sup>22</sup>Abramson (n 14 above) 2-3 citing the Commentary to the Beijing Rules.

<sup>23</sup>The Law Reform Commission of Hong Kong (2000) *Report on the Age of Criminal Responsibility in Hong Kong* (Hereinafter “Hong Kong Law Commission Report”) also available at < <http://www.info.gov.hk/hkreform> > (last accessed 21 January 2005).

<sup>24</sup>Australian Law Reform Commission (1997) *Seen and Heard: Priority for Children in Legal Processes ALRC Report No. 84* (hereinafter ALRC Report) (Chapter 18).

<sup>25</sup>UK Crime and Disorder Act (1998), section 34.

<sup>26</sup>The formulation of a rule setting a minimum age of criminal capacity can be done either as a procedural or substantive rule of law or both.

#### 4.2.1.3            **The abolition of the *doli incapax* rule is considered a violation of the CRC where its effect is a low minimum age**

The third prong of the CROC's jurisprudence deals with the *doli incapax rule* (discussed in more detail below)<sup>27</sup> under which children between certain ages are presumed to lack criminal capacity to commit crimes unless and until it is proved otherwise. In its reaction to a proposal that sought to abolish this doctrine in the Isle of Man (under the United Kingdom's (UK) jurisdiction), the Committee was of the view that abolition would be in violation of the CRC. It stated in its Concluding Observations thus:

“The Committee notes with concern that the Children and Young Persons Bill proposes to abolish the presumption that children between the ages of 10 and 14 years are doli incapax [incapable of committing a criminal offence], which means that legally the minimum age of full criminal responsibility is lowered from 14 to 10 years..... [It] strongly recommends that the Isle of Man reconsider its decision to abolish the principle of doli incapax for very young children. The Committee also recommends that the Isle of Man review its legislation with a view to increasing the age of criminal responsibility and to ensuring full conformity with the principles and provisions of the Convention.”<sup>28</sup>

It appears that this was the first time in the history of the CROC's examination of State reports that the Committee discussed the *doli incapax* doctrine directly. In a more recent examination of the United Kingdom's Second Periodic Report, the

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<sup>27</sup>Section 4.7, below.

<sup>28</sup>CROC, *Concluding Observations: Isle of Man (United Kingdom of Great Britain and Northern Ireland)*, CRC/C/15/Add.134, 16 October 2000 Paras 18-19.



Committee criticized the low minimum age of criminal responsibility set at 10 years for the rest of the UK (and 8 years for Scotland) and expressed ‘particular concern’ on the abolition of the doctrine.<sup>29</sup> However, while recommending that the UK considers raising the age of criminal responsibility from 10 years, the Committee stopped short of specifically recommending the reinstatement of the *doli incapax* rule.<sup>30</sup>

Thus, when read as a whole and more specifically in light of the CROC’s observations regarding the Isle of Man,<sup>31</sup> the CROC’s jurisprudence seems to suggest that the abolition of the doctrine would constitute a violation of the CRC where its effect is to leave an unacceptable low minimum criminal capacity in the eyes of the Committee. It has already been highlighted above that the Committee is increasingly adopting a minimum age threshold of 12 years in the absence of the *doli incapax* presumption. The CROC’s jurisprudence, however, remains silent on instances where the minimum age of criminal capacity is set at below 12 years (say 10 years) and the doctrine is retained for children below this age and the age of 14 years.<sup>32</sup> Further, the CROC’s jurisprudence also remains silent on how to ensure that the doctrine sufficiently protects children falling under its rubric, an issue to be discussed in the context of the discussion on the case study countries in this Chapter.<sup>33</sup>

In light of the discussion in the foregoing sections on the CROC’s jurisprudence, some tentative conclusions can be drawn on the obligation of State Parties under the

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<sup>29</sup>CROC, *Concluding Observations*: United Kingdom of Great Britain and Northern Ireland, CRC/C/15/Add. 188, 04 October 2002 Para 59.

<sup>30</sup>Concluding Observations, UK (2002) (as above) Para 62(a).

<sup>31</sup>See CROC, *Concluding Observations*: Isle of Man (n 28 above) Paras 18-19.

<sup>32</sup>Discussed in section 4.8.3, below.

<sup>33</sup>Section 4.8, below.

CRC on this issue.<sup>34</sup> These can be divided into three different approaches to the issue of setting a minimum age of criminal capacity. The first approach calls for a minimum age of 12 years or more.<sup>35</sup> The second approach calls for the setting of a minimum age of 12 and the inclusion of the *doli* presumption for children above this age.<sup>36</sup> The third approach that may be discerned from the CROC's view recommends the retention of the *doli* presumption where its abolition would lead to unacceptably low minimum age (the initial criticism on the age of 10 can be used as a reference in this regard).<sup>37</sup>

#### **4.2.1.4 Further CRC provisions relevant to the issue of age and criminal capacity**

It is important to emphasize that the Convention's obligations regarding age and criminal responsibility do not stop at the requirement of setting a minimum age of criminal capacity. The CRC embodies three other obligations.

The first obligation concerns the 'upper age of criminal responsibility'. At a normative level, consensus can now be said to have settled on the age of 18 as the relevant age in respect of which the CRC's provisions are applicable, in line with

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<sup>34</sup>These conclusions are termed 'tentative' since there is dearth of exhaustive CROC's Observations on the *doli* presumption and in particular where the common law minimum age of 7 is increased to a new minimum age (of say 10 years) but below 12, which has been stated as the preferred minimum by the CROC.

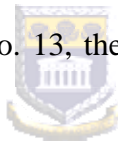
<sup>35</sup>This would be of relevance to countries that have adopted the approach of setting a minimum age of criminal capacity without the *doli* presumption. Most civil law countries fall within this category.

<sup>36</sup>This would be of relevance to countries that seek to increase their low minimum ages of criminal capacity while retaining the doctrine.

<sup>37</sup> See CROC, *Concluding Observations: Isle of Man* (n 28 above) Paras 18-19.

Article 1 of the CRC and the African Children’s Charter. The CROC has been consistent in voicing criticism on systems where persons below the age of 18 are subjected to the process of adult criminal justice system.<sup>38</sup> The core of the CROC’s message must thus be interpreted as an attempt to establish 18 as the upper age of criminal responsibility with the attendant CRC rights whether in a juvenile or adult court (although the requirement on separate institutions in Article 40 (1) seem to oblige the establishment of juvenile courts with exclusive jurisdiction for persons under 18 as will be discussed in a later Chapter of this work).<sup>39</sup>

The CROC’s position in relation to the age of 18 as the upper age for all juvenile justice systems is similar to that of the Human Rights Committee in charge of monitoring the United Nations International Covenant on Civil and Political Rights (ICCPR). In its General Comment No. 13, the Human Rights Committee has stated that:



“Article 10 does not indicate any limits of juvenile age. While this is to be determined by each State party in light of relevant social, cultural and other conditions, the Committee is of the opinion that the Covenant suggests that all persons under the age of 18 should be treated as juveniles, at least in matters relating to criminal justice.”<sup>40</sup>

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<sup>38</sup>For example the CROC told Morocco that it is “concerned that children between 16 and 18 years are treated as adults” in the justice system. See *Concluding Observations: Morocco*, CRC/C/15/Add.60, 30 October 1996 Para 16.

<sup>39</sup>Chapter 6 on the requirement of a Separate Juvenile Justice System.

<sup>40</sup>Human Rights Committee, *General Comment No. 13* “Article 14 (Administration of Justice)” (21st session, 1984), Para 13 reproduced in *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies* (1992), UN Doc. HRI/GEN/1, 32-34, 34.

The second State obligation relates to the requirement in Article 40(3) (b) to the effect that provision be made for children below the minimum age of criminal capacity.<sup>41</sup>

The third State obligation relates to how children who come into conflict with the law and who are aged between the minimum age and upper age of criminal capacity are to be handled in the juvenile justice system. This is the essence of most provisions of CRC in Article 37 and 40.<sup>42</sup>

## **4.2.2 Other International law instruments**

### **4.2.2.1 The European Convention on Human Rights**

The CRC and the African Children's Charter are the only internationally binding instruments alongside the 'non-binding' Beijing Rules that directly express themselves to the issue of age and criminal responsibility. However, two other instruments have been found to be of relevance - in the sense that their enforcement or monitoring bodies have been confronted with the issue. The first of these is the European Convention on Human Rights<sup>43</sup> considered in this section. The second is the ICCPR<sup>44</sup> considered in the next sub-section.

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<sup>41</sup>Discussed in detail in the context of the countries under study in section 4.9 below.

<sup>42</sup>See Chapter 2, section 2.8.1. A discussion of the individual aspects follows in Chapters 5 dealing with diversion, Chapter 6 on separate institutions and procedures, and Chapter 7 on Sentencing and alternative sentences.

<sup>43</sup>European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 U.N.T.S. 221, entered into force 3 September 1953. .

<sup>44</sup>ICCPR, introduced in Chapter 2, section 2.8.

The question whether the European Convention imposes an obligation on State parties to it in relation to rules regarding age and criminal responsibility came into consideration in the famous joint case of *T v UK* and *V v UK* cited earlier.<sup>45</sup> The case was brought by two applicants who had been charged and convicted, after a criminal trial before a Crown Court in England, for the abduction and murder of a 2-year-old boy. They were aged 10 at the time of the alleged commission of the offences and were 11 years of age at the time of conviction. Amongst the applicants' submissions was the averment that in light of their age, a public trial in an adult court was a violation of their Convention rights under articles 3 (on the right to the prohibition of torture, inhumane and other degrading treatment) and Article 6 (on fair trial rights).

The English law rule relevant to the issue of age stated that there was a conclusive presumption that a child under the age of 10 could not be regarded as having criminal capacity. The Court did not consider the age issue as directly relevant to article 6 on fair trial rights. Thus, the fact, of itself, of subjecting a child as young as 11 to a criminal trial did not involve a breach of article 6(1) relating to fair trial. Rather, the Court considered it as an indirectly relevant factor in determining whether there was a violation of the applicants' rights to fair trial (article 6). Indeed the Court's decision specifically considered the age issue to be crucial to the applicants' fair trial rights since the applicants' minor status as children warranted sensitivity to their ability to participate in the trial. The court therefore found a violation of the applicants' trial basing its decision on the manner and procedure of their trial - in an adult criminal court with all the attendant procedures that did not reflect the applicants' vulnerability as children. In reaching this conclusion, the court was in agreement that the trial

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<sup>45</sup>Cited in n 19 above.

process of the applicants, in an adult court with the attendant publicity, constituted a severely intimidating procedure for children of the applicants' age and impinged on their ability to participate in the proceedings in any meaningful way.<sup>46</sup>

In further words of the court:

“It is essential that a child charged with an offence is dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings...”<sup>47</sup>

The Court ventured into the issue whether there was a rule concerning the setting by States of a minimum age of criminal capacity in the context of the European Convention. It also considered whether the attribution of criminal responsibility at a low age constitutes a violation of article 3 (prohibiting torture, cruel, inhuman and degrading treatment).

According to the Court,<sup>48</sup> the European Convention was not concerned with the setting of an age of criminal capacity (whether a minimum or upper age) and that it did not require of European legal systems to provide for any rules (in contrast to the CRC and the African Children's Charter) that children of a certain age lacked criminal capacity. Consequently, the court came to the conclusion that attribution of criminal responsibility to a child aged 10 did not, *ipso facto*, constitute a breach of Article 3. In reaching this decision, the Court referred to the lack of a common standard amongst

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<sup>46</sup>Para 86, p 179 citing the decision of the European Commission on Human Rights in *V v UK*, App. No. 24888/94, Comm., Rep., 4.12.98 (Unreported) Paras 98-108.

<sup>47</sup>At 192.

<sup>48</sup>At 179.

States in the Council of Europe. It stated that “there [was] not at this stage any clear [prevailing] common standard amongst the member States of the Council of Europe as to the minimum age of criminal responsibility”.<sup>49</sup> In the separate concurring opinion of Lord Reed, then an *ad hoc* member of the court, the compatibility of a rule on the age of criminal responsibility and article 3 of the Convention “will depend primarily upon the nature of the trial procedure and sentences applicable to such a child under domestic law”.<sup>50</sup>

The effect of the court’s decision is therefore that if a child is to be prosecuted, the procedures used must take into account the child’s level of maturity and intellectual and emotional capacities and must promote the child’s understanding of, and participation in, proceedings against him. The Court’s decision “seemed to indicate that attributing criminal responsibility at a young age may not in itself be a violation of the European Convention provided that the trial procedures are modified to reflect age, maturity and vulnerability”.<sup>51</sup> Put another way, according to the Court, the issue of minimum age applies regarding how it affects the child’s ability to participate in the criminal trial process and hence a child’s right to a fair trial.

It is notable that while the court’s majority decision did not make direct reference to the CRC’s provisions in Article 40, nor to the CROC’s jurisprudence. However Judge (Mr) Bratza, in his concurring opinion, made express reference not only to the importance of the best interests principle in Article 3 of the CRC, but also Article

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<sup>49</sup>At 179

<sup>50</sup>Opinion of Lord Reed, at 192.

<sup>51</sup>Whyte, B “Reviewing Youth Crime in Scotland: Beyond Children’s Hearings” in Defence for Children International (2001) *Juvenile Justice Worldwide No: 3* Geneva: Defence for Children International 18.

14(4) of the International Covenant on Civil and Political Rights as well as the Beijing Rules to emphasize the majority view of the court.<sup>52</sup>

The court's decision regarding what constitutes a fair trial for juveniles can therefore be said to have been informed by the provisions and principles of the CRC and remains a watershed in the sphere of children's rights protection.<sup>53</sup> This is more especially since the court, unlike the CROC, is an international tribunal in a position to render and enforce binding decisions.

However the reluctance (particularly in the context of Article 6(1) of the European Convention on fair trial rights)<sup>54</sup> to lay down standards interpreting the European Convention in light of the CRC's rule requiring the setting of an age of criminal capacity, while explicable, is no doubt a significant letdown.<sup>55</sup> Admittedly, there was obviously difficulty for the Court to establish a common age in light of the differences amongst the state parties to the European Convention due to "perceptions of childhood reflect[ed] by different social, cultural and historical circumstances which are subject to change over time".<sup>56</sup> Still there was scope, it can be argued, for the court to venture into setting certain general guiding standards to European State

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<sup>52</sup>Kilkelly, U "The Best of Both Worlds for Children's Rights? Interpreting the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child" (2001) 23 *Human Rights Quarterly* 322.

<sup>53</sup>Kilkelly (as above) 324.

<sup>54</sup>In light of how the Human Rights Committee in charge of monitoring the ICCPR has approached the issue, as discussed in section 4.2.2.2, below.

<sup>55</sup>In the context of legal interpretation, the Court's decision may be explained by the textual differences between Articles 3 and 6 of the European Convention, on the one hand, and Article 40 (3) of the CRC, on the other, in that the CRC's provision is explicit on a rule requiring the setting of an age of criminal capacity while the European Convention is not.

<sup>56</sup>Per Lord Reed's judgment (n 50 above) 43.



Parties to the Convention. This is more so especially in light of the CROC jurisprudence highlighted above. The court's total reluctance to venture further into the CRC rule requiring the setting of a minimum age of criminal responsibility thus contrasts sharply with the CROC's jurisprudence discussed above and the Human Rights Committee of the ICCPR (discussed below). The approach adopted by these latter bodies point to the laying down of certain minimum thresholds regarding the setting of a minimum age of criminal responsibility. It is submitted in particular that judging from the work of the CROC, the minimum age of ten in question (for England and Wales at the time of the case) would appear to violate the CRC.

#### **4.2.2.2 The Human Rights Committee**

The Human Rights Committee (HRC) in charge of monitoring the ICCPR has not had to deal with communications similar to the *T and V* cases discussed above. However, the Committee has considered civil and political rights both in the general sense of the ICCPR's protection in particular Article 14 (on fair trial rights)<sup>57</sup> and article 24 of the ICCPR (dealing with right of children to special protection)<sup>58</sup> through its General Comments and Concluding Observations.<sup>59</sup>

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<sup>57</sup>ICCPR, Article 14(4), specifically adds that "in the case of juvenile persons, the procedure shall be such as will take into account their age and the desirability of promoting their rehabilitation".

<sup>58</sup>ICCPR, Article 24 provides: "(1) Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State 2 Every child shall be registered immediately after birth and shall have a name (3) Every child has the right to acquire a nationality."

<sup>59</sup>For a discussion on the legal status of General Comments, see Chapter 3, section 3.2.

As with the European Convention, the ICCPR is silent on age issues in general and the specific issue of age and criminal responsibility. The HRC has nevertheless addressed itself to these issues. Thus, the Committee has strongly weighed in favour of 18 as the upper age of criminal responsibility lending credence to a universal consensus on this age as the age of majority at least in the juvenile justice sphere.<sup>60</sup> Regarding a minimum age of criminal responsibility, the Committee has required of States to indicate among other ages, the age at which the child assumes criminal responsibility and that this should not be set unreasonably low.<sup>61</sup>

The HRC has expressed concern in instances where it felt that the age of criminal responsibility was very low.<sup>62</sup> In this regard, the approach of the HRC mirrors the CROC's but is in contrast to the European Court's. This is despite the textual differences between the ICCPR (Article 14(4)) and the European Convention (Article 6) on the one hand and the CRC (Article 40(3)) on the other.

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<sup>60</sup>Human Rights Committee *General Comment No. 17* "(Article 24) Rights of the Child" (35<sup>th</sup> session, 1989) Para 4 stating in part that "a state cannot absolve itself from obligations under the Covenant regarding persons under the age of 18, notwithstanding that they have reached the age of majority under domestic law". On the general issue of when childhood ends, the Committee has stated that "the Covenant (ICCPR) does not indicate the age at which [children] attain the age of majority [and that] this is to be determined by each State party in light of relevant social and cultural conditions". See General Comment No. 17 Para 4.

<sup>61</sup>General Comment No. 17 (as above) Para 4.

<sup>62</sup>Joseph, S, Schulz, J, and Castan., M (2004) *The International Covenant on Civil and Political Rights: Cases, Materials & Commentary* (2nd edn) Oxford/New York: Oxford University Press 629 (citing as examples, Human Rights Committee, *Concluding Observations: Guyana* (2000) UN Doc. CCPR/C/79/Add. 121, Para 16 (criticizing the minimum age of responsibility set at 10), *Concluding Observations: Zambia* (1996) UN doc. CCPR/C/79/Add. 62, Para 19 (criticizing the minimum age of responsibility set at 8), *Concluding Observations: Hong Kong (China)*, (1999) UN Doc. CCPR/C/79/Add. 117, Para 17 (criticizing the minimum age of responsibility set at 7).

The HRC has even had occasion to disapprove of certain variations of the common law rule relating to *doli incapax*.<sup>63</sup> The HRC's reaction to the rule on the age of criminal responsibility in Sri Lanka is a case in hand:

“The low age of criminal responsibility and the stipulation within the Penal Code by which a child above 8 years of age and under 12 years of age can be held to be criminally responsible on the determination by the judge of the child's maturity of understanding as to the nature and consequence of his or her conduct are matters of profound concern to the Committee...”<sup>64</sup>

This view shows that the Committee considers this particular formulation of the rule to be a violation of the ICCPR. Indeed, because under the ICCPR the HRC has jurisdiction to entertain individual complaints regarding violations of the Covenant, it can be asserted in theory that the Committee would find a minimum age of criminal capacity of 7-10<sup>65</sup> years to be a violation of the ICCPR (in particular Article 14 on the right to a fair trial and Article 24 on the rights of the child). Such a finding would extend to the case of rebuttable presumptions as in the Sri Lankan rule cited above. What is not clear, however, is whether the Committee would have approved of the common law rule of the *doli incapax* rule if the upper threshold was 14 years (as in the case of Isle of Man highlighted by the CROC's view cited earlier)<sup>66</sup> and not 12 years, as in the case of the Sri Lankan rule that was under scrutiny. It is similarly a matter of conjecture whether the Committee's view would be different if the

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<sup>63</sup> Considered in detail in section 4.7, below.

<sup>64</sup> Human Rights Committee, *Concluding Observations: Sri Lanka*, (1995) UN doc. CCPR/C/79/Add. 56 Para 20 cited in Joseph, et al (as above) (Hereinafter HRC, *Concluding Observations: Sri Lanka*)).

<sup>65</sup> Joseph, Schulz and Castan (n 62 above) 629.

<sup>66</sup> CROC, *Concluding Observations, Isle of Man* (n 28 above) Paras 18-19.

minimum age of criminal responsibility was set at a higher age and the presumption of a lack of capacity retained between this age and the age of 14 years - an approach adopted by some of the reform proposals to be examined later in this Chapter.<sup>67</sup>

### 4.3 An African conception of age and criminal responsibility?

Traditional African societies recognised the distinction between children as persons who are still maturing and responsible adulthood even though this recognition was not always predicated on the fact of numerical age. In many African customary laws, the end of childhood was by and large linked to factors such as rites of passage, marriage or the activities a person would undertake.<sup>68</sup>

Regarding the specific issue of criminal capacity (responsibility), it is of note that the principle that there should be a minimum age of criminal responsibility is not limited to contemporary African society and is not necessarily western in origin.<sup>69</sup> For example, Myburgh, in his study of indigenous criminal law in Bophuthatswana in apartheid South Africa,<sup>70</sup> points out that under this indigenous law, criminal responsibility depended on the ability to distinguish between right and wrong. Thus he records that a boy of 9 years or younger accused of causing a person's death could, on

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<sup>67</sup> Section 4.8.3, below.

<sup>68</sup> Armstrong et al., "Towards a Cultural Understanding of the Inter-play between Children's and Women's Rights: An Eastern and Southern African Perspective" (1995) 3 *The International Journal of Children's Rights* 337-341. See also Rwezaura, B "Competing Images of Childhood in the Social and Legal Systems of Contemporary sub-Saharan Africa" (1998) 12(3) *International Journal of Law, Policy and the Family* 253-278.

<sup>69</sup> Ekirikubinza, L.T (2004) "Juvenile Justice and the Law in Uganda: Operationalisation of the Children's Statute" (Unpublished Paper on file) 4.

<sup>70</sup> Myburgh (1980) *Indigenous Criminal Law in Bophuthatswana* 39 cited in Tibatemwa (as above) 4.

account of lack of experience due to youth, “be found incapable of distinguishing and choosing between right and wrong and therefore allowed to continue his “normal development under parental guidance”. He recounts that on such occasions, while the traditional court “would be awed and make an accused child aware of the seriousness of his deed”, correction would be left to the parents”.<sup>71</sup>

Chapter 2 discussed the influence of reception of western colonial or inherited laws on the African juvenile justice discourse.<sup>72</sup> The fact that most of the received laws had been applying until recent child law reforms in the aftermath of the CRC<sup>73</sup> always led to justified criticism that juvenile justice laws in the African context were based on alien old-fashioned theories of juvenile justice, long outdated even in the colonizing countries from which they were received.<sup>74</sup> The rules relating to age and criminal responsibility that obtained in most African countries were part of these inherited laws (as will be deduced from the next section). It seems that the minimum age question constitutes an exception to the point that the received laws were in most cases foreign to local African contexts. It is submitted that this is due to the fact that the setting of a minimum age reflects traditional African thinking on children’s lack of capacity. It can therefore be concluded that the reception of western juvenile justice laws which repealed the application of customs in the sphere of juvenile justice was not disconnected to local thinking on the specific issue of age and criminal responsibility. The only difference hinges on the specific actual age at which a child was/is considered as lacking capacity to commit crime (which differed widely not only

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<sup>71</sup>Myburgh (as above) 39.

<sup>72</sup>Chapter 2, section 2.7.

<sup>73</sup>Introduced and discussed in Chapter 3, section 3.5.

<sup>74</sup>Rwezaura, B “Law, Culture and Children’s Rights in Eastern and Southern Africa” in Ncube (ed) (n 2 above) 305-306; see also discussion in Chapter 2, section 2.7.

between the numerous African customary laws but also between these laws and the received western juvenile justice laws).

#### 4.4 The position pre-child law reform in the countries under study

As with most common law jurisdictions, such as the United Kingdom and Australia, all the countries under study embraced the common law rule which regarded children under the age of seven as incapable of knowing the difference between right and wrong and therefore not having the capacity to commit crime- a doctrine referred to as *doli incapax* ('incapable of evil'). An additional component of the rule was a rebuttable presumption that children under the age of fourteen were *doli incapax* in the sense that a case against an alleged child offender under 14 years of age would not proceed until the prosecution proves beyond reasonable doubt that the defendant was capable of appreciating the difference between right and wrong.<sup>75</sup> As discussed below, earlier juvenile justice statutes applying in Ghana, Kenya, Lesotho and Uganda did enact this rule in various forms. Although not underpinned by statute, the rule also held sway both in South Africa and in Namibia by virtue of Roman-Dutch common law.

The period before the recent child law reform was as follows. While South Africa, Namibia and Lesotho retained the common law rule intact, the other three countries adopted certain variations of the rule. Both the laws of Ghana and Uganda retained seven as the minimum age of criminal capacity while reducing from 14 to 12 the age

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<sup>75</sup>While the age of 14 has been identified as having been linked with the age of puberty in Roman law, reasons for the choice of the age of 7 as the minimum age of criminal capacity in this common law rule remain unclear.

at which the rebuttable presumption ceased to apply.<sup>76</sup> The Kenyan legislation on this issue modified the common law rule reducing the upper limit of the presumption from 14 to 12 while it increasing the minimum age of criminal capacity from 7 to 8 years.<sup>77</sup> The arguments that motivated these modifications to the common law rule of *doli incapax* are not clear, although the increase in the Kenyan age of criminal capacity from 7 to 8 years may be attributed to an embrace of a similar raise in the age of criminal capacity in English legislation in 1932,<sup>78</sup> the blue print of Kenya's juvenile justice legislation before recent child law reforms. The recent post-CRC reform endeavours in all these countries have engaged with the issue of whether to reform this common law doctrine. The contrasting approaches of these law reform efforts are discussed in a subsequent section in this Chapter.<sup>79</sup>

#### 4.5 Other African countries and Europe



While the common law rule fixing the minimum age of criminal capacity at 7 or 8 years with the application of the *doli incapax* principle was the general norm in many commonwealth countries in Africa, the age of criminal capacity was, on the other

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<sup>76</sup>Appiah, E (1999) "Juvenile Justice: The Ghana Perspective Before and After Law Reform" (Unpublished Paper on file) 2; Child Law Review Committee of Uganda (1992) *Report of the Child Law Review Committee* 114 (Hereinafter, 'CLRC (Uganda) Report').

<sup>77</sup>An additional variant of the common law rule is the provision in section 14 of the Kenyan Penal Code, Chapter 63, Laws of Kenya which provides for the age of 12 as the minimum age of criminal capacity for boys accused of sexual offences.

<sup>78</sup>The UK Children and Young Persons Act (1932), succeeded by a host of legislation culminating in the Children's Act, 1989 which, however, for the first time excluded juvenile justice issues and dealt exclusively with child care and protection. The Crime and Disorder Act, 1998 (discussed further in section 4.7, below) was later to make provision for juvenile justice issues and this finally abolished the *doli incapax* rule while adopting 10 as the minimum age of criminal capacity.

<sup>79</sup>Section 4.8, below.

hand, set at much higher ages in other African countries. Senegal and Burkina Faso adopted 13 as the minimum age, and some other African countries opted for higher minimum ages - Sudan at 15 and Libya at 14.<sup>80</sup> It has been asserted that 13 is “the most common African minimum age”.<sup>81</sup> Rather than attribute these higher ages to either an influence of emerging influence of international law or as reflecting local perceptions on child offending, for many of these African countries this may be explained through the reception of colonial laws (as with the African commonwealth countries under study). The higher minimum ages of criminal responsibility may thus reflect the legacy of the former colonizing country, for example France.<sup>82</sup> The common minimum age of 13 in Senegal and Burkina Faso, just two examples of former French colonies is illustrative in this regard.

In Europe, while nearly all countries have adopted an upper age of 18, remarkable differences still obtain on the minimum ages of criminal responsibility. Thus 15 years is the minimum age in the Scandinavian countries of Denmark, Sweden and Finland. In Western Europe, Netherlands set this age at 12 years, in France it has been set at 13 for quite a while. In Germany and Italy the age is set at 14 years. At the lower end of the continuum are countries such as Cyprus with 7 as the minimum age and the UK with 10. Criticizing these differences as arbitrary and illogical, Jaap Doek has argued for the minimum age of criminal responsibility to be increased to at least 12 years of

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<sup>80</sup>Van Bueren, G “New Justice Bill Takes Child Rights a Giant Step Backwards” in *“The Sunday Independent”* 9 March 2003 6.

<sup>81</sup>Van Bueren (as above) 6.

<sup>82</sup>The minimum age of criminal responsibility in the French juvenile justice system has been 13 years since 1945 by virtue of the French Ordonnance of February 2, 1945 (as amended in 1951, 1993, and 1994) and discussed in Doek, J “Modern Juvenile Justice in Europe” in Rosenheim, M *et al* (2002) (eds) *A Century of Juvenile Justice* Chicago and London: The University of Chicago Press 508-510.



age in countries with a low minimum in Europe. He further argues that “raising the minimum age in just a few countries would help set an international standard for the more than forty countries in Eastern and Western Europe”.<sup>83</sup> The reference to 12 years for the lowest minimum age seems to draw influence from the earlier highlighted jurisprudence of the CROC of which Doek has been a member for some time.<sup>84</sup>

Discussion of the approach taken by the six African countries under study and the factors that motivated reform proposals, firstly regarding the upper age and secondly the minimum age of criminal capacity in a comparative light of developments elsewhere will be examined in the next sections of this Chapter .

#### **4.6 The approach of the reform countries under study on the upper age of criminal capacity**



As opposed to the minimum age of criminal capacity where the countries under study all seemed to have found common ground by adopting the *doli incapax* rule, a scrutiny of the repealed legislation reveals that there was not only varied ages set for the upper age of criminal responsibility amongst the countries but also within the legal systems of the individual countries as well. In each of the legal systems, wide disparities existed in legislation about the definition of children with the effect that this resulted, as in the Ugandan case, in the “lack of uniformity in legal entitlements

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<sup>83</sup>Doek (as above) 524.

<sup>84</sup>Professor Doek has extensive experience in the field of child-rights research. It is also of note that he has served as a member of the CROC for many years and has chaired the Committee since March 1999. Prof Doek does not explicitly motivate his choice of 12 as the minimum age of criminal capacity.

and safeguards for their welfare, rights and protection”.<sup>85</sup> An example of widespread disparities even within one legal system is the repealed Kenyan legislation which defined ‘child’ as a person under the age of 14 years, ‘juvenile’ as a person between 14 and 16 years and ‘young person’ as those between 16 and 18 years, while conferring jurisdiction over persons under the age of 18 years to a ‘specialised juvenile court’ with procedures and sentencing powers differing from those of ordinary criminal courts.<sup>86</sup> Similar inconsistencies were noted by the South African reform study.<sup>87</sup>

All the reform processes have, however, now adopted the age of 18 years as the minimum threshold for an upper limit of the new juvenile justice systems. This development can solely be attributed to the influence of international law in this area.<sup>88</sup> The South African and Namibian Bills, a desire is revealed to extend the ambit of the new juvenile justice system to persons over the age of 18 and under 21 under certain circumstances.<sup>89</sup> Such provisions, it is submitted, would still be in line with the CRC and African Children’s Charter which, it can be argued, only represent

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<sup>85</sup>CLRC (Uganda) Report (n 76 above) 39.

<sup>86</sup>Sections 2 and 3 of the Children and Young Persons Act, Chapter 141 Laws of Kenya, now repealed by the Children’s Act, 2001 (discussed in this thesis). For the new Act’s provisions on specialized courts, see discussion in Chapter 6.

<sup>87</sup>The South African Law Commission (1998) *Discussion Paper on Juvenile Justice* Para 3.4.

<sup>88</sup>See section 4.2.1.4, above.

<sup>89</sup>South African Bill, section 4(3) and Namibian Bill, section 2(2) (Both envisaging the extension, in limited circumstances, of the application of the new juvenile justice regimes to instances where persons are aged between 18 and 21). The South African Law Commission (2000) *Report on Juvenile Justice* Para 3.8 provides examples (in non-exhaustive terms) of the instances when the system may be extended to children between 18 and 21 years as including occasions where persons who during the course of trial attain the age of 18; where a person commits an offence whilst under the age of 18 years but is aged over 18 at the time of arrest; or when criminal proceedings are instituted and where persons between these ages jointly commit certain crimes.

minimum children's rights standards and permit the setting of higher standards by states.

On the other hand, the issue of setting a minimum age of criminal capacity remained contentious and involved debate in all the case study examples. In the next sections, discussion will be focused on how the law reform processes under study have treated this issue. Since in the pre-reform period the minimum age of criminal capacity was intricately linked to the *doli incapax* rule, the next section will discuss, as a prelude to the discussion of the reform processes under study, this doctrine in light of its application both in the reform countries and developments elsewhere.

#### **4.7 The *doli incapax* rule in a comparative light**



##### **4.7.1 The application**

In all the countries where the doctrine applied (including the countries under study) the test of rebutting *doli incapax* has been largely similar to the common law formulation of the applicable test. This test was codified in the much cited English House of Lords decision in *C v DPP*.<sup>90</sup>

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<sup>90</sup>(1996) 1 AC 1, 38. The Hong Kong Law Commission Report (n 23 above) discusses this case as reflecting the test applied in Hong Kong. The position in Australia is discussed in the ALRC Report (n 24 above) and affirms the relevance of this test. Of all the African countries under study, it is only in South Africa where detailed literature exists on case law on this point. An example of such work is Keightley, R "Capacity to be Held Accountable for Wrongdoing" in Van Heerden, B, Cockrell, A and Keightley, R (1999) *Boberg's Law of Persons and the Family* Cape Town: Juta 859 (which discusses the test applied by South African courts, by and large, similar to the English position).

The elements of the applicable test can be summarised as follows:<sup>91</sup>

- The presumption of *doli incapax* is not a defence to be pleaded by the accused child. The prosecution must rebut the presumption as an element of the prosecution's case.
- The test is whether the child knew the act was seriously wrong as opposed to the child acting merely naughtily/mischievously.
- The standard of proof of rebuttal by the prosecution is beyond reasonable doubt with the evidence relied upon by the prosecution being strong and clear beyond all doubt or contradiction.
- The evidence to prove the child's guilty knowledge must not be mere proof of doing the act charged, however horrifying or obviously wrong the act may be.
- The older the child is, the easier it will be for the prosecution to prove guilty knowledge. Thus the closer the child is to fourteen years of age and the more obviously wrong the act is, the easier it will be to rebut the presumption.

In applying these elements of the test, different courts have adopted varying legal interpretations regarding its precise application. Even so, there is commonality on most of the doctrine's requirements.<sup>92</sup> These include the requirements that the child must understand the criminality of the act (for which the child would appreciate that a court rather than the child's parents would punish) and that the application of the presumption applies to the elements of an offence, which must all be proved in addition to the necessity of proving requisite intention (*mens rea*). Direct evidence

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<sup>91</sup>Johnston, M (1999) "The Criminal Capacity of Children" (Unpublished Paper on file) 1.

<sup>92</sup>Crofts, T "Doli Incapax: Why Children Deserve its Protection" (2003) 10(3) *E Law-Murdoch University Electronic Journal of Law* 2.

about a child's understanding may be obtained from a number of sources including what the child says and where possible (although not necessarily), from expert witnesses to give evidence on a child's developmental state. Aside from direct evidence, inferences may be drawn from factors such as the reasonable level of understanding of a child of the same age, the home and school background or environment of the child, the child's appearance in court and, in very limited exceptions, evidence of past criminal record.

A number of legal difficulties have been cited in relation to the doctrine's rebuttal procedure. These difficulties relate, firstly, to the point of view of the doctrine as an important tool in protecting young children from facing the rigours of criminal law. Second, and on the other hand, these difficulties relate to criticism regarding the doctrine.<sup>93</sup> In relation to the former, it has been said that the rebuttal procedure may allow prejudicial evidence that touches on a child's guilt to be adduced by the prosecution well before the process of trial where the court embarks on the rebuttal procedure before the trial process proper. On the other hand, one of the arguments from a prosecutorial perspective, in criticism of the doctrine, has been that it hinders successful prosecution by virtue of its rigorous procedure and high evidentiary standard of proof. Further debate ensues as to what is meant by the child's knowledge that the act was 'seriously wrong' with divided opinion on whether this refers to legal or moral wrongfulness.<sup>94</sup>

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<sup>93</sup>For an in-depth discussion of these points, see Crofts (n 92 above) generally.

<sup>94</sup>For a detailed discussion, see Crofts, T (2002) *The Criminal Responsibility of Children* Aldershot: Ashgate 42-45.

However the philosophical dilemma of the above debates may not be overstated. At the practical level, the application of the doctrine reveals the tendency to dilute the importance of the *doli* presumption. Thus, before its abolition in England,<sup>95</sup> it was stated that the doctrine's influence was by and large symbolic. Practical research unearthed the fact that most youth courts were not "assiduous in applying the presumption prior to its abolition".<sup>96</sup> In contrast, while the doctrine has been popular with youth courts in Australian jurisdictions, the most common evidence used to rebut the presumption (out of the panoply of sources cited above) has been children's statements at police interviews. This has been so even in the face of Australian research that confirms that children confess to their crimes more readily than adults and which research therefore confirms a power imbalance between the police and the child.<sup>97</sup>



The little available anecdotal research on the application of the doctrine in the African context suggests a routine disregard for it in a number of jurisdictions.<sup>98</sup> In many instances the tendency to water down its protection has been revealed. Thus in the case of Namibia and South Africa, it has been noted that where the prosecution is set on proving criminal capacity, the test has almost exclusively focused on whether the child knows the difference between right and wrong, and not whether the child had

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<sup>95</sup>Discussed in section 4.7.2, below.

<sup>96</sup>Ball, C *et al* (2001) *Young Offenders: Law, Policy and Practice* (2nd edn) London: Sweet and Maxwell 20-21.

<sup>97</sup>Crofts (n 92 above) 9.

<sup>98</sup>Mwansa, A "Boy Six in Maximum Security Prison: Zambia" (2004) 1 *Article 40* 8 (on Zambia), see also Schulz, S and Hamutenya, M (2004) "Juvenile Justice in Namibia: Law Reform towards Reconciliation and Restorative Justice?" (Unpublished Paper on file) 8 (on Namibia). See also "Five-day Ordeal for Boy, 7" in "*The Daily Nation*" 12 January 2004 available at < [www.nationaudio.com](http://www.nationaudio.com) (Archives)> (on Kenya).

the ability to act in accordance with the knowledge of that unlawfulness.<sup>99</sup> In some other instances, even this partial focus on the test has been warped with judicial officers laying undue emphasis on the child's actions and not the child's state of mind or capacity to act as he did. A recent illustration is related to an inference of capacity from the fact that an accused child had run away from the scene of crime.<sup>100</sup> Clearly, such an approach falls short of the true test for rebuttal of the *doli* presumption. Similar deficiencies have additionally been highlighted in South Africa especially in the lower courts where it is not uncommon that when the presumption comes into play, magistrates frequently call the child's mother as a witness to affirm having taught the child the difference between right and wrong and the courts regarding an affirmative answer, which would often be forthcoming, as sufficient proof of the child's capacity.<sup>101</sup> In Namibia, the fear has been voiced that the virtual void of a child-welfare service delivery system coupled with 'a crime-control' attitude, may have created a tendency on the part of the judiciary to assume criminal capacity, with the effect that penal sanctions are used for children who should have the benefit of the *doli* doctrine.<sup>102</sup>

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<sup>99</sup> See Keightley (n 90 above) 859 (on South Africa) and on Namibia, see Super, G (1999) "Juvenile Justice in Namibia" 56 (Unpublished Discussion Document of the Inter-Ministerial Committee on Juvenile Justice on file).

<sup>100</sup> This came to the fore in a South African case, *S v Ngobesi* 2001(1) SACR 562; discussed in *Article 40* (2003) 5(3) 6 (in which a High Court review overturned a conviction of a child by a lower court on the basis that such an approach meant that 'in no way was the cognitive capacity of the accused assessed, that is his ability to resist temptation').

<sup>101</sup> South African Law Commission (1997), *Issue Paper on Juvenile Justice* Para 3.6.

<sup>102</sup> Schulz and Hamutenya (n 98 above) 11-12 points out that such a child welfare service system would be a useful mechanism to handle the case of children found to be lacking criminal capacity on application of the presumption or those below the minimum age of criminal capacity. For a discussion on how the reform efforts have dealt with the question of children below the age of criminal capacity or those adjudged as lacking capacity, see section 4.9, below.

It is submitted that these constraints to the application of the doctrine and its rebuttal procedure relate more to practice, and not to the rationale for the doctrine. The doctrine recognizes the fundamental nature of childhood in the sense of children not having the ability to understand the wrongfulness of criminal acts and that that they develop this understanding gradually, at different and inconsistent rates.<sup>103</sup> In sum, rather than an exclusive focus on these constraints, an analysis of the doctrine's place in the minimum age variant of a children's rights model should be done with the purpose of the doctrine in mind. Within such an analysis, the subsequent focus should be on how to address the constraints in the application of the doctrine.

#### 4.7.2 Contemporary developments regarding the rule in other jurisdictions

Contemporary developments elsewhere have led to the questioning of the validity and fairness of the *doli incapax* rule. Before the coming into operation of the 1998 Crime and Disorder Act<sup>104</sup> which abolished the doctrine in the UK, views including judicial opinion, were divided on its continued application at the time. Laws, J in the case *C v DPP*<sup>105</sup> had earlier decided the doctrine was no longer part of English law, describing it as “perverse, contrary to good sense, illogical and a disservice to English law”.<sup>106</sup>

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<sup>103</sup>Crofts (n 92 above) 9.

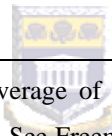
<sup>104</sup>This Act marked a radical reorganisation of the English juvenile justice with more emphasis on ‘children taking more responsibility for criminal actions’ as its clarion call. Thus, section 34 (which came into effect in September 1998) abolished the *doli incapax* presumption leaving England with one of the lowest ages of criminal responsibility in the world. The CROC has been critical of the abolition coupled with the low age of criminal responsibility. See CROC, *Concluding Observations: UK* (n 29 above) Para 62(a).

<sup>105</sup>[1994] 3 *WLR* 888.

<sup>106</sup>At 894 and 898. This position has been said to have been related to the public panic about escalation of youth crime and hence calls for harsher measures to deal with child offenders occasioned in Britain



The decision was overruled on appeal by the House of Lords, where the court opined that since the doctrine was part of common law, it could only be abrogated by statute.<sup>107</sup> While appraising the value of the doctrine as a ‘benevolent safeguard’, ‘illogical and inconsistently applied’ though it may be, the Court held that it was still valid law. However analysts of the decision reveal that the basis for the House of Lords judgement does not appear to be majority of the judges’ conviction regarding its desirability.<sup>108</sup> The House of Lords’ dilemma seem to have been heightened by the public furore surrounding serious child offending at the time. In light of the majority of the judges’ reservations on the value of the doctrine, it seems plausible that the court was only dissuaded from endorsing an abolition of the doctrine because it thought that such a move “would be socially and politically controversial and therefore should not come from the court but from Parliament”.<sup>109</sup>




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as a result of the occurrence and media coverage of the Bulger case where two (2) ten-year olds abducted and then killed a two year old child. See Freeman, M., “The James Bulger Tragedy: Childish Innocence and the Construction of guilt” in McGillivry, A (ed) (1997) *Governing Childhood* Aldershot: Dartmouth 123 (on the connection between public reaction and this decision). Regarding Law, J’s decision in *C v DPP* (n 105 above) in favour of abolition of the doctrine and its connection with the public’s reaction to the Bulger case, Freeman comments that “there is no need to believe in conspiracy theories to remark on their coincidence”, at 123.

<sup>107</sup>Lord Lowry holding that “This is a classic case for parliamentary investigation, deliberation and legislation”, at 64.

<sup>108</sup>Crofts (n 92 above) 3. In contrast with most of the individual decisions however, Lord Lowry’s judgement seemed to have been motivated by the value of the doctrine in acting as a safeguard to young children in conflict with the law. After the reasoning that the doctrine acts as ‘protection for children from the full force of law’, he calls for a balanced view on the debate on abolition in the following words: “There is a need to study other systems ... Whatever change is made, it should come only after collating and considering the evidence and after taking account of the effect which a change would have on the whole law relating to children’s anti-social behaviour”, at 403.

<sup>109</sup>Crofts (n 92 above) 3 citing individual views of the judges including Lord Ackner’s view to the effect that “I have, however, considerable sympathy with the criticisms expressed by Laws, J [cited in n 106 above] and would hope that parliament will provide an early opportunity for [the doctrine’s] review”, (at 46). A contrasting view of Lord Lowry is provided in n 107 above. For a discussion of the

The Labour party government took this up by calling for the doctrine's abolition. The government's justifications for this call mirrored the earlier arguments of Laws, J in his decision in *C v DPP*<sup>110</sup> that had overruled the doctrine's application.<sup>111</sup> The gist of the government's arguments for the doctrine's abolition seem to have coalesced on the historical existence of the rule which was, according to the government, now outdated and out of touch with modern English societal conditions.<sup>112</sup> However, the compelling factor that most commentators cite is that the doctrine was deemed unimportant in a climate within which child offending did not "fit the picture of childhood innocence along with ensuing media hype about children getting away with

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public panic regarding crime and the effect of the Bulger trial on the developments in the UK, see Freeman in McGillivry (n 106 above) 123.

<sup>110</sup> Cited in n 105 above.

<sup>111</sup> Home Office Consultation Paper (1997) *Tackling Youth Crime* 6-7 cited and discussed in Walsh, C "Irrational Presumptions of Rationality and Comprehension" (1998) *Web Journal of Current Legal Issues* available at < <http://webjcli.ncl.ac.uk/1998/issue3/walsh3.html> > (last accessed 21 January 2005).

<sup>112</sup> See Walsh (as above) generally (citing Home Office Consultation Paper's discussion on the arguments that the doctrine was 'archaic, illogical and unfair in practice'), see also Bandalli, S "Abolition of the Presumption of Doli Incapax and the Criminalisation of Children." (1998) 37 *Howard Journal of Criminal Justice* 114-123. The UK Labour Party government's justifications have been discussed as including arguments that: children matured faster than previously; that abolition would lead to children taking more responsibility; that the doctrine remained a hindrance to prosecution of worthy child offender cases; that the court had the prevention of child offending as one of its objectives alongside punishment and thus the doctrine was of little value; and that criminal sanctions/punishment have, by and large, been ameliorated and there are less harsher sentences than used to be. To the gist of the argument that the doctrine is outdated, it has been responded that there is no scientific or medical evidence to suggest that children and young people today are more able to make judgements about right and wrong than their predecessors were in centuries when the doctrine developed. It has also been cautioned that there should not be confusion in an increase in today's children's factual knowledge, their greater access to sophisticated technology with a corresponding increase in their ability to make moral judgements. For these debates, see Gelsthorpe, L and Morris, A "Much Ado about Nothing - A Critical Comment on Key Provisions Relating to Children in the Crime and Disorder Act" (1999) 3 *Child and Family Law Quarterly* 209, 213 (setting out these arguments and the rebuttals) and see also, Hong Kong Commission Law Report (n 23 above) generally.

crime”.<sup>113</sup> A number of commentators therefore agree on the point that the primary rationale for the doctrine’s abolition (in tandem with the erosion of other legal safeguards hitherto available to children) was rooted in a philosophy of ‘responsibilization’ through a new youth justice policy.<sup>114</sup>

These developments regarding the doctrine in England led to similar debates on its continued application in Australia. In an examination of the issue, the Law Reform Commission reached a contrary position to that in the UK. The Commission noted in the context of Australia that “community perceptions that youth crime is rampant have led to particularly punitive developments in many jurisdictions”.<sup>115</sup> Wary of this danger, it recommended the retention of the doctrine and suggested that it be legislated for through Statute.<sup>116</sup> In the Commission’s view, the doctrine allows for a gradual transition to full criminal responsibility and acts as protection for children from the full force of law.<sup>117</sup> This reasoning resonates with that of the Hong Kong

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<sup>113</sup>Crofts (n 92 above) 4, see also Bandalli (n 112 above) 114-123, Gelsthorpe and Morris (as above) 213.

<sup>114</sup>Captured in the title of the UK Labour Party government’s White Paper explaining the rationale behind the Crime and Disorder Act, see White Paper (1997) *No More Excuses: A New Approach to Tackling Youth Crime in England and Wales* (London: HMSO) (Cm 3809 ), cited and discussed in Walsh (n 111 above). For further support of this view, see Bandalli (n 112 above) 114-123; Fionda, J “New Labour, Old Hat: Youth Justice and the Crime and Disorder Act 1998” (1999) *Criminal Law Review* 36-47.

<sup>115</sup>ALRC Report (n 24 above) Para 18.3.

<sup>116</sup>ALRC Report (n 24 above) Recommendation 195. This has been given support by similar recommendations by the law reform commissions in a number of Australian jurisdictions, for example New South Wales. The recommendation as to statutory recognition is yet to be acted upon by many jurisdictions, however. Despite these recommendations, debate on the continued application of the doctrine is still dominant in Australia at both political and scholarly levels. See Crofts (n 92 above) generally.

<sup>117</sup>ALRC Report (n 24 above) Para 18.20.

Law Commission<sup>118</sup> whose proposals for an increase of the minimum age of criminal responsibility from 7 to 10 years and the retention of the *doli incapax* presumption for children between this age and the age of 14, were given statutory recognition through the recent Juvenile Offenders Ordinance of 2003.<sup>119</sup>

The approaches of the two latter reform bodies strike an accord with the CROC's jurisprudence, discussed at the commencement of this Chapter,<sup>120</sup> and which seem to favour retention of the doctrine where its abolition would result in an unacceptably low age of criminal capacity.

The new juvenile justice laws arising from the reforms in the countries under study have led to three conceptually distinct approaches to the twin issues of the *doli incapax* rule and the minimum age of criminal capacity. These and the motivating factors behind them are examined next to test their compliance with the emerging international law jurisprudence of the CROC as a benchmark.

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<sup>118</sup>Canvassed in Hong Kong Law Commission Report (n 23 above) generally.

<sup>119</sup>Section 3.

<sup>120</sup>Section 4.2.1.3, above.

## 4.8 The approach to reform in the countries under study

### 4.8.1 Retention of the *doli incapax* rule as obtaining before reform

Both Kenya<sup>121</sup> and Namibia<sup>122</sup> have retained the age of 8 years as the minimum age of criminal capacity with the *doli incapax* presumption applying for children between this age and the age of 14 (in Namibia's case) and 12 (in Kenya's case).<sup>123</sup> In Kenya's case the retention of the doctrine in its original form (with 8 as the minimum age) is all the more glaring due to the fact that the eventual enactment of the new child legislation by Parliament took place well after the country's Initial Report under the CRC had been examined by the CROC. In its Concluding Observations the Committee had observed that "the minimum age of eight years is too low".<sup>124</sup> The CROC had however shied away from commenting on the rebuttable presumption of *doli incapax*.



The rationales proffered for the retention of rule in these two countries are very contrasting. In Namibia's case, the retention was largely due to the huge influence of

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<sup>121</sup>Penal Code (Chapter 63 Laws of Kenya), section 14(1). It is of note that this legislation which is general penal law has been in operation and was in place at the time of law reform. The Law Commission's Report, Kenya Law Reform Commission (1993) *A New Law on Children* (Hereinafter 'KLRC Report') Chapter 4 called for the amendment of "existing laws" to ensure compliance with its proposals culminating in the new Act, but on the specific issue of age of criminal responsibility, the Report, Paras 4.28-4.30 argued for the retention of 8 as the minimum age of criminal capacity and the continued application of the *doli incapax* rule. The new Act does not legislate on the doctrine leaving the Penal Code's provision to apply.

<sup>122</sup>Namibian Bill, section 6. It may be reasoned that since the Bill is yet to be enacted as of the time of writing this may change.

<sup>123</sup>See discussions in section 4.4, above (on the position before law reform).

<sup>124</sup>See CROC *Concluding Observations: Kenya*, CRC/C/15/Add.160 07 November 2001 Para 22 (hereinafter CROC's Concluding Observations (Kenya)).

the government of the day. The reform body behind the new legislation in Namibia had proposed a minimum age of 10 and retention of the presumption of incapacity for children aged between 10 and 14 years. Section 6 of the first Draft Bill reflected this position.<sup>125</sup> This was until a follow up meeting of Government Ministers of 8 May 2003 recommended the retention of the common law rule pertaining to capacity. Although this government meeting did not give the rationale for this executive fiat, commentators have pointed to the government's desire to affirm, through the retention of the presumption in its original form, "prevalent social ideas and norms which emphasize the value of retribution and deterrence as a means of social control".<sup>126</sup> The government's position seemed to have found support among a few respondents (in particular lawyers and prosecutors) to the reform study who had argued that evidence pointed to serious child offending including murder, and that an increase in the minimum age would prevent prosecution of such offenders.<sup>127</sup>



The result of the government position is such that the common law rule is left intact in the final draft Bill, hence a low minimum age of 7 and the *doli* doctrine's application for children between this age and 14 years. This is in contrast to the initial proposal of an increase in the minimum age and retention of the *doli* doctrine as cited above. The initial proposal had been underpinned by reference to comparative minimum ages of criminal responsibility both in Europe and Africa (citing Ghana and Uganda, discussed below), reference to the standards set in the Beijing Rules (Rule 5(1) and, as discussed earlier, national research that depicted that in the past the presumption was

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<sup>125</sup>Schulz and Hamutenya (n 98 above) 10.

<sup>126</sup>Schulz and Hamutenya (n 98 above) 10.

<sup>127</sup>Schulz and Hamutenya (n 98 above) 7 (This is reminiscent of one of the arguments raised by the UK Labour Party government for the abolition of the doctrine as detailed in (n 112 above). It is unclear whether these arguments in Namibia were premised on supportive data or research.

far too easily rebutted in practice.<sup>128</sup> Commentators have therefore argued that retention of the common law rule (with its low minimum age of 7) does not accord with the protection of children's rights under the CRC.<sup>129</sup>

An important new introduction is the Bill's provision detailing an array of options for the doctrine's rebuttal procedure.<sup>130</sup> This can sufficiently enhance the doctrine's protective value especially in light of evidence that suggests that it is far too easily rebutted in practice.<sup>131</sup> Of significance is the provision under the Bill which requires that at the "instance of the prosecution or the child or his representative, an evaluation of the child's cognitive, emotional, psychological, and social development must be ordered by the court".<sup>132</sup> The drafter's intention here was to redress court situations where assuming children's criminal capacity was the norm (because of a disregard either of the doctrine's rebuttal procedure or the doctrine altogether).<sup>133</sup>



While the latter provisions strengthening the operation of the *doli incapax* presumption are consistent with the approach of the CROC in its reasoning on the rule,<sup>134</sup> the low minimum age in Namibia's proposed new law falls short of the obligations under the CRC. This, it is submitted, undermines the Bill's aim for a child

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<sup>128</sup>Super (n 99 above) 30, 31.

<sup>129</sup>Schulz and Hamutenya (n 98 above) 7.

<sup>130</sup>Namibian Bill, section 93.

<sup>131</sup>Schulz and Hamutenya (n 98 above) 11.

<sup>132</sup> Namibian Bill, section 93(4).

<sup>133</sup>Schulz and Hamutenya (n 98 above) 11.

<sup>134</sup> See CROC, *Concluding Observations: Isle of Man* (n 28 above) Paras 18-19 (The CROC affirms the protective value of the doctrine). It is submitted here that while the CROC has thus far not opined on the rebuttal procedure of the rule, legislative provisions aimed at strengthening the doctrine's rebuttal procedure are consistent with the CROC's view on the doctrine's importance as a protective device in protecting the rights of vulnerable young children in conflict with the law.

rights oriented juvenile justice system as stated in the preamble of the Bill (and considered further in Chapters 5-7 of this thesis). Thus it has been remarked that the new system will, by and large, be built on internationally recognized child rights standards with the exception of the provision on the minimum age of criminal capacity.<sup>135</sup>

The Kenyan situation on retention of the rule is in contrast to the Namibian one dealt with above. The motivations for the Kenyan Law Reform Commission's study leading to the retention of the rule were rooted in the reform body's interpretation of the CRC obligation in this regard. Despite the consultative nature of the Kenyan reform study as was highlighted in the last Chapter,<sup>136</sup> the Law Commission did not receive much response on this specific issue and much of its interpretation was by and large predicated on the reform team's own reasoning. This reasoning mirrored the view expressed in the European Court's judgment in *V and T v UK* cases<sup>137</sup> (discussed earlier) in which the emphasis is on the procedures and conduct of a trial for children rather than focusing on a specific rule requiring the setting of a minimum age of criminal capacity. Thus, the Law Commission's Report records specific support of the reform team for the operation of the existing rebuttable presumption for children between the age of 8 and 12 and recommends "that their cases be considered exclusively in juvenile courts where they are likely to benefit from the practice of privacy and informal procedures".<sup>138</sup> The result is that the new Act makes detailed

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<sup>135</sup>Schulz and Hamutenya (n 98 above) 26. The compliance of the Namibian Bill with the international child rights standards on other issues apart from the minimum age issue will be the subject of subsequent chapters.

<sup>136</sup>Chapter 3 section 3.5.2.

<sup>137</sup>Discussed in section 4.2.2.1, above.

<sup>138</sup>KLRC Report (n 121 above) Para 5.24.



provisions for a new juvenile justice system with explicit reference to standards drawing from the CRC, as will be discussed in subsequent chapters. It remains silent on the issue of a minimum age of criminal capacity and the *doli incapax* rule however, leaving the position in the Penal Code to hold sway.

Inevitably, although the report further comments on the lack of a comprehensive method of proof of age at the time,<sup>139</sup> it does not deal with the issue of the rebuttal procedure as opposed to the Namibian legislation, once again leaving the former legal position to apply.

It is submitted that while the retention to retain the common law rule was not informed by the political pressures reflected in the eventual Namibian position and instead anchored on the review team's interpretation of the CRC obligation in this regard, the Kenyan position remains inconsistent with the provisions of the CRC and international law (in particular, the ICCPR). The HRC's specific criticism of a similar rule (a minimum age of 8 with the *doli incapax* rule applying until the age of 12) in Sri Lankan law that was highlighted earlier, and the CROC's overall jurisprudence, are illustrative of the possible reaction of both the CROC and the HRC.<sup>140</sup> The CROC did not examine the retention of this rule in its consideration of Kenya's Initial State Report. However, it is submitted that the retention of the common law rule without increasing the minimum age from 8 years, coupled with the absence of provisions strengthening the rebuttal procedure, is in violation of the CRC.

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<sup>139</sup>KLRC Report (n 121 above) Para 5.28.

<sup>140</sup>HRC, *Concluding Observations*: Sri Lanka (n 64 above) Para 20.

#### 4.8.2 Abolition of the doctrine and an increase in the minimum age

A second approach has been taken by the new legislation of Uganda and Ghana. In both instances the new laws provide for (increased) minimum ages of criminal responsibility while abolishing the *doli incapax* doctrine. In both countries the minimum age was originally set at 7 with the *doli* presumption applying between the ages of 8 and 12. In Ghana, the abolition of the doctrine and concomitant increase of the minimum age were part of earlier reforms initiated well before the process of developing the recent comprehensive Juvenile Justice Act.<sup>141</sup> A 1998 legislative amendment to the general penal code had increased the minimum age to 14 years in Ghana. This amendment also abolished the doctrine.<sup>142</sup> In Uganda's case, abolition of the doctrine and an increase of the minimum age to 12 was part of the comprehensive law reforms that culminated in the Ugandan Statute of 1996.



The reasons for the increase in the minimum age in Ghana were mainly predicated on references to the guideline in the Beijing Rules (Rule 4.1). However, the rationale for the choice of 14 as the minimum age is not clear. Tested against the jurisprudence of the CROC, this choice meets the standards required of States under the CRC.<sup>143</sup> Abolition of the doctrine seemed, however, to have been motivated by practical considerations rather than a desire to strive to the ideology of children's rights. Available statistics showed that "children under 14 years were generally involved in

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<sup>141</sup> Ghanaian Act, discussed in this thesis.

<sup>142</sup> These earlier reforms were given effect through the 1998 Ghana Criminal Code (Amendment) Act as part of piece meal changes to certain juvenile justice provisions well before the new Ghanaian Act.

<sup>143</sup> See Section 4.2.1.2, above (discussing CROC's criticism of minimum ages set below 12 years in the absence of the *doli* doctrine).

petty (rather than any serious offences)".<sup>144</sup> This also seemed to be a handy rationale for the Ugandan review committee's recommendation for the doctrine's abolition (and a raise in the minimum age). The Ugandan Committee was swayed by its research that showed that very few children under the age of 14 had been arrested and charged with serious offences during a two year period.<sup>145</sup> The argument was therefore premised on the point that the doctrine was rarely invoked by courts in the period before reform.

Based on the above study that identified the age of 14 as the age from which most children faced criminal charges, the Ugandan committee recommended a new minimum age to be set at 14. The committee made reference to an international survey that showed that for a number of countries especially in Europe, the minimum age was set at 14 or higher.<sup>146</sup> Of particular interest to the Ugandan committee was the argument to the effect that the age of 14 "represented the age at which children have attained puberty and in 'normal circumstances' should have sufficient understanding and maturity to know the results of their actions and make decisions".<sup>147</sup> The committee's report noted that the initial proposal to set 14 as the

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<sup>144</sup> Appiah (n 76 above) 2.

<sup>145</sup> The study, carried out in 9 main magisterial districts in Uganda, characterised as serious offences, crimes such as burglary, assault occasioning grievous bodily harm, robbery, arson, rape, attempted murder and murder. Out of 60 children (under 18 years of age) charged with these offences, only 12 were aged 14 years and under. Of the 12 cases, only 7 were completed with 5 cases being dismissed. The result was that only 2 children under the age of 14 years had been convicted of offences (attempted murder and arson) and placed on probation over a two year period. See "Social Researcher Study" in CLRC Uganda Report (n 76 above) Appendix.

<sup>146</sup> CLRC Uganda Report (n 76 above) 116.

<sup>147</sup> CLRC (Uganda) Report (n 76 above) 114. However the committee did not refer to any explicit scientific or other study to support this contention. The committee was expressly wary of the general use of the terminology 'normal circumstances' since child development varies in each and every individual child's case. The report does not discuss how the committee eventually resolved this dilemma.

minimum age was, however, reduced to 12 by the relevant government department in charge of the final drafting of the legislation; a decision taken more in unilateral anticipation of perceived harsh public attitude towards child offending (as in Namibia's case) than one based on ideology or practical study as the review committee had engaged in. The research and proposals of the review committee were however influential in militating, even in the wake of this executive decision, against the setting of the minimum age at a lower age than 12. It is submitted that by adopting a minimum age of 12, the new Ugandan law complies with the emerging jurisprudence of the CROC as was discussed earlier in this Chapter.<sup>148</sup>

Since they both abolished the *doli* presumption, the new laws in Ghana and Uganda do not engage with the issue of its rebuttal procedure. An important development in the Ghanaian reform process on the minimum age issue was the suggestion of proposals described as having been intended to “strengthen registration of child births [to] reduce the incidence whereby courts are required to determine the age of children for purposes of the judicial system”.<sup>149</sup> The process of determination of age was given a boost to ‘give sufficient directive to the court’<sup>150</sup> by a provision that required the production of medical certificates as proof of age following medical examination of a child in the absence of a birth or ‘baptismal certificate’.<sup>151</sup>

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<sup>148</sup>Section 4.2.1, above.

<sup>149</sup>Appiah (n 76 above) 3 (referring to clause 121 of a Children's Bill that was prepared at the same time as the Criminal Amendment Bill raising the minimum age of criminal capacity. It is not clear whether this proposal on birth registration was given effect).

<sup>150</sup>Appiah (n 76 above) 3.

<sup>151</sup>Criminal Code (Amendment) Act (Amending section 343(1) of the Ghanaian Criminal Procedure Code, 1960) cited in Appiah (n 76 above) 2.

Although the debates in both reform processes were largely based on the local contexts of these countries and a reference to comparative examples, it is of note that the minimum ages set in the new laws are consistent with the CROC's approach.

#### **4.8.3 Raising the minimum age of criminal responsibility and a retention of the presumption of *doli incapax***

This third approach is adopted by the proposed South African<sup>152</sup> and Lesotho<sup>153</sup> Bills. In both cases, there is an increase in the minimum age of criminal capacity from 7 to 10 years and a retention of the rebuttable presumption for children aged between 10 and 14.

The juvenile justice law reform process in South Africa did inspire the process of development of the Lesotho Bill<sup>154</sup> and the motivations behind the South African reform proposals seem to have held sway in Lesotho. The motivations for adopting this position are canvassed in the South African Law Commission's Report.<sup>155</sup>

The decision to increase the minimum age from 7 to 10 was motivated by the jurisprudence of the CROC and, in particular, studies that pointed to a criticism by the CROC of countries that had set their minimum age at 10 years and below. It seems in this regard that the consideration of the Law Commission of the age of 10 has now

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<sup>152</sup>South African Bill, section 5.

<sup>153</sup>Lesotho Bill, section 83.

<sup>154</sup>See discussion in Chapter 3, section 3.1 and Kimane, I (2004) "The Children's Law Reform Process in Lesotho" 4 (Unpublished Paper on file) (noting the study tours by the Lesotho Law Reform Commission to South Africa as having been of significance to the reform process in Lesotho).

<sup>155</sup>South African Law Commission *Report* (n 89 above) Chapter 3.

been overtaken by the fledging jurisprudence pointing to the threshold of 12 years as a minimum.<sup>156</sup> In setting the minimum age, the Commission's approach was very consultative<sup>157</sup> and included the hosting of an international experts' seminar specifically dedicated to this issue by bringing legal, psychological and criminological perspectives into the debate.<sup>158</sup> This seminar, in addition to the public consultation described in the last Chapter, was very influential in leading to the decision to set the minimum age at 10 years.<sup>159</sup> Additionally, the Commission embarked on a survey of the minimum age set in other countries, including the Ugandan and Ghanaian proposals discussed earlier. The decision to set the minimum age at 10 rather than 12 (which was favoured by most respondents to the Commission's study) hinged on the deliberations at the experts' seminar. Setting the age at 10 was also linked to the Commission's desire to retain the rebuttable presumption for children between this age and 14 years.



The Commission was in agreement with the retention of the doctrine calling it “a protective mantle”.<sup>160</sup> This view was premised firstly, on the point that the presumption comes into effect automatically by the simple fact of a child's age and thus once applicable, the onus was on the State to present evidence overturning the

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<sup>156</sup>See section 4.2.1.2, above.

<sup>157</sup>The consultative nature of the Commission's process is highlighted in Chapter 3, section 3.5.3.

<sup>158</sup>Mentioned in Chapter 3, section 3.5.3. For an analysis of this seminar's proceedings on the age issue, see “Report of the South African Law Commission Seminar on Age and Criminal Capacity” (1999) 1(2) *Article 40* 5-6.

<sup>159</sup>South African Law Reform Commission *Report* (n 89 above) Para 3.19 stating that “the Commission was sufficiently convinced by scientific and developmental arguments (based on studies on selected South African children tend to show that children develop cognitive and connative capacity more or less at the age of 10), the public support received for this age and the guidance provided by international law, to propose the minimum age of criminal capacity of ten years...”

<sup>160</sup>South African Law Commission *Report* (n 89 above) Para 3.10.

presumption. On the second score, the Commission highlighted the flexible nature of the presumption. Thus the younger the child, the 'greater the cloak of the presumption' which then requires more evidence to rebut. The Commission noted that in this scheme of flexibility, the actual age of the child was an important factor to be considered, while not being in itself a conclusive one.<sup>161</sup> However it is a further dimension of the SALC's view on the flexible nature of the presumption that is of significant relevance to other African countries, especially in light of the plurality (socio-economic and cultural) and the rural-urban dichotomy that characterises a number of these countries. The Commission argued in support of retaining the *doli* presumption and the refusal to adopt an absolute fixed age approach to the issue thus:

“The very plural nature of South African society and significant differences in upbringing, maturity and development in differing circumstances, culture, rural/urban environment and socio-economic and educational factors all play a role in shaping children's development and consequently, the age at which they attain criminal capacity...”<sup>162</sup>

Thus by retaining the doctrine, the Commission sought to ensure the relevance of the rule in taking into account the diverse nature of society, and by extension, differing rates of child development.

The Commission found that majority of the respondents supported the retention of the rebuttable presumption but did not proffer the options of the age thresholds under which the presumption would operate (especially whether and why the upper

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<sup>161</sup>South African Law Commission *Report* (n 89 above) Para 3.11.

<sup>162</sup>South African Law Commission *Report* (n 89 above) Para 3.9.

threshold of 14, a common law relic, should be retained). Retention of the age of criminal capacity and the fixing of the thresholds at 10 (minimum age) and 14 (the age up to which the presumption applies) was motivated by scientific<sup>163</sup> as well as practical considerations. The main practical argument mirrored the Ugandan example.<sup>164</sup> Research presented before the Committee showed that very few children between the ages of 7 and 14 (the ages for the common law presumption) are actually charged and convicted of crimes.<sup>165</sup> Further, in retaining the age of 14 as the upper threshold, the Commission was influenced by an argument premised on the South African Constitution<sup>166</sup> under which children's rights; including juvenile justice rights and children's right to have their best interests protected, form part of the general Bill of Rights.<sup>167</sup> The Commission's argument went that since limitation of the constitutionally protected rights is only permissible if it complied with the tenor of the limitation clause,<sup>168</sup> including the requirement that limitation must take into account a 'less restrictive means' of achieving its purpose, reducing the threshold of the presumption from 14 years to say 13 or 12 years, would fall short of the constitutionally permitted limitation of rights.<sup>169</sup> Consequently that this would result in lesser protection for the rights of the child and might thus be vulnerable to a court challenge based on the Constitution.

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<sup>163</sup>Mostly canvassed in the Experts Seminar referred to in (n 158 above), where international research was presented showing the development of cognitive capacity between the ages of 10 and 11 for different children, see South African Law Commission *Report* (n 89 above) Para 3.29-3.30.

<sup>164</sup>Research in Uganda (n 145 above).

<sup>165</sup>South African Law Commission *Report* (n 89 above) Para. 3.25.

<sup>166</sup>Act No. 108 of 1996.

<sup>167</sup>Section 28 of the Constitution, also discussed in Chapter 3, section 3.5.3.

<sup>168</sup>Section 36 of the Constitution.

<sup>169</sup>South African Law Commission *Report* (n 89 above) Para 3.20.



Further, by fixing the thresholds of 10 and 14 the Commission remained alive to the political ramifications of setting higher age thresholds; in particular the fear that resonates with South African politicians as to the possibility of exploitation of children by adults who may use children to commit crimes. A similar concern was the danger that setting these ages at higher thresholds may lead to the excesses of welfarism, with the potential that those children below the set high ages would be subjected to lengthy and indeterminate placements without the due process safeguards being observed.<sup>170</sup>

Recalling that the practical value of the doctrine had been watered down in the past through flawed practice, where it was in some cases routinely ignored or easily rebutted,<sup>171</sup> the Commission was keen to address the rebuttal procedure as happened in a similar endeavour in the Namibian example. The final provisions of the draft Bill are thus fairly detailed in this regard. The Bill invites a ‘gate keeping’ role of the head of prosecutions, who should give a certificate indicating a desire to proceed with prosecution of child offenders under 18 years of age.<sup>172</sup> The Commission envisions that in light of research detailing the paltry number of child offenders in general and in the age category of 10-14 in particular, very few of child offender cases – mainly

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<sup>170</sup>South African Law Commission *Discussion Paper* (n 87 above) Para 6.42.

<sup>171</sup>South African Law Commission *Report* (n 89 above) Para 3.24. These concerns are also part of the discussion in section 4.7 above.

<sup>172</sup>South African Bill, section 5. The Lesotho Bill, in spite of its similarity (sections 83-95) on the issues of age and criminal capacity) with the South African one does not include such a provision though. However, the ongoing parliamentary process in South Africa has revealed that the Parliamentary Portfolio Committee has proposed the deletion of this gate keeping role for the head of prosecutions. For the Committee’s minutes on the deliberations and hearings on the Bill, see < [www.pmg.org.za](http://www.pmg.org.za) > (last accessed 30 September 2005).

singular and unusual cases of serious offending - may actually proceed to trial in light of the centrality of diversion as a procedure in the proposed child justice system.<sup>173</sup>

With regard to child offenders between 10 and 14 years, the Bill gives some legislative guidance regarding when and how the rebuttal procedure should occur.<sup>174</sup>

The provision enacts the common law position that vests the burden of rebutting the presumption on the prosecution beyond reasonable doubt.<sup>175</sup> A significant new introduction to the rebuttal procedure is the provision which requires that at the instance of the child or his legal representative,<sup>176</sup> an evaluation by child development experts of the child's cognitive, emotional, psychological, and social development must be ordered by the court.<sup>177</sup> Such experts may be called to give their evidence of the evaluation in court. The Law Commission believed in the pragmatism in this rebuttal procedure and envisioned an important function of the director of prosecution in the screening of child offending cases worthy of full prosecution.<sup>178</sup> A similar rebuttal procedure is adopted by Lesotho's proposed law.<sup>179</sup>

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<sup>173</sup>Discussed in Chapter 5.

<sup>174</sup>South African Bill, sections 5 and 56.

<sup>175</sup>South African Bill, section 56.

<sup>176</sup>South African Bill, section 75(1) provides for the right of children below the age of 14 to legal representation at the State's expense where this is necessary. A similar provision for children falling under the rubric of the *doli* presumption in Namibia (between the ages of 8 and 14) is contained in the Namibian Bill, section 100. The Namibian provision was influenced by the South African proposal, see Schulz and Hamutenya (n 98 above) 6-12.

<sup>177</sup>South African Bill, section 56 ( the section uses the words 'suitably qualified person' to refer to such child development experts and the use of these words invites the relevance of a range of persons including medics, psychologists, etc).

<sup>178</sup>See South African Law Commission *Report* (n 89 above) Para 3.29. The argument here was premised on the scarcity of experts on child development especially in the context of a developing country such as South Africa and further in light of disparate distribution of the few experts between rural and urban areas since most, if not all, was more likely to be found in urban areas. However as explained earlier in this sub-section, the 'gate keeping' role may not survive the Parliamentary process.

<sup>179</sup>Lesotho Bill, section 83.

In its examination of South Africa's Initial State Report under the CRC, the CROC commented that the proposed setting of a minimum age of criminal responsibility at 10 years was still 'too low'.<sup>180</sup> The CROC did not however analyse whether the modification to the common law rule on the *doli* presumption and the strengthening of the rebuttal procedure ensured consistency with the CRC. It is submitted that in light of the CROC's overall approach to this issue, and in particular, its fledging jurisprudence pointing to an important 'protective role' for the presumption where the minimum age is below 12,<sup>181</sup> the proposed provisions of the South African and Lesotho Bills may be substantially in conformity with international law in this area.

#### **4.9 Legislating for children below the minimum age of criminal responsibility or deemed to lack capacity on the application of the *doli* presumption**



While the CROC has been consistent in its examination of the setting of a minimum and upper age of criminal responsibility, it has not been as rigorous with its scrutiny of how juvenile justice systems have made provision for dealing with children below the minimum age of criminal responsibility. Yet, the obligations on States Parties in this regard are also explicitly the subject of the CRC.<sup>182</sup> It is important to emphasize that failure to recognize a link between setting a minimum age and how to deal with children below the minimum age leads to the possibility of serious violations of

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<sup>180</sup>CROC, *Concluding Observations*: South Africa CRC/C/15/Add.122, 28 January 2000 Para 17. This is possibly in light of the CROC jurisprudence on the minimum age to be set at 12, discussed in section 4.2.1, above.

<sup>181</sup>See discussion of the CROC's jurisprudence in section 4.2.1.3, above.

<sup>182</sup>Discussed in section 4.2.1.4, above. CRC, Article 40(3) (b) calls for measures for dealing with children below the minimum age 'without resorting to judicial procedures' while fully respecting 'human rights and legal safeguards fully'. A corollary provision is absent in the African Children's Charter, Article 17.

children's rights. This makes provision for children below the minimum age a key to this aspect of the children's rights model, just as the rule on setting a minimum age is. Cantwell's international comparative discussion on this issue flags the practical dimension of this obligation under the CRC.<sup>183</sup> Thus, a country may set a very high minimum age of criminal capacity of say 18 years but children below such an age may find themselves subjected to indeterminate custodial placements without the benefit of due process safeguards and grave violations of their rights while in custody. The contrary example could also be the existence of a low age of criminal responsibility but in the context of a system that is children's rights oriented in other issues other than the minimum age issue.<sup>184</sup>

#### 4.9.1 The approach of the reform countries under study



The need to deal with children below the age of criminal capacity in the context of the positions in Kenya, Namibia, Lesotho and South Africa (all of which retain the *doli*

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<sup>183</sup>Cantwell in UNICEF (n 14 above) 4.

<sup>184</sup>An example would be the Scottish welfare system (applicable to a number of criminal offences, with the exception of serious offending) which, by and large, excludes the penal process for a significant number of child offenders but with a minimum age of criminal capacity set at 8. The process of reform proposed by the Scottish Law Reform Commission *Report* (n 17 above) seeks to give further support for this system and adopt the age of 12 as the minimum age, although the Commission does not use the term "minimum age of criminal capacity" in the sense of the CRC requiring the setting of a minimum age of criminal capacity. It is argued here that such a system may, for example, give effect to the requirement on Separate Procedures and Institutions (discussed in Chapter 6 of this thesis) to deal with children in conflict with the law (as one pillar of the children's rights-orientated juvenile justice system model, see Chapter 2, section 2.8.1). In the context of the obligations of the CRC requiring the setting of a minimum and upper age however, the issue of age and criminal responsibility is also a key plank of the children's rights- orientated juvenile justice as was expressed in Chapter 2, section 2.8.1 and discussed in this Chapter. The Hong Kong Law Commission in Chapter 5 of its Report (n 23 above) sets out on a detailed treatment of procedures for children under the minimum age of criminal capacity and gives an array of recommendations in the context of child law reforms in Hong Kong.

presumption in varied forms), applies not only for children below the set minimum age, but also those found to be lacking capacity following a failed attempt to rebut the *doli* presumption. In all the proposed new laws of Namibia, Lesotho and South Africa, this issue is dealt with by similar provisions which envisage a primary role for probation officers or child care workers.<sup>185</sup>

Apart from the role these laws now place on the probation officer or child care worker in regard to assessing the age of children accused of crimes where their ages are uncertain, these provisions legislate for the powers and duties of the same officers to assess the child for the purpose of detailing how to deal with children below the age of criminal capacity or found lacking capacity.<sup>186</sup> In these events discretion is accorded to the probation officer or child care worker to take one of a number of options thus:<sup>187</sup>



- Refer the matter to the children's courts' under these jurisdictions (with the mandate for child protection issues under child care legislation).<sup>188</sup>

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<sup>185</sup>Namibian Bill, section 45; South Africa Bill, section 23(7) and Lesotho Bill, section 93.

<sup>186</sup>Namibian Bill, section 45; South Africa Bill, section 23 and Lesotho Bill, section 93. (Other purposes of assessment as detailed in these provisions include, preparation for preliminary inquiries before trial and gauging the prospects of diversion in each individual case). The Assessment procedure is further dealt with in Chapter 6, section 6.5.1.

<sup>187</sup>Namibian Bill, section 45 and Lesotho Bill, section 93 both of which expressly provide for these options. The initial South African Draft Bill (annexed to the South African Law Commission *Report* (n 89 above) make similar explicit provisions. These detailed provisions were sacrificed in the current Bill (introduced in Parliament) for a general provision granting the probation officer power, upon the assessment of a child, 'to recommend the transfer of a matter to a children's court stating the reasons for such transfer' (South African Bill, section 23(7) (d)).

<sup>188</sup>This proposal will however have to reckon with challenges unearthed by research which shows that referrals to children's court inquiries have been hampered by the fact that children's courts are under-resourced (and lack specialized officers) for example in South Africa. See South African Law

- Refer the child and/or the family to counselling or therapy.
- Arrange support services for the child's family.
- Convene a conference (attended by the child, the child's parents or appropriate adult, the victim of the offence, any other persons deemed relevant by the child care worker or probation officer). The purpose of such conference is to obtain more information and details of the circumstances surrounding the alleged child offending and the formulation of a plan.

The latter option is a novel use of Family Group Conferences (FGCs) as a social intervention mechanism in child care and welfare issues thereby extending the use of FGCs (now pre-eminent in many juvenile justice systems) beyond the sphere of juvenile justice.<sup>189</sup>



The three remaining countries have approached the issue more broadly, but retained the philosophy of invoking a 'preventative approach' through child protection legislation. While the Ugandan Statute is not explicit on what happens to children below the minimum age, a two tiered system is designed.<sup>190</sup> On the first tier, local government councils (from village to sub-county level), as the first port of call after the police for particular offences,<sup>191</sup> are entrusted to deal with the matter.<sup>192</sup> The

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Commission *Discussion Paper* (n 87 above) Para 10.48. Similarly in Namibia, constraints such as delays in the preparation of social workers' reports have characterised the working of these courts. The problem of limited options for dealing with children in need of care has been recorded in Namibia and an improved child-welfare service delivery system called for. See Schulz and Hamutenya (n 102 above) 11-12.

<sup>189</sup>FGCs are further considered in Chapter 5 on Diversion.

<sup>190</sup>Ugandan Statute, section 23.

<sup>191</sup>Set out in the Statute and including affray, assault, theft, trespass, malicious damage to property, see Ugandan Statute, 3rd Schedule.

second tier imposes a duty on the probation and social welfare officers or ‘any authorised person’ to apply to the Family and Children’s Court for a supervision or care order (where resolution of the matter fails at the council level or where a particular crime exceeds the council’s jurisdiction).<sup>193</sup> The effect of either order is to place the child under the probation officer’s supervision while the child stays with the parents or relatives or in the care of wardens of an approved home or foster care parent.<sup>194</sup> During placement of the child in places other than with the child’s parents, the probation and social welfare officer is tasked with monitoring the child’s progress, including continuing interaction with the child’s parents while bearing in mind the wishes of the child.<sup>195</sup> This approach is similar to the position in Ghana where the role of the ‘social welfare officer’ is retained for the supervision and care orders while the role envisaged for Uganda’s local government councils is vested in district child panels.<sup>196</sup>




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<sup>192</sup>The provisions mandate the Councils to pursue a restorative justice path by reference to the orders it should give thus compensation, reconciliation, apology etc., see Ugandan Statute, section 93 and 3<sup>rd</sup> Schedule. This is further discussed in Chapter 5.

<sup>193</sup>Ugandan Statute, sections 20-43. The Court must act on the basis of a social enquiry report (section 25(2)) evidencing the break with the tradition of using these reports only at pre-sentence stage. For a discussion on pre-sentencing reports, see Chapter 7, section 7.5.

<sup>194</sup>The Statute is alive to the dangers or excesses of this ‘welfarist’ provision in regard to approved and foster care homes by placing emphasis on special duties of the probation officers in relation to supervision and care orders, for example through regular visits to assess the state of the child, as per section 33. Ugandan Statute, 2<sup>nd</sup> Schedule details explicit Foster Care Placement Rules.

<sup>195</sup>Ugandan Statute, section 33.

<sup>196</sup>Ghanaian Act section 31 (Juvenile Justice Act, 2003, discussed in this thesis) and Ghanaian Children’s Act 560 of 1998, Part II. The latter Act envisages the appointment by the relevant Minister of the members of these Panels drawing from nominated members of public in the respective magisterial districts. The focus in the Act is on ‘Mediation’ as the main resolution method. This is discussed further in Chapter 5 on Diversion.

In Kenya, the Children's Court's jurisdiction dealing with 'children in need of care' is of relevance to children under the minimum age and those found to be lacking capacity under the *doli* presumption.<sup>197</sup> Any person is authorised to report instances of children in need of care to the nearest authorised officer (police, probation, children's officers, etc)<sup>198</sup> and the government's children's officers may approach the Children's court vested with jurisdiction to grant an appropriate order. The orders that the court may grant in such cases range from an order that a child be returned to his parents to exercise 'parental responsibility', placement under supervision of probation officers, foster care, to any other orders the Court may find appropriate provided that it is guided by the principle of the best interests of the child under the Act.<sup>199</sup>

#### 4.10 Conclusion



This Chapter has examined the issue of age and criminal capacity as an important signpost of the influence of a children's rights approach on juvenile justice reforms in Africa. It has contended that while the issue of setting a minimum age of criminal

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<sup>197</sup>Kenyan Act, section 119(3) invites the application of the Penal Code's provision on the minimum age of criminal capacity discussed in section, above. Section 119(1) provides an in exhaustive list of children in need of care and protection.

<sup>198</sup>Kenyan Act, section 120(1). The general 'criminalisation' of children in need of care and protection, for example the police arrest and harassment of street children in Kenya has been widely criticized. See generally Human Rights Watch (1997) *Juvenile Injustice: Police Abuse and Detention of Street Children in Kenya* New York: Human Rights Watch. The Act attempts to address this criticism by the host of rights of the child (including due process rights discussed in Chapter 6, section 6.6.3) that it includes. An attempt at decriminalisation is to be found in section 119(2) which specifically provides that "a child apprehended [as a child in need of care] shall be placed in separate facilities from a child offenders' facility."

<sup>199</sup>Kenyan Act, section 125. The Act's provisions detailing the rights of the child (mainly Part II) and provisions such as the Foster Care Placement Rules under the Act (4<sup>th</sup> Schedule) are relevant to the dangers of child rights abuses in cases to foster care homes or some form of institutionalization.



responsibility remains much contentious (and much less of a legal issue than one of societal and practical dilemmas), emerging guiding international law standards are discernible from the CROC's approach to this issue. The CROC's approach distils what can be said to be an emerging 'minimum' threshold that requires the minimum age to be set at 12 years or more.<sup>200</sup> Related to this is an instructive emerging norm to States applying the *doli* presumption. This norm can be characterised as militating against the abolition of the doctrine where this would result in a low age of criminal capacity (of below 12).<sup>201</sup> The CROC's approach of using age thresholds regarding the minimum age issue mirrors the corollary treaty law development of what may now be termed as an international consensus pointing to 18 years as the acceptable upper age applicable to all jurisdictions in spite of different socio-cultural and legal systems worldwide.<sup>202</sup>



The country-specific reform examples discussed in this Chapter have adopted differing approaches to the issues of age and criminal capacity. In many instances, these approaches were underpinned by different local debates on the issue.<sup>203</sup> Arguments on the obligations under the CRC were, however, of persuasive value to the reformers. Indeed, the increase in the minimum age of criminal capacity in Ghana and Uganda, and proposed increase in Lesotho and South Africa all accord with the CROC's consistent criticisms when the minimum age is set at a very low age. It was submitted that while the minimum age of 10 in Lesotho and South Africa may still be

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<sup>200</sup>See sections 4.2.1.1, 4.2.1.2 and 4.2.1.3, above.

<sup>201</sup>See section 4.2.3, above.

<sup>202</sup>See section 4.2.1.4, above. In further specific reference to the African countries under study, the African Children's Charter (article 1) adopts the age of 18 as the upper age for all the Charter's protected rights.

<sup>203</sup>Section 4.8, above.

considered lower than the age of 12 suggested in many instances by the CROC, retention of *doli incapax* rule with strengthened rebuttal procedures will ensure an enhanced protection for children between the ages of 10 and 14 where it cannot be proved that they had the capacity to commit crime.

In light of the jurisprudence of the CROC and the reforms in these countries, the Chapter considered that the retention of low minimum ages in Kenya (8 years) and Namibia (7 years) is in violation of the CRC. By exposing the non-compliance of these two countries' positions with the emerging principles of the CRC, the Chapter has brought to the fore the value of using international children's rights law as a benchmark in examining the issue of age and criminal capacity.

Of significance is the common approach by the Ghana, Lesotho, South Africa and Uganda which all adjusted the minimum age of criminal responsibility upwards. Rather than follow the legacy of former colonizing countries from which they had inherited juvenile justice laws, a different pattern emerges. The pattern views children's rights ideology as a main reference point amongst other competing ideologies for example, perceived negative public attitude towards crime and pragmatism, which would have militated against an increase in the minimum age.<sup>204</sup>

The contrasting arguments that determined the fate of the *doli incapax* doctrine in the UK on the one hand and the four countries under study on the other hand, are examples amplified in this Chapter.<sup>205</sup>

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<sup>204</sup> See section 4.8.2 and 4.8.3, above

<sup>205</sup> See section 4.7 above on the comparative discussion regarding the doctrine and the reasons that motivated its abolition in England.

Further influence of the CRC is evident in the country-attempts at making provision for children below the minimum age of criminal capacity.<sup>206</sup>

Apart from highlighting the influence of international law standards on issues surrounding the minimum age of criminal capacity, this Chapter has also demonstrated, in relation to the reforms relating to the strengthening of the common law rebuttal procedure for the *doli* presumption, an example of how legislating for improved State practice may substantially bolster provisions at international law.<sup>207</sup>



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<sup>206</sup>See section 4.9 above.

<sup>207</sup>In respect of the proposed rebuttal procedure in the Lesotho, Namibian and South African Bills.

## CHAPTER 5

### DIVERSION IN THE NEW JUVENILE JUSTICE SYSTEMS UNDER STUDY

#### 5.1 Introduction

A central pillar of a child's rights-orientated juvenile justice system identified in Chapter 2 is the feature of diversion.<sup>1</sup> Therefore the extent to which a juvenile justice system incorporates diversion both in legislation and practice is one pointer to the system's adherence to children's rights.

This Chapter focuses on how the new juvenile justice systems in select African countries have engaged with diversion. The Chapter first gives a definition of what the practice of diversion entails and the theoretical justifications that underlie it. The Chapter then gives a historical synopsis of diversion in juvenile justice systems, tracing the evolution of the practice in western juvenile justice systems. Following this, the legal basis under international law for diversion is discussed. The last part of the Chapter engages in a comparative discussion of how the juvenile justice law reform processes in the African countries under study have engaged with the practice of diversion. This discussion will also highlight the position obtaining in these countries with regard to diversion both prior to and after the law reform processes.

Overall, this Chapter will contend that the respective country reform case studies represent diverse examples of a recognition of diversion in line with the precepts at

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<sup>1</sup>See Chapter 2 section 2.8.1.

international children's rights law. A further contention will be that the differences in the approach of the countries under study are in keeping with the premise that while international children's rights law has now made diversion a binding feature on States since the coming into force of the CRC, there is no specific detail on how diversion is to be given effect except for broad guidelines.

## 5.2 Diversion and its origins

Diversion has been defined as entailing "strategies developed in the youth justice system to prevent young people from committing crime or to ensure that they avoid formal court action and custody if they are arrested and prosecuted".<sup>2</sup> This definition is so broad as to include preventative programmes in relation to child offending. It has therefore been observed that diversion can incorporate a variety of strategies from school-based crime prevention programmes through to community based programmes used as an alternative to custody.<sup>3</sup> However in relation to children in conflict with the law who are the subjects of this thesis, the concept of diversion assumes a much more limited meaning. Thus it involves the referral of cases away from formal criminal court procedures where there is enough evidence to prosecute.<sup>4</sup> This is also in keeping with a study which defines juvenile diversion as referring to "programmes and practices which are employed for young people who have initial contact with the police, but are diverted from traditional juvenile justice processes before children's

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<sup>2</sup>Muncie, J (1999) *Youth and Crime: A Critical Introduction*, London: Sage 305 quoted in Wood, C (2003) *Diversion in South Africa: A Review of Policy and Practice, 1990-2003* Institute for Security Studies (ISS) Paper 79 Pretoria: ISS 1.

<sup>3</sup>Wood (as above) 1.

<sup>4</sup>Gallinetti, J, Muntingh, L and Skelton, A "Child Justice Concepts" in Sloth-Nielsen, J and Gallinetti, J (2004) *Child Justice in Africa: A guide to good practice* Community Law Centre: Cape Town 32.

court adjudication”.<sup>5</sup> Although pre-trial diversion represents the earliest stage at which child offenders may be channelled away from the formal criminal justice process, diversion may occur at any stage of the process. Muntingh explains thus:

“Diversion entails a decision to halt the criminal justice process at any particular point and replace subsequent judicial actions (arrest, trial, conviction, sentencing, institutional care, etc) with alternative measures. [The aim of diversion is therefore] that the next logical step in the criminal justice process would not be in the best interests of the child offender, the victim, or the community...”<sup>6</sup>

This Chapter will therefore take cognisance of the possibility of using diversion in the course of trial or at the post-trial stage of criminal proceedings.



In light of diversion practices over the years, it has been contended that diversion is a process of flexible nature with no hard and fast demands for formal programmes as an alternative to formal court procedure. Wood explains thus:

“Diversion does not necessarily require a child to be placed in a formal programme but includes interventions such as receiving a police caution, writing an apology letter, participating in an alternative dispute resolution forum or being placed under supervision...”<sup>7</sup>

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<sup>5</sup>Polk, K (2003) “Juvenile Diversion in Australia: A national Review” (Unpublished Paper presented at the conference entitled “Juvenile Justice: From Lessons of the Past to a Road Map for the Future” convened by the Australian Institute of Criminology in conjunction with the New South Wales Department of Juvenile Justice and held in Sydney , 1-2 December 2003).

<sup>6</sup>Muntingh, L “The Development of Diversion Options for Young Offenders” in ISS (1997) *Policing the Transformation* Monograph No. 12 Pretoria: ISS 3.

<sup>7</sup> Wood (n 2 above) 1.

The concept of diversion only entered the vocabulary of juvenile justice as a result of the (US) President's Crime Commission in the 1960s, although the practice of diversion existed before this period. Indeed, the very establishment in the late 19<sup>th</sup> century of a separate court system for young people accused of crimes is considered as heralding the beginning of diversion, as this was a form of channelling children away from the adult criminal justice system. Reformatories and institutions specially designated for children emerged following the establishment of separate courts.<sup>8</sup> The programmes in these institutions entailed the provision of treatment and moral re-education aimed at preventing recidivism. This amounted to diversion by virtue of the premise that these programmes were intended as an alternative to formal criminal justice systems' institutions such as prisons.

Wood asserts that "different periods have resulted in various diversion practices coming in and out of the vogue".<sup>9</sup> Following the establishment of separate courts and diversion interventions in institutions, the use of police cautions also increasingly gained prominence in early 20<sup>th</sup> century and was eventually formalised in a number of western jurisdictions.

### **5.3 Theoretical justifications for and against diversion**

Diversionary practices can be said to have arisen as a response to a desire to redress the pitfalls in the juvenile justice system. Thus juvenile courts, underpinned by the welfarist understanding of the 'best interests of the child', were developed in recognition of childhood and a desire to handle child offenders differently from adult

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<sup>8</sup> See Chapter 2 section 2.2.

<sup>9</sup> Wood (n 2 above) 1.

offenders. As was detailed in Chapter 2, abuse of the ‘welfarist’ philosophy was characterized by increasing and indeterminate periods of incarceration of children under the guise of rehabilitation.<sup>10</sup> This led to the shift in the philosophy of juvenile justice to alternative philosophies such as the justice theory. In response to the excesses in the practice of the welfare theory, juvenile justice was marked with advocacy which called for the implementation of ‘the 3-Ds’ (de-institutionalisation, decriminalisation, and diversion<sup>11</sup>).<sup>12</sup> As one of the components of ‘the 3-Ds’, initiatives geared towards diversion in juvenile justice systems have since come to the fore.

Aside from this historical explanation concerning the development of diversion, a number of theoretical justifications abound in explanation of its desirability. Foremost in this regard is the link between diversion and the ‘labelling theory’ of crime. The rationale for the labelling theory developed by Becker which dates back to the 1960s is that:

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<sup>10</sup>Chapter 2 section 2.3.

<sup>11</sup>See Walgrave, L and Mehlbye, J “An Overview: Comparative Comments on Juvenile Offending and its Treatment in Europe” in Mehlbye, J and Walgrave, L (1998) *Confronting Youth in Europe-Juvenile Crime and Juvenile Justice* Copenhagen: AKF Forlaget 21-53, 22 (explaining that in the course of challenging the doctrine of *parens patriae*, discussed in Chapter 2, “Children’s rights movements and other emancipating movements claimed fundamental reforms of the protective [welfare-oriented] juvenile justice systems, which neglected too much the visions and the specific juridical interests of children and juveniles. The so called-4 Ds - (diversion, de-judicialisation, de-institutionalisation, due process) were the slogans of this movement.”). The fourth ‘D’ considered by these two authors – de-judicialisation – denotes a lessened role for courts or judges. In this sense it can be considered as part of the 3-Ds since decriminalisation is also to a similar effect.

<sup>12</sup>Chapter 2, sections 2.3 and 2.4.



“Deviance is not a quality of the act a person commits, but rather a consequence of the application by others of rules and sanctions to an ‘offender’. The deviant is one to whom the label has successfully been applied; deviant behaviour is behaviour that people so label.”<sup>13</sup>

The theory therefore argues that contact with the justice system burdens a child with a label that makes the child behave according to such a label. The theory further explains that labelling encourages stigma, which in turn fosters low self-esteem and, eventually, such low self-esteem prompts anti-social behaviour.<sup>14</sup>

Diversion has been advocated as a means of eliminating the stigma attached to being accused in criminal proceedings. Thus, an offending child is also potentially spared of a criminal record and the child’s future opportunities (such as employment) and individual development are not hampered as would have been the case if a criminal charge was pursued in a formal criminal proceeding.

On the other hand, the labelling theory as a theoretical foundation for diversion has also been faulted. It has been observed that the proposed benefit of reducing stigma is illusory, since the stigma of contravention of the law is known (or attaches) in one way or another even when a child is diverted.<sup>15</sup>

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<sup>13</sup>Becker, H.S (1963) *Outsiders: Studies in the Sociology of Deviance* New York: The Free Press 9.

<sup>14</sup>Fishman, G “The Paradoxical Effect of Labelling” (1976) 4 *International Journal of Criminology and Penology* 1 cited in Lewis, S (1997) “Juvenile Diversion: Keeping Children out of Prison” (Unpublished Masters of Arts thesis submitted to Rhodes University) 11.

<sup>15</sup>Dorhne, C and Gewerth, K (1995) *American Juvenile Justice: Cases, Legislation and Comments* Maryland: Austin and Winfield 295. It has also been suggested that labeling theory is more of an attitude or a perspective than a theory and that it fails to explain the psychological processes by which the burden of a labelling process produces corresponding behaviour. Further, it ignores existing

Despite the varied philosophical roots for the practice of diversion, it is widely acknowledged to promote more humanitarian and less stigmatising responses to child offending than punitive sentences.<sup>16</sup> Van Bueren and Tootell contend that diversion practices which involve the removal of children from criminal justice processes serve to hinder negative effects of subsequent proceedings in juvenile justice administration, such as the stigma of conviction and sentence.<sup>17</sup> Their view is motivated by the Commentary to the Beijing Rules which explains that:-

“Diversion, involving removal from criminal justice processing and, frequently, redirection to community support services, is commonly practised on a formal and informal basis in many legal systems. This practice serves to hinder the negative effects of subsequent proceedings in juvenile justice administration (for example the stigma of conviction and sentence). In many cases, non-intervention would be the best response.”<sup>18</sup>



In addition to the avoidance of stigma, diversion has been justified on the basis that it aims to avoid the contamination of child offenders by more serious or recidivist offenders.

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temperamental predispositions; it underplays resistance to labelling; it focuses only on reactions to negative labels, ignoring reactions to positive labels.

<sup>16</sup> Wood (n 2 above) 3.

<sup>17</sup> Van Bueren, G and Tootell, A “United Nations Standard Minimum Rules for the Administration of Juvenile Justice” (Unpublished Commentary submitted to Defence for Children International) available at < [http://child-abuse.com/childhouse/childrens\\_rights/dci\\_be29.html](http://child-abuse.com/childhouse/childrens_rights/dci_be29.html) > (last accessed 30 September 2005).

<sup>18</sup> Commentary to the Beijing Rules, Rule 11.

Further, diversion has been lauded as being more effective in comparison to criminal trials and sentences. Studies have shown that through diversion child offenders are encouraged to accept responsibility for their actions, to provide restitution to the community or victims of offence, and to channel individual skills to the community, hence lowering re-offending rates by comparison to trial and conventional sentences.<sup>19</sup>

The fact that most (pre-trial) diversion practices are devoid of the technical rigours and time delays that traditionally characterise formal criminal proceedings has also been cited as making diversion a simpler, faster and economical alternative to formal criminal proceedings.

Diversory options have been said to recognize that most juvenile offending is “episodic and transitory (since) most young people mature out of criminal behaviour”.<sup>20</sup>

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<sup>19</sup>Muntingh conducted a study in 1998 in the context of diversion programmes offered by a South African non-governmental organisation, National Institute for Crime Prevention and Rehabilitation of Offenders (NICRO) in South Africa. Out of a sample of 640 children who had participated in five different programmes, the compliance rate (indicating the commitment of the participants to complete the diversion programme) was recorded at 75%. In the first twelve months after participation in the diversion programme only a paltry 6.7% of the sample re-offended. The study further records that participants “expressed a positive personal change after the programme, the highlight being acceptance of responsibility for their actions.” See Muntingh, L “Does Diversion Work?” (1999) 3 *Article 40* 8. For an analysis in similar vein see, Sloth-Nielsen, J (2001) “The Role of International Law in Juvenile Justice Reform in South Africa” (Unpublished LL.D Thesis submitted to the University of the Western Cape) 242-245.

<sup>20</sup>Australian Human Rights and Equal Opportunity Commission (2001) “Human Rights Brief No. 5 - Best practice principles for the diversion of juvenile offenders” (Unpublished Paper on file) 1. (Hereinafter “Human Rights Brief No. 5).

However, a number of commentators have voiced concerns that the practice of diversion may not necessarily promote a more humanitarian and less stigmatising response to child offending.<sup>21</sup> The primary criticism has been the potential for ‘net-widening’ - the inclusion into the juvenile justice system of children who would (were it not for the existence of diversion programmes) ordinarily be out of the juvenile (criminal) justice system’s ambit. In this way diversion can often be a means of expanding the scope of more invasive measures of social control.<sup>22</sup>

Further, as Wood explains:

“A counter argument proposes that diversion can be used as part of a process to ‘define deviance down’ which consequently has the opposite effect of net-widening. It allows certain individuals, usually those who have committed relatively minor offences or who are first offenders, to experience negligible state intervention. This in turn, alleviates the pressure on an invariably overburdened criminal justice system and the State can appear to be productive with minimal effort and expenditure.”<sup>23</sup>

Wood’s explanation is lent support by the views of Garland.<sup>24</sup> Garland attributes the increased use of diversion in the United Kingdom and the United States of America to the inability of governments in these industrialised nations to cope with a high volume of minor offences coming to police attention. Garland contends that, based on this

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<sup>21</sup>Muntingh, L “A Critical Review of Diversion” in Muntingh, L (ed) (1995) *Perspectives on Diversion*, NICRO Research Series No. 2 Cape Town: NICRO.

<sup>22</sup>Cohen, S (1985) *Visions of Social Control*, Cambridge: Polity; Cohen, S and Scull, A (eds) (1983) *Social Control and the State: Historical and Comparative Essays*, Oxford: Martin Robertson.

<sup>23</sup>Wood (n 2 above) 2.

<sup>24</sup>Garland, D (2001) *The Culture of Control: Crime and Social Order in Contemporary Society* Oxford: Oxford University Press 117.

inability, these governments have sought to exclude certain crimes committed by children - such as drug possession and first-time theft offences - from the ambit of the criminal justice system in order to alleviate costs and improve managerial efficiency, rather than as a result of any great shift in penological thinking.<sup>25</sup> In this regard, diversion becomes a means of keeping children out of the official realm of the juvenile justice system not because it promotes a more humane and beneficial approach but to alleviate pressure on the criminal justice system by reducing caseload. Hence, the benefits of diversion, such as the reduction of stigma, recidivism, coercion and social control are likely to be compromised in the quest for efficiency and cost-savings.

A further concern is that diversion is often initiated without the concurrent measures to ensure the protection of children's legal rights.<sup>26</sup> The most affected children's due process rights comprise the right to the presumption of innocence, the right to be protected from self-incrimination and the right to remain silent.<sup>27</sup> The referral of a child to diversion therefore requires the child's free consent. Otherwise, the child must go through the process of a trial and these due process rights must be safeguarded. It has been asserted that there is a danger that a child could be unduly influenced into accepting responsibility for an offence at the expense of his or her right to remain silent. Consequently it is imperative that children are not diverted to a programme or other informal diversion options *in lieu* of the possibility of prosecution.<sup>28</sup>

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<sup>25</sup>Garland (as above) 118.

<sup>26</sup>Wood (n 2 above) 2.

<sup>27</sup>CRC, Article 40(3), considered further in Chapter 6, section 6.6.3.

<sup>28</sup>Gallinetti, Muntingh and Skelton (n 4 above) 33.

An additional problem is that the power to divert is often vested in a limited number of officials or professionals who are granted wide discretionary authority. Abuse of such discretion can result in discrimination on the basis of race, class, gender or other status.<sup>29</sup> This has been demonstrated in practice in two of the countries under study (South Africa and Namibia) as will be highlighted in a later section of this Chapter.<sup>30</sup>

A detailed discussion on the standards at international law in relation to diversion reveals that some of the above concerns are addressed within the international law framework.<sup>31</sup> It has also been argued that “while concerns regarding the practice of diversion are valid, the establishment of a suitable legal framework to govern the referral procedures, access and delivery of diversion interventions can provide sufficient protection”.<sup>32</sup>



#### **5.4 The development of diversion options in Western jurisdictions**

In the juvenile justice systems of the African countries under study, the use of diversion remains a relatively new concept as opposed to Europe, North America and Australasia where diversionary practices in juvenile justice have been in place for many years. Since the 1970s, different forms of diversion became an integral part of juvenile justice systems in most western countries.<sup>33</sup>

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<sup>29</sup> Wood (n 2 above) 2.

<sup>30</sup> Section 5.6, below.

<sup>31</sup> Discussed in section 5.5, below.

<sup>32</sup> Wood (n 2 above) 2.

<sup>33</sup> Sarre, R “Destructuring and Criminal Justice Reforms: Rescuing Diversion Ideas from the Waste Paper-basket” (1999) 10(3) *Current Issues in Criminal Justice* 259-272, 259.

It is widely acknowledged that diversions became prominently associated with the procedure of police cautioning, both formal and informal.<sup>34</sup> The example of western Commonwealth countries shows early use of police cautioning as a form of diversion.<sup>35</sup> Australia and Britain are two cases in hand.

Although it is only now that the use of police cautions is widespread in all eight jurisdictions of Australia, police cautions became an integral feature of the juvenile justice systems in Victoria and Queensland as early as the mid-1960s.<sup>36</sup> Examples of informal police cautions and warnings can be found in New South Wales as early as the 1930s even though it was in the mid-1980s that the formal introduction of police cautioning was seen in this jurisdiction.<sup>37</sup> Juvenile justice practice in England and Wales has included the widespread use of police cautions. This continues to date, albeit on the strength of a new procedure which provides for the reprimand and final warning of child offenders (in *lieu* of cautioning) that was introduced by the UK Crime and Disorder Act, 1998.<sup>38</sup>

Most western jurisdictions recognise that the police are the first point of contact for juvenile offenders and so allocate substantial discretion to them in terms of who

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<sup>34</sup>Polk (n 5 above) 2 defines formal cautioning as involving the warning and release of a child offender by the police and specific recording of such caution while informal cautioning simply entails the warning and release of the child offender without a formal note or record.

<sup>35</sup>Whose legal systems bear some relevance to the African countries under study in this thesis (due to a colonial link with Britain).

<sup>36</sup> Polk (n 5 above) 2

<sup>37</sup>Bargen, J, *et al* "Regulating Police Discretion: An Assessment of the Impact of the New South Wales Young Offenders Act, 1997" (2005) *Criminal Law Journal* 130.

<sup>38</sup> Sections 65 and 66.

qualifies for diversion. The police have thus been described as the “gatekeepers” to diversion in England, Germany, Ireland and New Zealand.<sup>39</sup>

The practice of police cautioning has now been developed into varied forms in some of the Western jurisdictions and different ways exist for the administration of cautions.<sup>40</sup> While there is still the situation where a child offender is diverted out of the system by way of a police caution and no other further action ensues, cautioning may now entail, in addition, the referral of a child on a voluntary basis into a programme such a drug and alcohol counselling centre. Further, there may be cautioning of a child offender on the basis of some conditional undertaking such as the payment of a fine, attendance at a programme or community service. In this latter case, diversion through cautions is made conditional on the fulfilment of these undertakings and, hence, there is the possibility of re-entry back into the system in case of failure to meet the conditions. A number of schemes established in England and Wales in the 1980s introduced the possibility of cautions with additional conditions.<sup>41</sup>

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<sup>39</sup>Lyne B.C “Finding a Place for Juveniles in the Irish Criminal Justice System: Easy Question, Impossible Answer” (2005) *Cork On-line Law Review* 1-12, 7.

<sup>40</sup>Polk (n 5 above) 2-3 (detailing the example of police cautioning in Australia).

<sup>41</sup>Miers, D and Semenchuk, M (2002) “Victim-offender Mediation with Juvenile Offenders in England and Wales (Unpublished Paper prepared for European Commission Grotius II Criminal Programme for 2002-2003) 10 explain that in most cases a caution would be issued with a condition that the young offender attends courses on matters such as anger management and victim awareness courses run by the local authorities’ social services department.



With the rise of restorative justice practices, new diversion interventions that focus on repairing the harm caused by crime were developed.<sup>42</sup> Of relevance in the juvenile justice sphere were family group conferences (FGCs) and victim offender mediations (VOMs) that developed in the early 1990s. The link between police cautions and these new diversion practices was seen for example in the case of England and Wales in the early 1980s. At this early stage, VOMs or FGCs were rarely invoked on their own in England and Wales.<sup>43</sup> Instead, a form of victim-child offender relationship or contact was forged through the avenue of police cautions.<sup>44</sup>

The movement towards more involvement by the community and victims of crime was influential in legislative developments for (restorative justice-oriented) diversions elsewhere, in particular, Australia and New Zealand. In New Zealand, this led to the introduction of FGCs by virtue of the enactment of the Children, Young Persons and their Families Act 1989 (CYPFA). The philosophy underlying the CYPFA had four main strands: “family responsibility, children’s rights, (including the right to due process), cultural acknowledgement and partnership between the State and the

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<sup>42</sup>Wood (n 2 above) 1. For a comprehensive discussion see generally, Braithwaite, J (1989) *Crime, Shame and Reintegration* Cambridge: Cambridge University Press; Zehr, F (1990) *Changing Lenses: A New Focus for Crime and Justice* Scottsdale: Herald; Skelton, A “Restorative Justice as a Framework for Juvenile Justice Reform: A South African Perspective” (2002) 42(3) *British Journal of Criminology* 496-513; Considine, J (1999) *Restorative Justice: Healing the Effects of Crime*. Ploughshares Publications. New Zealand 171-172.

<sup>43</sup>Crawford, A and Newburn, T “Recent Developments in Restorative Justice for Young People in England and Wales – Community Participation and Representation” (2002) 42 *British Journal of Criminology* 476-495.

<sup>44</sup>Miers and Semenchuk (n 41 above) 3 record the practice during this time of typical arrangements between the police and local social services departments in which young offenders who were cautioned were invited to make direct or indirect reparation to the victim.

community”.<sup>45</sup> Through the provisions of the Act, FGCs (conferences) were the central mechanism for the adjudication of juvenile justice cases.

Conferencing was then considered a novel diversionary experiment. It was placed on an entirely different paradigm from police cautions or a hybrid of diversionary practices that had been fashioned around the use of cautioning. Bargaen and others summarise the distinguishing paradigm on which FGCs were based as “putting family support and victim satisfaction at the centre, rather than the perimeter of, reactions to offending by young people”.<sup>46</sup> The same can be said of VOM, albeit that mediation involves fewer stakeholders (victim and offender) than FGCs (which may involve third parties to the incident of child offending such as representatives of the community). In New Zealand, the increased use of FGCs following the enactment of the CYPFA is credited with the dramatic decrease in the number of young offenders appearing before the Youth Court.<sup>47</sup> The New Zealand model has been of profound comparative relevance to many jurisdictions. These include Australia and the UK where examples of different forms of FGCs and VOMs have been in vogue.<sup>48</sup> As will be considered in section 5.6, below, FGCs and VOMs modelled on the New Zealand example have been used in the juvenile justice systems of Namibia and South Africa, two countries under study. Further as section 5.7.3.3 will discuss, the Lesotho,

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<sup>45</sup>Bargaen, *et al* (n 37 above) 131 (citing Hassal, I “Origin and Development of Family Group Conferences”, in Hudson, J., Morris, A, Maxwell, G and Galaway, B (1996) *Family Group Conferences: Perspectives on Policy and Practice* London: Federation Press 19).

<sup>46</sup>Bargaen, *et al* (n 37 above) 131.

<sup>47</sup>Bargaen, *et al* (n 37 above) 131.

<sup>48</sup>See detailed discussions on a number of individual western countries in Morris, A and Maxwell, G (eds) (2001) *Restorative Justice for Juveniles: Conferencing, Mediation and Circles* Oregon/Oxford: Hart Publishing.

Namibian and South African recognize the FGCs and VOMs as a diversion mechanism.

Although FGCs and VOMs were well received and continue to enjoy high level of support within the juvenile justice systems in these jurisdictions,<sup>49</sup> the link between these new diversion initiatives in these jurisdictions and police cautions was never lost. Police cautions became widely regarded as a complimentary diversion initiative to FGCs and VOMs. Hence, in New Zealand and many of the Australian jurisdictions, conferencing (FGCs) was to be used for more serious offences, while cautioning would be retained for minor offences.<sup>50</sup> This resulted in a tiered process in which conferencing would be reserved for more serious offences for which cautions and ad-hoc reparation were deemed inappropriate.<sup>51</sup>



With time, additional diversion interventions such as sentencing circles emerged.<sup>52</sup> It is thus clear that since the 1970s, diversion and increasing community involvement in dispute resolution processes have characterised developments in juvenile justice in many countries. This has been associated with moves towards restorative justice. The

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<sup>49</sup>See Polk (n 5 above) 5 (on the popularity of FGCs in Australia); Miers and Semenchuk (n above) 4-5 (on the prevalence of VOM use in England Wales) and Barga, *et al* (n 37 above) 139-147 (on the use of diversion in terms of rates, consistency and equity in New South Wales, Australia ).

<sup>50</sup> Barga, *et al* (n 37 above) 132-133.

<sup>51</sup> Morris and Maxwell (n 48 above) generally.

<sup>52</sup>See McCold, P “Primary Restorative Justice Practices” in Morris and Maxwell (n 48 above) 41-58, Lilles, H, “Circle Sentencing: Part of the Restorative Justice Continuum” in Morris and Maxwell (n 48 above) 161-182 (on the origin and practice of sentencing circles). A detailed consideration of these different forms of diversion is not provided here due to the limited scope of this thesis.

forms taken are many and varied. They include mediation and reparation schemes, police cautions, community service, FGCs and VOMs.<sup>53</sup>

#### **5.4.1 The introduction of legislative measures to regulate diversion**

For a long time, the practice of diversion in Western jurisdictions was predicated on the discretion of the police and other criminal justice role players such as presiding officers of youth courts. The lack of statutory recognition and definition of diversion led to a number of factors which amounted to obstacles to the effectiveness of diversion. Issues of lack of consistency, lack of uniformity and inequity in the application of diversion options were therefore inevitable. For example, the history of police cautions reveals that a number of factors (least of which was abuse of police discretion and police disbelief in the effectiveness of cautions) have over the years inhibited their use.<sup>54</sup> This is despite the reality that, in some jurisdictions, in excess of 50-60% of young offenders were diverted from court via police cautions.<sup>55</sup>

Further, the actual implementation of diversion programmes in a number of jurisdictions often mismatched their intended purposes. In some cases, discrimination or bias in child offender access to diversion was unearthed.<sup>56</sup>

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<sup>53</sup>Hallett, C “Where Do We Go From Here? The International Context: Trends in Juvenile Justice and Child Welfare” available at < <http://www.scotland.gov.uk/cru/documents/ech4-02.asp> > (last accessed 30 May 2005).

<sup>54</sup>See Polk (n 5 above) and Barga, *et al* (n 37 above) 130-131 (in respect of the example of Australia).

<sup>55</sup>Barga, *et al* (n 37 above) 130 (on the example of most Australian jurisdictions in the 1990s).

<sup>56</sup>See for example, Australian Law Reform Commission (1997) *Seen and Heard: Priority for Children in Legal Processes* Para 18.35.

These concerns gradually led to statutory recognition and regulation of diversions in many jurisdictions. In relation to one of Australia's jurisdiction up and until the 1990s, Bargaen and others explain thus:

“To overcome barriers [in relation to diversion] it was recommended that diversion should be promoted through statutory recognition, policy endorsement, training, stricter management and state-wide monitoring.”<sup>57</sup>

As a result, the New South Wales' (Australia) Youth Offender Act 1997 was enacted.<sup>58</sup> It legislated for FGCs and was modelled on the New Zealand's CYFPA of 1989, discussed earlier in this section.<sup>59</sup> However, unlike the CYFPA, this Act included provisions aimed at regulating diversion. Commentators explain that:

“... [T]he Act provides a legislative framework for the diversion of young offenders from court. Police discretion in the use of warnings, cautions and youth justice conferences is guided to an extent not usually seen in legislation.”<sup>60</sup>

Procedures in similar vein exist in a number of other western jurisdictions which have since moved to legislate for diversion.<sup>61</sup> However, the problem of how to regulate

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<sup>57</sup> Bargaen, *et al* (n 37 above) 131 (on the example of New South Wales).

<sup>58</sup> This legislation is only discussed as a recent prominent example of the move towards regulating diversions in Western countries.

<sup>59</sup> Bargaen, *et al* (n 37 above) 134 points out the influence of the New Zealand legislation on the Australian Act.

<sup>60</sup> Bargaen, *et al* (n 37 above) 134 discussing that this Act enacted provisions aimed at formally recognizing diversion options in statute and reducing the procedures associated with diversionary options. Further it included provisions aimed at enabling the police to determine the appropriateness of warnings and cautions; and introducing levels of review of these determinations, including judicial review of administrative decisions on diversion. In this regard these writers further describe the legislation “as going some way towards addressing some of the barriers to diversion identified throughout the 1980s and 1990s.

referrals to diversion and police discretion in this regard has been noted.<sup>62</sup> Further, pitfalls with children's access to diversion (especially in relation to the universal problems of net-widening and the creation of bifurcated systems where children accused of serious offences are often excluded from diversion programmes while those accused of minor offences are allowed access) persist in many jurisdictions.<sup>63</sup> The increasing statutory recognition of diversion and regulation of its practice demonstrates legislative attempts at addressing some of the concerns in relation to diversion as alluded to earlier in this Chapter and hence reduce the potential for violation of children's rights in diversion.<sup>64</sup>

It is submitted that the practice of diversion as existing in juvenile justice practice in many jurisdictions influenced the inclusion of provisions relating to diversion in the CRC and international standards as detailed in the section that follows below.<sup>65</sup> In addition, comparative domestic experiences have been shared. As already noted (and




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<sup>61</sup>See Lyne (n 39 above) 6.

<sup>62</sup>In a recent survey of diversion trends in a few European countries, the perceived failings of diversion have been highlighted. Lyne explains this as follows: "firstly question has been raised as to the amount of discretion afforded to the police in this area many of whom have been accused of 'cherry picking' offenders with the best chances and letting the serious offenders try their luck in the criminal courts. Another area of criticism is the 'net widening' of social control which these programmes afford offenders who would have been 'let off' in the past are now entering the system through a different door." See Lyne (n 39 above) 7. For a specific discussion of this problem in the context of Australia, see Sarre (n 33 above) generally.

<sup>63</sup>Lyne (n 39 above) 7.

<sup>64</sup>Section 5.3, above.

<sup>65</sup>Detrick confirms that the provision in Article 40(3) (b) of the CRC drew largely from those of Rule 11 of the Beijing Rules (n above) in respect of which the commentary (on the Beijing Rules) notes that diversion, "involving removal from criminal justice proceedings and, often, redirection to community support services, was commonly practiced on a formal and informal basis in many legal systems." See Detrick, S (1999) *A Commentary on the United Nations Convention on the Rights of the Child* The Hague: Martinus Nijhoff Publishers 702.

to be discussed in section 5.7.3.3), the New Zealand model influenced the Lesotho, Namibian and South African Bills on diversion.

## 5.5 International law and diversion

Article 40 (3) of the CRC expressly provides for alternative diversionary measures over formal judicial proceedings. It provides that:

“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:-

(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.”



The CRC provisions borrow from Rule 11 of the Beijing Rules which pertains to diversion and which provides sufficient clarity on some of the principles which are of guidance to States in this regard.<sup>66</sup> Read together with the overarching principle that

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<sup>66</sup>Beijing Rules, Rule 11.1 provides that “consideration shall be given, where appropriate, to dealing with juvenile offenders without resorting to formal trial by the competent authority.”

11.2 The police, prosecutor or other agencies dealing with juvenile cases shall be empowered to dispose of such cases, at their discretion, without recourse to formal hearings with the criteria laid down for that purpose in the respective legal system and also in accordance with the principles contained in these rules.

11.3 Any diversion involving the referral to appropriate community or other services shall require the consent of the juvenile, or his parents or guardian, provided that such decision to refer a case shall be subject to review by a competent authority, upon application.

detention should be used as a last resort and when resorted to, used for the shortest period of time,<sup>67</sup> Article 40(3) of the CRC therefore calls for alternative measures to the traditional mechanism of criminal trials. By virtue of these CRC provisions, diversion has now been given a binding status for the first time in international law.<sup>68</sup> In its examination of States Parties' Reports submitted under the CRC, the Committee on the Rights of the Child (CROC) has consistently examined alternatives to the deprivation of liberty in formal juvenile justice systems. The Committee has repeatedly called for the strengthening of such measures.<sup>69</sup> This examination by the CROC includes within its ambit the institution of diversion programmes.

However, while encouraging the desirability of diversionary options, the CRC is also explicit that the human rights and legal safeguards of the child who is referred to




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11.4 In order to facilitate the discretionary disposition of juvenile cases, efforts shall be to provide for community programmes, such as temporary supervision and guidance, restitution, and compensation of victims.”

<sup>67</sup>CRC, Article 37(b), also considered in more detail in Chapter 6, section 6.2.1 (in relation to pre-trial detention).

<sup>68</sup>For this view see, Van Bueren, G (1995) *The International Law on the Rights of the Child* Dordrecht: Martinus Nijhoff 174. See also Sloth-Nielsen, J “1994-1995 Annual Juvenile Justice Review” (1995) 8 *South African Journal of Criminal Justice* 331, 339 arguing that, “while the principle of diversion has been advocated by other non-binding international instruments, the inclusion in CRC of an Article encouraging diversion in a legally binding treaty has significantly upgraded its status.” Wood (n 2 above) 3 contends that the effect of the stipulation in Article 40(3) (b) is that “child justice systems should develop diversion options when appropriate and with structures to ensure the protection of children’s due process rights.”

<sup>69</sup>For example, CROC, *Concluding Observations: Algeria*, CRC/C/15/Add. 269, 30 September 2005 Para 82; *Concluding Observations: India*, CRC/C/15/Add. 228, 26 February 2004 Para 80; *Concluding Observations: Argentina*, CRC/C/15/Add. 187, 9 October 2002 Para 63; *Concluding Observations: Peru*, CRC/C/15/Add.120, 22 February 2000 Para. 381; *Concluding Observations: Honduras*, CRC/C/15/Add. 105, 24 August 1999 Para 130; *Concluding Observations: Kuwait*, CRC/C/15/Add. 96, 26 October 1998 Para. 150.



diversion must be respected.<sup>70</sup> Diversion programmes must also comply with the overarching principles in the CRC which require the relevance of the best interests of the child principle, the right to non-discrimination, the right to be protected from cruel, inhuman and degrading treatment and the right of children to participate in decisions affecting them including judicial and administrative proceedings.<sup>71</sup>

Further standards relevant to diversion are to be found in the Beijing Rules from which (as pointed out above) the provisions of the CRC on diversion were drawn.

On the issue of viable diversionary measures, Rule 11.4 of the Beijing Rules emphasizes the importance of community-based alternatives to juvenile justice processing, by stipulating that “in order to facilitate the discretionary disposition of juvenile cases, efforts shall be made to provide for community programmes, such as temporary supervision and guidance, restitution, and compensation of victims”.<sup>72</sup>

Diversionary options should be made available at any point of decision-making by the police, prosecutor or other agencies such as courts and tribunals.<sup>73</sup> The possibility of diversion should be considered wherever appropriate, which implies that it is not restricted to cases involving minor offences. In particular, the standards specify that there may be mitigating circumstances which make diversion appropriate even for

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<sup>70</sup> CRC, Article 40(3) (b).

<sup>71</sup> CRC, Articles 2, 3, 12, 13 and 37, respectively.

<sup>72</sup> UN Office of the High Commissioner of Human Rights and The International Bar Association (2003) *Human Rights in the Administration of Juvenile Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* New York and Geneva: United Nations 430-431.

<sup>73</sup> Beijing Rules, Rule 6(1).

more serious offences committed by a child.<sup>74</sup> This reflects the need for individualised approaches to diversion, which in turn requires an investigation of the background and circumstances of each and every child to adjudge the appropriateness of referrals to pre-trial diversion.

The obligation on States to put in place diversionary measures is buttressed by standards which call for a check on the exercise of discretion by authorities in charge of the juvenile system. Thus, agencies with the discretionary power to divert children in conflict with the law from criminal proceedings must exercise such power on the basis of established criteria. Access to diversionary programmes must not be arbitrary.<sup>75</sup> Specific training and instruction of juvenile justice administration officials on responding to the needs of children in diversion is therefore particularly encouraged, along with the need for diversity in juvenile justice personnel to reflect the diversity of children who come into contact with the juvenile justice system.<sup>76</sup>

In response to the potential for violation of the child's right to be presumed innocent, international standards require that there must be informed consent of the young

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<sup>74</sup>Commentary to the Beijing Rules, Rule 11.4. The Commentary argues that the merits of individual cases would make diversion appropriate, even when more serious offences have been committed (for example the act having been committed under peer pressure).

<sup>75</sup>See in this regard, the UN Standard Minimum Rules for Non-Custodial Measures 1990, Adopted by General Assembly Resolution 45/110 of 14 December 1990 (Tokyo Rules), Rule 3.1 which requires that the "introduction, definition and application of non-custodial measures must be prescribed by law." As with the Beijing Rules, the Riyadh Guidelines, other UN Declarations, Principles, Guidelines, Standard Rules and Recommendations, the Tokyo Rules have no binding legal effect. However (as with other UN 'soft law' instruments) they have undeniable moral force (by virtue of the adoption by States through the UN General Assembly). Therefore, it provides practical guidance to States in this regard. For further discussion, see Chapter 2, section 2.8.1.

<sup>76</sup>Beijing Rules, Rules 12.1, 22.2 and Riyadh Guidelines, Guideline 58.

offender (or the child's parent or guardian) to diversion. Further, care should be taken to minimise the potential for coercion at all levels of the diversion process.<sup>77</sup>

A complaints procedure system must be available to children who are the subject of diversion options,<sup>78</sup> as well as procedures for review and accountability of diversion programmes.<sup>79</sup> Similarly, there should be mechanisms in place for the monitoring and evaluation of diversion, so as to curb any abuses of discretionary power and to safeguard the rights of children referred to diversion.<sup>80</sup>

## **5.6 Diversion in the African countries under study: The position before child law reform in the 1990s**

The history of pre-trial diversion in the six African countries under study in this thesis is a fairly recent one. In some cases, this history is even more narrowly limited to the advent of the recent child law reforms introduced in Chapter 3. Hence in Ghana, Kenya, Lesotho and Uganda, pre-trial referrals of children to diversion were not formally recognized by law up and until the recently enacted or proposed new legislation in the mid to end-1990s.<sup>81</sup> Further, prior to the period after the enactment

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<sup>77</sup>Beijing Rules, Rule 11.3.

<sup>78</sup>Tokyo Rules, Rules 3.5 and 3.6.

<sup>79</sup>Beijing Rules, Rule 6.2.

<sup>80</sup>Beijing Rules, Rule 30 and Tokyo Rules, Rule 2.4.

<sup>81</sup>The new laws referred to here are; the Ghanaian Children's Act of 1998 whose provisions on diversion were included in the Juvenile Justice Act (2003) (the later legislation is discussed in this thesis), the Kenyan Children's Act (2001), the Ugandan Children's Statute (1996). All these laws are now part of these countries' statutes. On the other hand, the proposed Lesotho Child Welfare and Protection Bill (2004) still awaits enactment.

and proposal of the new laws, pre-trial diversions were rarely used, if at all, by the formal juvenile justice systems of these four countries.<sup>82</sup>

On the other hand, there was possibility for the use of post-trial diversions by virtue of wide-ranging alternative sentences which by their nature involved a child's removal from the formal criminal justice system (and detention) into community-based programmes. The array of non-custodial or non-formal measures included orders for compensation, conditional discharge of a child with a warning, placement into parental care and the possibility of referring children to community service.<sup>83</sup> In keeping with the flexible definition of diversion - as not necessarily entailing the

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<sup>82</sup>On the absence of pre-trial diversion practice up and until the enactment of the new laws in these four countries, see generally, Kassan, D (2003) "Report on the Ghanaian Juvenile Justice System in Light of Best Practices and New Developments" (Unpublished, submitted to Community Law Centre, University of the Western Cape) 12 (noting that pre-trial diversion in Ghana was limited to the sporadic use of police cautions); on Kenya, see Odongo, G.O (2003) "Report on the Juvenile Justice System in Kenya in Light of Best Practices and Challenges" (Unpublished submitted to Community Law Centre, University of the Western Cape) 15 (noting that only isolated 'ad-hoc' instances of referrals to pre-trial mediation in cases of petty offences by virtue of the 'willingness' of victims of crime, and the discretion of courts and prosecutors have been observed in the past); on Uganda, see Kakama, P (1999) "Juvenile Justice in Uganda" (Unpublished Paper presented at a seminar on Juvenile Justice held in Lilongwe, Malawi on 23-25 November 1999, available at < [http://www.penalreform.org/english/vuln\\_jjuganda.htm](http://www.penalreform.org/english/vuln_jjuganda.htm) > (last accessed 01 October 2005) (noting the absence of pre-trial diversions before the enactment of the 1996 Statute); on Lesotho, see CROC, *Concluding Observations: Lesotho*, CRC/C/15/Add.147, 26 January 2001, Para 61 (noting the existence of local Chiefs' Courts to adjudicate isolated cases of 'petty' child offending. However, the CROC highlights these Courts' failure to uphold due process safeguards and children's rights (for example their predominant use of corporal punishment). The CROC also noted the lack of co-ordination between these courts and the formal criminal justice systems. Thacker, R "Traditional Systems in Lesotho" in Petty, C and Brown, M (eds) (1998) *Justice for Children: Challenges for Policy and Practice in sub-Saharan Africa* London: Save the Children 90 concluded that "the process and sentencing system of the traditional chieftainship justice in Lesotho did not conform to the principles embodied in the CRC and the various international standards on administration of juvenile justice."

<sup>83</sup>In the laws of the countries under study as considered in more detail in Chapter 7 section 7.3.2.

referral of child offenders into (pre-trial) programmes - these range of alternative sentences would suffice as diversionary practices even at the post-trial phase.<sup>84</sup> However, past juvenile justice practice in these countries reveals the over-reliance on custodial sentences rather than on these alternative sentences.<sup>85</sup> Another consideration concerning the possibility of post-trial diversion in these countries is that it remains unclear whether the 'diverted' children are/were spared from acquiring a criminal label by the expunging of court or trial records. This is one of the central aims of diversion as highlighted earlier in this Chapter.<sup>86</sup>

In contrast to the four countries considered in the foregoing section, both Namibia and South Africa have experimented widely with pre-trial diversions. However, even for these two countries, this is limited to the last decade.<sup>87</sup> South African diversion has been premised on the practice that in majority of cases where diversion is authorised,




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<sup>84</sup>This is also in line with the broader definition of diversion as the channel of children away from the formal criminal process at any stage of this process, see section 5.2, above.

<sup>85</sup>Considered in Chapter 7, section 7.3.3.

<sup>86</sup>See section 5.3, above.

<sup>87</sup>Recent South African research on diversion include, Muntingh (n 6 above) and Wood (n 2 above), Mbambo, B "Diversion: A central feature of the new child justice system" in Maepa, T (ed) (2005) *Beyond Retribution: Prospects for Restorative Justice in South Africa Monograph No. 111* Pretoria: Institute for Security Studies 76-88; Open Society Foundation for South Africa (2005) *Review of South African Innovations in Diversion and Reintegration of Youth at Risk* Cape Town: Open Society Foundation; Stout, B and Wood, C "Child Justice and Diversion: Will Children's Rights Outlast the Transition" in Dixon, E and Van der Spuy, E., (2004) *Justice Gained? Crime and Crime Control in South Africa's Transition* Cape Town, UCT Press 115-139. These studies trace the introduction and use of diversion practices such as Conferencing, pre-trial programmes for the rehabilitation and reintegration of child offenders from the period 1990 to-date. The same has been documented in Namibia's case, see Mukonda, R (1999) "Juvenile Justice Project in Namibia" (Unpublished Paper presented at a seminar on Juvenile Justice held in Lilongwe, Malawi, 23-25 November 1999) available at < [http://www.penalreform.org/english/vuln\\_juvenamibia.htm](http://www.penalreform.org/english/vuln_juvenamibia.htm) > (last accessed 28 September 2005); Gallinetti, J "Diversion" in Sloth-Nielsen and Gallinetti, (n 4 above) 66-73, 68 (tracing the establishment of pre-trial diversions in Namibia to the period 1994-1995).

the prosecutor withdraws the criminal charges on condition that the child completes a specified activity such as participation in a diversion programme or performance of community service.<sup>88</sup> In similar vein, in 1997, the Namibian Prosecutor General delegated powers on the exercise of the decision whether to divert a child offender or not to prosecutors countrywide.<sup>89</sup> This has provided a legal basis for pre-trial diversions, particularly for less serious offences, in Namibia. Further, in both Namibia and South Africa, the range of alternative sentences (similar to the laws in Ghana, Kenya, Lesotho and Uganda) that sentencing courts may use at the post-trial stage of a trial has been a useful avenue for referrals to diversion programmes at the sentencing phase.<sup>90</sup>

In South Africa, diversion has mainly been conducted through programmes offered by a non-governmental organisation (NICRO<sup>91</sup>) and other non-governmental organisations (NGOs) since the early 1990s.<sup>92</sup> To a limited extent, these NGO-initiated programmes have involved the government as a partner.<sup>93</sup> Presently, some

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<sup>88</sup>Wood (n 2 above) 3, Mbambo (n 87 above) 76. This withdrawal procedure was later given formal recognition by regional directors of public prosecutions who issued guidelines on when diversion of child offenders would be appropriate. These guidelines were directed for the information of district prosecutors who were in turn tasked with the decision on referral of cases. However, the guidelines lack (ed) binding status.

<sup>89</sup>Schulz and Hamutenya (2004) “Juvenile Justice in Namibia: Law Reform towards Reconciliation and Restorative Justice” (Unpublished Paper on file) 16.

<sup>90</sup>Further considered in Chapter 7, section 7.3.2 and 7.3.3 which also notes the limited use of alternative sentences and the predominance of custodial sentences.

<sup>91</sup>National Institute for Crime Prevention and the Rehabilitation of Offenders.

<sup>92</sup>Mbambo (n 87 above) 76, Muntingh (n 21 above) 1-2.

<sup>93</sup>As far back as 1997, Muntingh (n 6 above) 8 describes the situation in South Africa thus “diversion services are currently provided by NICRO, an NGO funded by government subsidies and private donors. The government has committed itself to diversion as a principle of juvenile justice but has done

access to diversion in South Africa is also offered through government-employed probation officers, individual judicial officers and prosecutors who on their own volition arrange pre-trial diversion for children accused of crimes. Community service, apology letters to victims written by accused children, informal reprimands and referral to community and traditional dispute resolution mechanisms are all illustrative of diversion practices that have been used before, during and after trial.<sup>94</sup>

An array of pre-trial diversion programmes have included less intensive programmes of short duration of time for less serious child offending, and more intensive programmes and diversion options such as conferencing and victim offender mediation for more serious offences.<sup>95</sup> Despite the absence of a legal framework in South Africa, in 2004 it was estimated that some 18 000 children were diverted away from the criminal justice system. This number is expected to increase dramatically once the Child Justice Bill is enacted.<sup>96</sup>



Comparison of Namibian diversion practice with the South African counterpart reveals many similarities in the nature and types of diversion programmes and

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very little to provide such services in terms of either delivering the services or contracting them out...” See also Mbambo (n 87 above) 83-84 in similar vein.

<sup>94</sup>Open Society Foundation for South Africa (n 87 above) generally.

<sup>95</sup>Stout and Wood (n 87 above) 120-121.

<sup>96</sup>The source of this figure is a personal correspondence between Open Society Foundation of South Africa and NICRO in 2004, cited in Open Society Foundation (n 87 above) 1. Mbambo (n 87 above) 76 puts the figure at 15,000 in 2001. These figures may be contrasted to the number of recorded police arrests of children in South Africa put at 55,000 in 2002. The figures on the number of children referred to diversion show a gradual increase. This is compared to the 1999 figures which revealed that about 10,000 children were diverted to NICRO programmes. See Sloth-Nielsen, J and Muntingh, L “Juvenile Justice Review 1999-2000” (2001) 14 *South African Journal of Criminal Justice* 384.

methods used.<sup>97</sup> The only difference is that the Namibian diversion practice took off much later than it did in South Africa.<sup>98</sup>

The absence of the formal legal regulation or recognition of diversion under both South African and Namibian law has led to constraints in practice over the years. Wood points out that in South Africa “children who committed offences have experienced very cautious and highly discretionary diversion”.<sup>99</sup> This is also closely linked to the point that since diversion has been primarily implemented through NGOs, there has been uneven distribution of programmes, and hence availability of diversion, with a big gap between rural and urban areas.<sup>100</sup> This is also so in Namibia’s case, where Schulz and Hamutenya note that despite the fact of the Prosecutor General’s permission for diversion, there remains a lack of uniformity in the way children are assessed in preparation for decisions concerning diversion. This has led to a situation where not all children in Namibia receive the same treatment with regard to diversion and in some cases where diversion should be available, it is not considered at all.<sup>101</sup>

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<sup>97</sup>Mukonda (n 87 above) generally; Gallinetti (n 87 above) 68.

<sup>98</sup>Schulz and Hamutenya (n 89 above) 17 documenting that the piloting of diversion programmes in Namibia mirrors the South African example (started in the early 1990s) but later in the 1990s. An example is the piloting with informal Family Group Conferences as recently as 2003 through the involvement of NGOs. In contrast, the South African experiences with pilot FGCs dates back to the late 1990s.

<sup>99</sup>Wood (n 2 above) 3.

<sup>100</sup>Open Society Foundation (n 87 above) 1 points out that the number of diversion services has “increased significantly over the past few years but there is still not enough of them to cope with the load.” For the problem of over-concentration of diversion services in urban rather than rural areas especially due to the over-concentration of NGOs in urban areas, see Mbambo (n 87 above) 83, also Mbambo, B “Community as Role-Players” in Sloth-Nielsen and Gallinetti (n 4 above) 144-153.

<sup>101</sup>Schulz and Hamutenya (n 89 above) 16.



Although few written accounts in both countries reveal instances of violation of due process safeguards and other children's rights in the process of diversion, this danger remains in an unregulated diversion system.<sup>102</sup> This is especially in the absence of legal provisions to this effect.<sup>103</sup> The potential for unequal access and discrimination in referral of child offenders to diversion calls for the need for diversion to be underpinned by legislation. This has been confirmed by South African judicial decisions discussed below.

### 5.6.1 South African case law on prosecutorial decisions to divert

Despite the growth of pre-trial diversions in South Africa since the early 1990s, judicial case law on diversion has been in short supply. This has been attributed to the traditional judicial reluctance to interfere with prosecutorial decisions.<sup>104</sup>



The first judicial reference to diversion was in the case *S v D*.<sup>105</sup> The case involved four children who had been charged with the possession of a small quantity of marijuana. Their complaint was that in a similar case, within the same jurisdiction in which they were charged, six weeks earlier, the prosecution had opted to withdraw charges and refer the accused children to diversion programmes in lieu of prosecution. In an *obiter dictum*, the Cape High Court expressed approval for the idea of diversion. However, the judge opined that in each and every case, the prosecutor, as *dominus*

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<sup>102</sup>Mbambo (n 87 above) 80-81 (on South Africa), Mukonda (n 87 above) generally (on South Africa).

<sup>103</sup>The proposals in the Namibian and South African Child Justice Bill in relation to standards for and regulation of diversion are considered in section 5.7.3, below.

<sup>104</sup>Sloth-Nielsen and Muntingh (n 96 above) 389 citing the English court decision in *Gillingham v Attorney General* [1909] TS 572 in this regard.

<sup>105</sup>1997 (2) SACR 673 (C).

*litis*, had the right to proceed with criminal charges against children.<sup>106</sup> In a discussion of this case, Sloth-Nielsen and Muntingh point out that the import of this *dictum* “suggested that there is no right to diversion, even where diversion had been decided upon previously in the same jurisdiction in relation to substantially similar matters”.<sup>107</sup>

Another case, *S v Z*<sup>108</sup> directly concerned a review of several cases involving the imposition of suspended prison sentences upon children (and not diversion as such).<sup>109</sup> However, in relation to diversion, the Court approved of the full content of a circular entitled ‘Juvenile Offenders: Diversion Programmes’ sent out by the Director of Prosecutions (Eastern Cape). This Circular suggests that whenever appropriate, trial courts should promote the placement of a child offender in a diversion programme prior to the commencement of the trial.<sup>110</sup> In *S v J and Others*,<sup>111</sup> a South African High Court referred to the desirability of legislation for diversion.

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<sup>106</sup> At 673 h-i.

<sup>107</sup> Sloth-Nielsen, J and Muntingh, L “Juvenile Justice Review” (1999) 12 *South African Journal of Criminal Justice* 65. For a further detailed discussion of these cases, see Sloth-Nielsen (n 19 above) 261-265.

<sup>108</sup> 1999 (10) *SACR* 427 (E), discussed in Sloth-Nielsen (n 19 above) 263-264.

<sup>109</sup> Discussed further in Chapter 7, section 7.3.5 in relation to sentencing.

<sup>110</sup> The Court quoted the Circular at (437b-438i) which details the content of some of the guidelines and conditions for referral to South Africa’s NICRO’s youth offenders. These guidelines or conditions include the points that to be subjected to a diversion programme, the child must admit to his part in the crime for which he is indicted and must be prepared to undergo the programme; the child’s parent or guardian must agree to the implementation of the programme, must be prepared to co-operate and must agree to the programme’s implementation; the child should be preferably be a first offender or where the juvenile offender has previous convictions, (s)he may be considered for this referral if the previous convictions are not of such a nature as to result in the conversion of the proceedings to a children’s court inquiry; the child should preferably not have undergone another diversion; the crime should be of a less serious nature (specific reference is made to ‘divertible offences’ as including offences of shoplifting, common assault and malicious injury to property); the child should have a fixed address

These cases suggest judicial support for diversion as a matter of good policy. In addition, they “allude to the desirability of active judicial participation in the furtherance of the ideal of diversion”.<sup>112</sup> However, the position that the decision whether to divert or not still largely rests on prosecutorial policy was re-emphasised by the High Court in a later decision, *M v The Senior Public Prosecutor, Randburg*.<sup>113</sup> This case involved an application for review brought by the guardian of a minor girl (M), who had been convicted of shoplifting in the lower court. The applicant argued that M was entitled to diversion because M’s co-accused who had also been arrested for the same offence of shoplifting had been granted diversion by the prosecution. The applicant’s argument was therefore that the failure by the prosecution to exercise discretion in relation to M was discriminatory, and hence could not stand legal scrutiny. In essence, the applicant asserted she had a right to diversion based on the fact that M’s co-accused was granted diversion. The prosecutor did not respond to the application and hence it is known whether he actually considered diversion. The Court explained that if the prosecutor had responded with an affidavit to explain his decision indicating whether he considered diversion, the outcome of this application may have been different. In the absence of such an explanation, the Court drew the inference on the facts of this case to the effect

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and in a case of joint offending, the child to be considered for diversion may not escape prosecution although a referral to the relevant diversion programme may be an option for the sentencing officer to consider.

<sup>111</sup>2000 (2) SACR 310 (C) (concerning the appropriateness and duration of custodial sentences for persons below the age of eighteen years, discussed in Chapter 7, section 7.3.5).

<sup>112</sup>Sloth-Nielsen and Muntingh (n 96 above) 100-101.

<sup>113</sup>Case 3284/00 WLD, (Unreported), discussed in Sloth-Nielsen, J “Challenging the Decision Not to Divert: *M v The Senior Public Prosecutor, Randburg and Another*” (2000) 2(4) *Article 40* 1-2; Sloth-Nielsen and Muntingh (n 96 above) 100-101; Badenhorst, C (2003) “A Forensic Criminological Perspective on the Adjudication of Children in South Africa” (Unpublished Masters of Arts Thesis submitted to the University of South Africa) 131.

that the question of diversion came into the equation but was not considered by the prosecutor. This, the Court held, implied that the prosecutor did not properly exercise his discretion. The Court set aside M's conviction on this basis and referred the matter back to the prosecutor to consider the prospects for and the possibility of diversion by applying himself to the facts before him.

It has been correctly argued that *M v The Senior Public Prosecutor, Randburg* does not establish a right to be considered for diversion in every case.<sup>114</sup> The limited general principle that emerges from this case is that, “based on the principle that like cases should be treated alike, there is scope to argue that within a broad margin of discretion, diversion (and the converse decision to prosecute) must be applied relatively consistently within a jurisdiction”.<sup>115</sup> The value of the judgment is that for the first time, “it provides a basis for future legal challenges when obvious candidates for diversion are taken, instead, through the criminal process”.<sup>116</sup> The decision emphasizes the value of judicial review of improper exercise of administrative or prosecutorial decision to refer or not to refer a child to diversion. However, it is only the courts that can exercise such a review and this is in the limited circumstances of applications brought before them. This constraint calls for legislative provisions in this regard. Such legislation would also ensure equal access to diversion in accordance with the requirement of international children's rights law standards.

The next section of this Chapter considers the approach to diversion of the new and proposed laws of the countries under study. The discussion will be underlain with a

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<sup>114</sup>Sloth-Nielsen and Muntingh (n 96 above) 100.

<sup>115</sup>Sloth-Nielsen and Muntingh (n 96 above) 101. See also, Badenhorst (n 113 above) 131.

<sup>116</sup>Sloth-Nielsen and Muntingh (n 96 above) 100.

view to analysing the extent to which they comply with the obligations of State Parties under the CRC in relation to diversion.

### **5.7 Three diverse approaches in the new and proposed laws of the countries under study**

Three diverse approaches characterise the new and proposed laws in relation to diversion. While the provisions in the new Kenyan legislation hold considerable promise for the establishment, access and regulation of diversion, it adopts an approach that still gives considerable leeway to prosecutorial authority on access to diversion, unlike the case of the new laws of Ghana and Uganda on the one hand, and on the other the South African, Namibian and Lesotho Bills.



Both Ghana's and Uganda's new laws are similar in making provision for community participation and affording a prominent role to village courts or community panels in the adjudication of some child offending cases. The aim of this approach is to channel child offenders away from the formal criminal justice system.

In the Lesotho, South African and Namibian Bills, diversion is considered a central aim of the envisaged new juvenile justice systems. Wide-ranging provisions have been included in these new pieces of draft legislation, aimed at expanding and regulating diversion practice. Lesotho's proposed legislation is strikingly similar to the South African and Namibian Bills in this regard even though Lesotho's juvenile justice system has not had similar experiments with pre-trial diversion programmes, as has been the case in Namibia and South Africa.

These three diverse approaches are discussed respectively in more detail in the different sub-sections that follow below.

### 5.7.1 The Kenyan Approach

The new Kenyan Children's Act does not directly make provision for pre-trial diversions. However, two provisions can be argued to provide a basis for pre-trial diversions.

The first provision in this regard is the enactment in the Act of the principle in the CRC which calls for the detention of children as a last resort and for the shortest period of time.<sup>117</sup> This principle is crucial for the establishment of pre-trial diversion in the new juvenile justice system, since diversion is one of the ways of ensuring the de-institutionalization of children in trouble with the law whenever appropriate. Secondly, the Act establishes the National Council for Children's Services ('the Council') to which it accords wide-ranging powers.<sup>118</sup> The Council is particularly charged with the responsibility of ensuring "the full implementation of Kenya's international and regional obligations relating to children..."<sup>119</sup> In addition, section 33

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<sup>117</sup>Kenyan Act, Schedule 5. This principle is expressly included in the CRC, Article 37 (b) and is considered in further detail in relation to pre-trial detention generally in Chapter 6, section 6.2.1 and the use of custodial sentences, Chapter 7, section 7.2.

<sup>118</sup>Kenyan Act, Part IV (sections 30-46). The Council's membership is drawn from representatives of government departments, the Attorney General's office, the police, churches and non-government organisations. The Council was gazetted in 2002. Under section 30 of the Act, the Council's function is stated to be that of exercising "general supervision and control over planning, financing and co-ordination of child rights and welfare activities and to advise the government in all respects thereof."

<sup>119</sup>Kenyan Act, section 32(2) (i).

gives the Council unlimited powers to do everything that supports its objectives.<sup>120</sup> Under the Act, the Council has the mandate to establish area advisory councils to monitor the implementation of the new legislation at the local or district levels.<sup>121</sup> It is submitted that these provisions provide a statutory basis for diversion and an opportunity for the government (in partnership with NGOs and communities) to develop diversion programs at all levels.

Despite the considerable promise of the above provisions in relation to diversion it has been remarked that:

“[These indirect and limited provisions] do not vindicate for the absence of adequate legal provisions in support of pre-trial diversion. The lacuna occasioned by this absence only serves to perpetuate the misplaced notion that justice can only be obtained through certain laid down procedures in court. Thus the popular refrain remains chorused that the only answer to child offending is the subjection of child offenders to court or custodial/institutional care. To a large extent this has been the prevailing norm in the Kenyan juvenile justice system....”<sup>122</sup>

To this criticism may be added the point that the Act is similarly silent on the conditions upon which a child may be diverted at the pre-trial stage, and when it is appropriate to divert a child. Under Kenyan constitutional and criminal procedure law,

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<sup>120</sup>Kenyan Act, section 33 provides: “The Council shall have power for the purposes of carrying out its functions, to do all such acts and things as appear to it requisite, advantageous or convenient for or in connection with the carrying out of its functions or incidental to their proper discharge and may carry out any activities in that behalf alone or in association with other persons or bodies.”

<sup>121</sup>Kenyan Act, section 32(2) (q).

<sup>122</sup>Odongo (n 82 above) 13.

absolute prosecutorial authority is expressly vested in the Attorney General.<sup>123</sup> This is regardless of the wide latitude accorded to the Council in developing diversion programmes and the courts in encouraging pre-trial diversions.<sup>124</sup> In essence therefore, the Act leaves the sphere of prosecutorial discretion on when and whether to divert intact, with the ensuing danger for arbitrariness and bias.

In contrast to the above 'indirect' provisions on pre-trial diversions, the section of the Kenyan Act which deals with the orders that a court may impose are explicit.<sup>125</sup> These invite the possibility of post-trial diversions through a range of alternative sentences. The observation has therefore been made in relation to the Kenyan Act that, "the most significant provisions relating to diversion are those providing for an array of measures by which a court may deal with the child upon finding of guilt".<sup>126</sup> While these measures would apply in the aftermath of a criminal trial, it is submitted that they are no doubt in accordance with the wider definition of diversion, especially

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<sup>123</sup>Constitution of the Republic of Kenya (Act 5 of 1969, as amended), section 26 and Criminal Procedure Code (Chapter 75 Laws of Kenya), section 82. Both these provisions provide for the Attorney General's power to initiate, prosecute, continue and terminate criminal proceedings. This power extends to the termination of criminal proceedings (*nolle prosequi*) in privately-initiated criminal prosecutions. The Attorney General may delegate these powers to designated Public Prosecutors.

<sup>124</sup>In respect of the Council, through its wide ranging powers and in respect of courts, through the principle emphasizing detention as a last resort. However diversion is not expressly mentioned in relation to the Council's powers.

<sup>125</sup>Kenyan Act, section 191(1) providing that upon a finding of guilt, the court may deal with the case involving a child in one or more ways including, making a probation order, committing the child to the care of 'a fit person such as relatives and charitable institutions willing to undertake his care, ordering compensation, ordering the child to a vocational training programme and making a community service order. These are further considered in Chapter 7, section 7.5.4.

<sup>126</sup>Odongo, G.O "The Domestication of International Standards on the Rights of the Child: A Critical and Comparative Evaluation of the Kenyan example" (2004) 12(4) *The International Journal of Children's Rights* 425.



where a child is spared from acquiring a criminal record and placed into a diversion programme.<sup>127</sup>

The Act legislates for the rights of the child and a number of legal safeguards both of which by their general nature apply to any diversion practices.<sup>128</sup> Specifically, the provisions of the Act which guarantee the right to obtain legal assistance and the right not be compelled to give testimony or to confess guilt are important to guard against the violation of due process rights of child offenders in the process of diversion.<sup>129</sup>

### 5.7.1.1 Diversion pilot project in Kenya

Thus far, the window of opportunity that the new Act creates with regard to diversion is evident through the diversion pilot project initiated by different role-players (and supported by the Council) in 2001.<sup>130</sup> It is currently piloted in a number of Kenyan urban areas. There are plans for its extension to other districts.<sup>131</sup> The practical

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<sup>127</sup>See section 5.3, above. It is significant in this regard that section 189 of the Act specifically prohibits the trial courts' use of the words 'conviction' and 'sentence' and instead provides for the use of the words 'a finding of guilt' and 'an order upon such finding', respectively.

<sup>128</sup> Kenyan Act, sections 3-22 catalogues the rights of the child and section 186 guarantees the legal safeguards of the child.

<sup>129</sup>Kenyan Act, section 186 (d), considered further in Chapter 6, section 6.6.3.

<sup>130</sup>A detailed synopsis of the pilot project initiated under the auspices of an international non-governmental organisation, Save the Children Fund (UK) and involving national and international child rights-oriented NGOs, government departments on children's affairs, probation, the police and courts, is contained in Odongo, G.O "The Juvenile Justice System in Kenya and Challenges to Law, Policy and Practice in Regard to Diversion" (2004) 13(2) *The Chronicle* 6-11.

<sup>131</sup>"Draft Guidelines for the Implementation of the Diversion Strategy for the Protection and Care Cases in the Juvenile Justice System in Kenya" in Save the Children Fund (UK) (2001) "Report of the Save the Children (UK) Kenya Programme Workshop on Diversion for Children in Conflict with the Law" (Annex).

implementation of the project involves cooperation between the State agencies involved in juvenile justice (courts, the police and prosecution), children in trouble with the law and victims of crime.

The pilot project entails an assessment and classification<sup>132</sup> of children by the police upon arrest, following which a meeting of a diversion co-ordination team of all the relevant state agencies should be convened. The main aim of the pilot project is to assist in the removal of children who have not committed criminal offences from the juvenile justice administration into community-based alternatives, in line with aim of filtering social welfare cases out of Kenya's criminal (juvenile) justice system.<sup>133</sup> The project eventually aims for the avoidance criminal trials for children who commit offences designated as 'petty'.<sup>134</sup> Diversion measures envisaged here include the imposition of orders such as a caution, execution of police bonds by parents or guardians of a child, restitution, mediation or release under supervision of a probation officer or government's children's officers.<sup>135</sup> However, the project envisages the process of a criminal trial for children deemed to have committed 'serious offences'. In these cases, the project encourages the use, as post-trial diversion options, of an array of alternative sentencing options as provided for under the Act. The total

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<sup>132</sup>Into the categories; 'children in need of care and protection', 'petty offenders' and 'serious offenders'.

<sup>133</sup>Odongo (n 130 above) 9 pointing out that studies on the Kenyan juvenile justice system have found that up to 80-85% children arrested and placed in pre-trial detention are children in need of care and protection rather than child offenders.

<sup>134</sup>It is further testimony to the lack of an adequate legal framework for the diversion process that neither the Act nor the pilot project specify which offences qualify as 'petty or 'serious'.

<sup>135</sup>Government children's officers were recognized under the previous law repealed by the Act and in the new Act as well. Their roles are specifically defined under the Act (sections 37-39) and include supervision and monitoring of the situation of children in residential care, children in need of care and protection and those in trouble with the law.

exclusion of certain categories of child offenders from the possibility of pre-trial diversion (without the individual assessment of the circumstances of the child as required by international law)<sup>136</sup> has led to the criticism that:

“In keeping with the provisions of international law on diversion (which permit diversion for all child offender cases) it would have been desirable that the pre-trial exclusion of a formal criminal trial be the general rule in all the cases. In essence this would have meant that diversion can be considered in each and every case and only rejected in appropriate cases.”<sup>137</sup>

Following a preliminary review of the initial implementation of the project, the main benefit of the project has been identified to be the separation of child welfare cases that would have otherwise found their way into the criminal justice system.<sup>138</sup> It is thus far not clear how successful the project is in relation to diversion of child offenders away from the formal criminal justice system.<sup>139</sup>

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<sup>136</sup>See section 5.5, above.

<sup>137</sup>Odongo (n 130 above) 10.

<sup>138</sup>Odongo (n 130 above) 11.

<sup>139</sup>A comprehensive study in this regard is awaited. However, implementation of the diversion project is faced with a number of hurdles. These include the lack of awareness about the process at all levels (including the community) and the need for training of officers, the problem of the many child welfare cases in the juvenile justice system, the underlying problem of addressing the root causes of child offending, infrastructural and resource problems, lack of community participation, inadequate governmental financial support, the problem of there being few willing role players in the private sector (NGOs), amongst others. Chapter 8 of this thesis deals in more depth with these issues.

### 5.7.2 The approach in the Ugandan and Ghanaian new juvenile justice legislation

Both the new juvenile justice laws of Uganda and Ghana acknowledge the centrality of a non-interventionist approach to dealing with children's issues, and support diversion in this regard. Similarly, both countries' laws embrace a system which envisages a prominent role for lay courts or tribunals in handling particular child offender cases. In the Ugandan Statute, this feature involves local council courts. The local courts function within the framework of local authorities and have the presiding officers or committee members elected by members of public in the respective local councils.<sup>140</sup>

Before the enactment of the Juvenile Justice Act (2003), the principle of diversion was already known to Ghanaian jurisprudence.<sup>141</sup> Diversion was one of the principles of the earlier-enacted Children's Act of 1998<sup>142</sup> which provided for lay child panels to mediate in certain civil and criminal matters affecting a child.<sup>143</sup> The panels are to be established by the district assemblies (legislatures) in collaboration with the ministry in charge of children's affairs. Their composition includes a district social worker,

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<sup>140</sup>Ugandan Statute, section 93 and Schedule 3. These provisions also make reference to the legal framework for the establishment of local committee courts laid down by the Local Council (Judicial Powers) Statute of 1988. Section 1 of this 1988 Statute provides for the establishment of these courts "in every village, parish, and sub-county."

<sup>141</sup>Mills, N.O (2003) "A Review of the Juvenile Justice Bill" (Unpublished Paper presented at the 'Public Hearing on the Juvenile Justice Bill' organised by the Ghana Centre for Democratic Development and the Parliamentary Committee on Constitutional and Legal Affairs, in Kumasi, Ghana 26 May 2003) (on file) 8

<sup>142</sup>Act 560 of 1998. This Act is referred to in subsequent sections of this Chapter as 'the Ghanaian Children's Act' in contrast with the Ghanaian Juvenile Justice Act which is the subject of this thesis.

<sup>143</sup>Ghanaian Children's Act, sections 27-32.

representative from a women's organisation, a representative of the traditional council and people from the community in which the panel is constituted.<sup>144</sup> The new Juvenile Justice Act expressly acknowledges the role of these panels.<sup>145</sup>

By virtue of these provisions it was envisaged that the Ugandan and Ghanaian juvenile justice systems would move away from the reliance on the traditional criminal procedure that involves the process of a criminal trial, and instead place emphasis on informal resolution of conflict at community level.

In respect of Uganda's system of local courts, the Report of the Review Committee explains the thinking behind the proposal for local courts in the following words:

“[The Committee] approved the informal settlement of issues concerning children at the village level and that the [village] court should be the court of first instance in less serious criminal and child care matters. This way problems (sic) can be dealt with locally where the child is known using such [locally] accepted traditional methods as reconciliation, restitution, compensation and cautioning.”<sup>146</sup>

Additionally the Report explains that:

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<sup>144</sup>Ghanaian Children's Act, section 29.

<sup>145</sup>Juvenile Justice Act, sections 25 and 26 and “Preamble to Memorandum accompanying the Act”. Mills (n 141 above) 8 remarks that this inclusion of the principle of diversion through the role of Child Panels is “highly remarkable... for the sake of consistency.”

<sup>146</sup>Child Law Review Committee (Uganda) (1992) *Report of the Child Law Review Committee* 91 (hereinafter, CLRC (Uganda) Report).

“Diversion was also pressed for by stressing the introduction of police cautioning or if court proceedings are to be taken release on police bond...”<sup>147</sup>

These intentions of the Ugandan review committee are manifested in the Ugandan Children’s Statute which recognizes diversion at three levels. At the first and second level, the legislation recognizes the role of police cautions and adjudication by local courts as diversion measures at the pre-trial stage. The criminal offences involving children that may be resolved at the level of local courts include, among others, the offences of affray, assault, theft, criminal trespass, and malicious damage to property.<sup>148</sup>

The local court adjudication process holds significant potential for the implementation of restorative justice principles.<sup>149</sup> This is illustrated by the fact that the orders that these courts are empowered to give are devoid of the traditional retributive element in criminal law. Thus, according to the Statute, the village courts have jurisdiction to impose a range of orders, including reconciliation, compensation, restitution, apology or caution in respect of a child against whom an offence has been proved.<sup>150</sup> In addition to these measures, the local court is also empowered to make a guidance order “under which the child is required to submit himself or herself to the guidance, supervision, advice and assistance of a person designated by the court”.<sup>151</sup> These

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<sup>147</sup>CLRC (Uganda) Report (as above) 91-92.

<sup>148</sup>Section 93 and Schedule 3 of the Statute.

<sup>149</sup>See Chapter 2, section 2.8 (on an introduction of the relevance of restorative justice principles).

<sup>150</sup>Ugandan Statute, section 93 (4).

<sup>151</sup>Ugandan Statute, section 93(5). In addition, under section 19 of the Local Council (Judicial Powers Statute (n 140 above) section 19, the order for compensation can constitute the handing over by the ‘offender’, either property or cash to the aggrieved party “as the local court may deem to be the equivalent of the complainant’s property or right which was damaged, lost or injured”.

provisions have been lauded as being “in line with the often applauded traditional African concept of community responsibility for children”.<sup>152</sup>

At the third level, the Statute implicitly enacts the overarching principle of detention as a last resort (and for the shortest period of time) in course of trial, through provisions supportive of bail and bonds while a child offender stays with the family in the course of a criminal trial. In cases which are not tried by local council courts, specialized Family and Children Courts (rather than ordinary courts) are the courts of first instance. Where a charge is admitted or proved against a child, the Family and Children Court is empowered to issue various types of orders including cautions, compensation, restitution, conditional discharge, binding the child to be of good behaviour and referrals to community service.<sup>153</sup> These provisions provide a statutory basis for the use of diversion at the sentencing stage.



The Ghanaian approach mirrors the Ugandan example in a number of ways, primarily in the role of child panels. In criminal matters involving children the panel is tasked with the facilitation of victim-offender mediation in minor criminal matters such as “petty theft and threatening offences”.<sup>154</sup> The Children’s Act<sup>155</sup> is not specific on the particular criminal offences falling under this rubric, as opposed to the Ugandan

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<sup>152</sup>Ekirikubinza, L.T, “Juvenile Justice and the Law in Uganda: Operationalisation of the Children Statute” in Bainhaim, A and Rwezaura, B (eds) (2005) *The International Survey of Family Law 2005 Edition* Bristol: Jordan Publishing 516.

<sup>153</sup>Ugandan Statute, section 95(4), considered further in Chapter 7, section 7.4.5.

<sup>154</sup>See “Memorandum to the Children’s Bill (1998) (Ghana)” 4. The specific provision (section 32(1)) of the Act states that “A Child Panel shall assist in victim-offender mediation in minor criminal matters involving a child where the circumstances of the offence are not aggravated.”

<sup>155</sup>This applies to juvenile justice by virtue of the explicit reference of the new Juvenile Justice Act to it, see n 145 above.

Statute which details the criminal offences in respect of which local courts may adjudicate. The Ghanaian Children's Act expressly enacts that the child panels should primarily aim to facilitate reconciliation between the child and victims of crime. The Act further empowers the panels to "caution the child as to the implications of his action and that similar behaviour may subject him to the juvenile justice system". It also expressly legislates that the panels may seek out an apology, restitution from the child and his parents or guardians, or service by the child to the offended person in the course of or subsequent to the mediation process.<sup>156</sup> At the extreme end of the continuum (and in a similar manner to the provision in the Ugandan Statute), the panels may impose a community guidance order which entails placing the child offender under the "guidance and supervision of a person of good standing in the local community for a period not exceeding six months for purposes of his reform".<sup>157</sup>



The new Juvenile Justice Act<sup>158</sup> also allows for the use by the police of (pre-trial) formal or informal cautions where "it is in the best interests of the juvenile to do so".<sup>159</sup> Although formal cautions are to be recorded and may be with or without conditions, they must be expunged after a definite period of time.<sup>160</sup> In a similar way to the Ugandan Statute, the new Act allows for the use of a range of alternative sentences at the post-trial stage. This provides a further opportunity for diversion.<sup>161</sup>

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<sup>156</sup>Ghanaian Children's Act section 32.

<sup>157</sup>Ghanaian Children's Act, section 32(4) and (5).

<sup>158</sup>Act 653 of 2003.

<sup>159</sup>Ghanaian Juvenile Justice Act, section 12.

<sup>160</sup>Ghanaian Juvenile Justice Act, section 12.

<sup>161</sup>Ghanaian Juvenile Justice Act, section 29 on 'methods of dealing with a child offender' providing for a range of alternative sentences, including orders for the conditional discharge of a child, placement on probation, compensation, and a payment of damages. These are further considered in Chapter 7, section 7.5.4.



It is instructive that in both countries, no emphasis is laid on the establishment of formal diversion programmes, although there is scope for the establishment of such.<sup>162</sup> By placing reliance on the system of local tribunals, accessibility and affordability issues are also taken into account. In regard to Uganda, Kakama's conclusion (which can be said to apply to Ghana by virtue of the similarities in their approach to diversion) is as follows:

“In sum, it can be said that the prominent role allocated to the village courts ensures that issues of juvenile justice are approached from the local context as a first step, that children's issues are addressed in their own communities and contexts and that such justice is accessible and affordable with children being diverted from the formal criminal justice arena”.<sup>163</sup>



However, the emphasis in both approaches is to allow the local-based diversion approach to apply in respect of less serious offences. As discussed above, these offences are specifically listed in the Ugandan Statute and referred to as “minor criminal matters” in the Ghanaian Children's Act. Thus offences deemed serious are totally excluded from the diversion process. This is reminiscent of the Kenyan approach discussed in section 5.7.2, above. The adjudication of ‘serious’ offences is left to the formal juvenile justice system. One commentator has remarked in this respect that “it appears that diversion will only be an option where the offence is not

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<sup>162</sup>It is submitted that this possible mainly in respect of post-trial diversions where courts may discharge a child offender or postpone a sentence on a number of conditions. Ugandan Statute, section 95(4); Ghanaian Juvenile Justice Act, section 29(1). Diversion programmes may be one of the options.

<sup>163</sup>Kakama, P (2002) “Juvenile Justice in Uganda: Past and Present Perspectives” (Unpublished paper on file) 3.

serious”.<sup>164</sup> The automatic exclusion of particular categories of child offenders from diversion is contrary to international standards which call for the consideration of diversion in each and every case.<sup>165</sup> In this regard, the determination of whether a child offender should be referred to pre-trial diversion should depend on the recommendations in a social inquiry report on the individual circumstances of the child.<sup>166</sup> Although the Ghanaian Juvenile Justice Act provides for the role of pre-trial social inquiry reports,<sup>167</sup> the value of this provision is hindered by the express and implied provisions limiting the use of pre-trial diversions to ‘minor criminal matters’.

It is however submitted that the arena of wide prosecutorial discretion in the sphere of diversion has been significantly curtailed. This is through the local adjudication approaches which are mandatory in dealing with certain offences committed by children



In addition, both new laws provide for legal safeguards to keep in check the danger of violation of legal safeguards in the process of diversion. Firstly, the new laws make provision for orders which the local courts or panels may issue or make following adjudication (as already discussed). Secondly, children’s rights, including legal safeguards influenced by international law, are incorporated. Diversion processes are

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<sup>164</sup>Mills (n 141 above) 9.

<sup>165</sup> See section 5.5, above, discussing the international standards in this regard.

<sup>166</sup>On issues such as whether the child is a first or repeat offender, the background of the child and the circumstances in which he has committed the crime in relation to the nature and the gravity of the crime committed.

<sup>167</sup>Ghanaian Act, section 25 providing that “where a juvenile is charged with an offence, the juvenile court shall order a social enquiry report to be submitted to the court which shall be taken into account by the court in the making of an order.” The Ugandan Act (section 96) limits the use of these reports only to instances when a court makes a detention or probation order. This is discussed further in Chapter 7, section 7.5.5.

no exception. The Ugandan Statute's approach is to make general provisions which apply to all children's issues. The first Schedule of the Statute provides that the principle of the best interests of the child should be considered in all matters concerning children. It also enumerates the overall rights that should apply for decisions involving children. These include the child's rights, to participation, to have his physical, emotional and educational needs met, to non-discrimination and to be protected from any form of harm.<sup>168</sup> In addition to all the rights stated in this Schedule, the Statute expressly enacts the applicability of all the child rights set out in the CRC and the African Children's Charter.<sup>169</sup> In this regard, it is therefore submitted that the Ugandan Statute is in accordance with the CRC, Article 40(3) which calls for the use of diversion "provided legal safeguards are respected".

The new Ghanaian Juvenile Justice Act  specifically deals with the theme of regulation of diversion. The Act states that no child "shall be discriminated against in the selection of a diversion programme" and that all shall have equal access to diversion options.<sup>170</sup> As further minimum standards, the Act provides that inhuman or degrading treatment shall not form part of diversion and diversion programmes should promote the dignity and well-being of children, their self esteem and ability to contribute to society; not be exploitative, harmful or hazardous to a child's physical and mental health; be appropriate to a child's age and maturity; not interfere with a child's schooling and give useful skills to a child where possible.<sup>171</sup> It is submitted

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<sup>168</sup> Ugandan Statute, First Schedule, sections 1-4

<sup>169</sup> Ugandan Statute, First Schedule, section 4 (c).

<sup>170</sup> Ghanaian Act, section 26(2).

<sup>171</sup> Ghanaian Act, sections 26(3) and 27.

that these standards draw from the international children's rights standards in respect of diversion which were highlighted earlier in this Chapter.<sup>172</sup>

### **5.7.2.1 Practical constraints in relation to the Ghanaian and Ugandan approaches**

The most significant practical constraint in relation to Ghana and Uganda's juvenile justice systems is that the locally based adjudication diversion processes discussed in this section are yet to be fully implemented in both countries. In Uganda, while local committees are vibrant in some regions and hence serve as useful conduits for diversion of petty offences committed by children, in other regions they are yet to be operational.<sup>173</sup> Where they are active, it has been reported that many are yet to grasp the essence of the diversion process.<sup>174</sup> The point has been made that local courts may at times exceed their jurisdiction to the detriment of the purposes of diversion by imposing custodial sentences in violation of the provision of the Statute.<sup>175</sup> In other instances, they have been by-passed by the police who proceed to determine a matter or refer the matter to formal courts, even for offences in which local courts have

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<sup>172</sup>Section 5.5, above.

<sup>173</sup>Law Development Centre (Uganda) (2003) "Juvenile Justice Annual Report 2003" (Unpublished report on file) 58 pointing out that while local council courts "help in the diversion of children from the formal legal system and reintegration back into the community", "in many of [Uganda's] districts the courts are not aware of their roles in juvenile justice and therefore little is being done by them in regard to children in conflict with the law".

<sup>174</sup>See Kakama, P (2002) "Implementing Juvenile Justice Reforms in Uganda: Our Experience with Diversion" (Unpublished Paper prepared for Save the Children, UK (Uganda) (On file) 7-8.

<sup>175</sup>Law Development Centre (as above) 58.

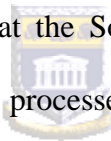
jurisdiction.<sup>176</sup> Some of these concerns have been expressed in Ghana as well.

Writing recently, one commentator notes in respect of Ghana that:

“Since the coming into force of the Children’s Act of 1998 the District Assemblies have failed to establish the child panels and even where they have been established, they are dormant.”<sup>177</sup>

### **5.7.3 The common approach adopted by the draft laws of Lesotho, Namibia and South Africa**

The Namibian and Lesotho Bills substantially draw from the South African Bill’s proposals on diversion.<sup>178</sup> This is partly on account of the regional proximity of three countries and because of the fact that the South African law reform process was started earlier than the other reform processes. This afforded the two countries a




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<sup>176</sup>Ekirikubinza, L.T (2004) “Juvenile justice in Uganda: Operationalisation of the Children’s Statute” (Unpublished paper on file) 13 also recording that one girl-child was arrested for alleged prostitution, an offence in respect of which the local committee courts have jurisdiction. She therefore concludes that “the police should always involve the local council courts in arrests. Before taking a child to the police station or to court, children should first be taken to their respective local council courts. The local council court should call the parents of the child offender and the victim and the case should be settled without the police or court involvement”.

<sup>177</sup>Opong, G (2004) “The Role of Defence for Children International – Ghana in advocacy on Juvenile Justice” (Unpublished paper presented at the International Symposium on the “Rights-Based Approach to International Incorporation: Child Rights Perspectives” held in Geneva on 22-23 November 2004) 10. These practical challenges are the subject of in-depth discussions in Chapter 8.

<sup>178</sup>The Bills referred to here are the Lesotho Child Welfare and Protection Bill (2004); Namibian Child Justice Bill (2002) and the South African Child Justice Bill (2002), which are all still awaiting enactment. See Schulz and Hamutenya (n 89 above) 15-18 and Kimane, I (2004) “Child law reform process in Lesotho” (Unpublished Paper on file) 4 both confirming the influence of the South African reform process on both these countries’ Bills in this regard. Their confirmation is illustrated in the similarity and in many respects, identical nature of the two Bills’ provisions with the South African counterpart.

comparative example on juvenile justice law reform in general and the theme of diversion in particular.

The South African Bill's provisions were developed as a result of the South African Law Reform Commission's process, described in Chapter 3 (section 3.5.3) of this thesis. In an in-depth analysis of the provisions of the Bill viewed in light of international law, Sloth-Nielsen proposes that the final recommendations on diversion which are contained in the Commission's Report<sup>179</sup> attempted to achieve four things.<sup>180</sup> The first was to strengthen the referral procedures for diversion to ensure its continued development and growth in practice. Second, was to provide a range of innovative diversion options. The third objective was to introduce a legislative framework for restorative justice oriented diversion practices and family group conferences (FGCs) in particular.<sup>181</sup> The fourth was to legislate for the protection of human rights in the implementation of diversion.

Based on the influence of the provisions of the South African Bill on the Bills of Lesotho and Namibia, the next section that follows below considers these themes in the context of the common approach adopted by the three Bills. The comparative discussion will be undertaken with a view to highlighting the similarities between the three Bills and the extent to which the Bills are in accordance with international law

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<sup>179</sup> South African Law Commission (2000) *Report on Juvenile Justice* Chapter 7.

<sup>180</sup> Sloth-Nielsen (n 19 above) 270-281.

<sup>181</sup> Section 5.6 above, discussed the piloting of FGCs in South Africa.

relating to diversion.<sup>182</sup> In this regard, the discussion will also take into account (parliamentary) debates thus far, especially on the South African Bill.<sup>183</sup>

### **5.7.3.1 Referral procedures and finding solutions to the highly discretionary character of diversions**

The three Bills have striven to remedy most of the shortcomings that ensue with an unregulated diversion framework, especially, the possibility of arbitrary and biased referrals through the exercise of prosecutorial discretion. This was noted in the discussion in relation to pre-trial diversion practice in both South Africa and Namibia.<sup>184</sup> As a consequence, all three Bills enact provisions which determine and strengthen referral procedures to diversion and diversion programmes.



The Bills propose that the decision on whether a child actually enters the diversion process will depend on the outcome of a Preliminary Inquiry (P.I) (a forum presided over by the inquiry magistrate and attended by probation officers, police representatives, child offender and the child's parents or guardian). The P.I will be a novel pre-trial procedure in all the three countries' criminal justice systems.<sup>185</sup> The holding of a P.I will follow the mandatory process of pre-trial assessment of any child who is apprehended by the police on suspicion of committing an offence. The police

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<sup>182</sup>Discussed in section 5.5, above.

<sup>183</sup>This is motivated by the fact that Sloth-Nielsen's analysis (n 19 above) was done based on the provisions of Bill as proposed by the Law Commission in 2000 (and not the version presented in Parliament (2002) after the redrafting by the State Law Advisors). Hence, the analysis in this section will benefit from the debates regarding the proposals on diversion during the public hearings by the South African Parliament during 2003.

<sup>184</sup> See section 5.6, above.

<sup>185</sup>Chapter 6, section 6.5.1.

will have an obligation to notify the relevant youth or child worker or probation officer for the assessment of the child. The assessment report coupled with the data introduced into the preliminary inquiry (including seriousness of offence, the offender's age, maturity and circumstances at home) will inform the basis for the decision whether a matter can be diverted. The intention of the Bills is that although the inquiry magistrates will make this decision as well as the appropriateness of diversion option(s), the decision on referral must be predicated on whether the prosecution indicates that the matter can be diverted.<sup>186</sup> The drafters envisage decisions based on consensus, but reserve the position of prosecutor as *dominus litis*.<sup>187</sup> It is submitted that this is attended with the inherent danger that the absolute discretion of prosecutors may remain intact, thus rendering the P.I's role redundant in some cases.



The above danger and the desirability of consensus in the P.I on the decision whether to refer a matter to diversion, was documented in the South African Parliamentary (public) debates on the Child Justice Bill.<sup>188</sup> Political support for a legal position vesting the final decision on the inquiry magistrate rather than the prosecutor was

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<sup>186</sup>Lesotho Bill, section 110(3) (c); Namibian Bill, section 70(2) (b); South African Bill, section 25(3)(a) all making the provision that one of the purposes of the P.I will be to determine “whether a matter may be diverted or not.”

<sup>187</sup>Referring to the position of prosecutor as the final authority on the decision to prosecute any criminal case or withdraw charges thus enabling diversion, see the discussion on South Africa and Namibia in section 5.6.1, above.

<sup>188</sup>In Chapter 3, section 3.5.3, it was pointed out that parliamentary public hearings and deliberations on the South African Child Justice Bill are ongoing. See “Minutes of the Public Hearings on the Child Justice Bill” (March 2003) available at < [www.pmg.org.za](http://www.pmg.org.za) > (last accessed 30 September 2005). A similar process (involving public hearings) has not ensued in the case of Lesotho and Namibian Bills.



expressed at the Parliamentary Portfolio Committee public hearings on the Bill.<sup>189</sup> In this regard it is therefore submitted that, in view of the possibility for arbitrary and inconsistent exercise of prosecutorial decisions,<sup>190</sup> the ideal position is that decisions on referral to diversion should be arrived at by consensus at the P.I. In the absence of such consensus, the ultimate decision should rest with the inquiry magistrate with the possibility of further judicial challenge of this decision. However, such a position may not be constitutionally valid in light of the provisions of the South African Constitution, 1996 which gives the National Prosecuting Authority the “power to institute criminal proceedings on behalf of the State”.<sup>191</sup> It is submitted that this provision extends to the exercise of the discretion whether to prosecute a matter or refer it to diversion. The only restriction to the absolute discretion of the prosecutors may be the potential for arguments premised on the desirability of diversion as being in the best interests of individual children. The best interests principle is provided for under section 28 (2) of the South African Constitution.

The Parliamentary Committee’s debates on referral procedures raised the question whether diversion is appropriate as a general rule for all criminal cases involving children.<sup>192</sup> The Committee examined the desirability of excluding certain categories of child offenders from the possibility of pre-trial diversion. This was particularly in

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<sup>189</sup>See “Minutes of the Public Hearings on the Child Justice Bill” (March 2003) available at < [www.pmg.org.za](http://www.pmg.org.za) > (last accessed 30 September 2005).

<sup>190</sup> See section 5.6.1, above on examples of the challenge in the case *M v The Prosecutor, Randburg* (n 113 above).

<sup>191</sup>Constitution of the Republic of South Africa, Act 108 of 1996, section 179(2). Unless this provision was specifically amended to provide for a limitation of the Prosecutorial Authority’s power in this regard.

<sup>192</sup> Odongo, G.O “Public Hearings by the Justice and Constitutional Development Portfolio Committee on the Child Justice Bill” (2003) 1 *Article 40* 1-2.

relation to specified serious offences.<sup>193</sup> It is thus a possibility that the final South African Bill will reflect provisions totally excluding certain categories of serious offences from the purview of diversion while retaining the discretion of the prosecutor to divert other matters.<sup>194</sup> It is, however, submitted that such automatic exclusion of certain categories of offenders from diversion disallows for an individualised response to the issue of whether to refer a matter to diversion or not.<sup>195</sup> As in the case of Ghana, Kenya and Uganda considered in the previous sections, such a position would be contrary to the general thrust of international children's rights law.<sup>196</sup>

It is not clear whether the role of the proposed P.I in the Lesotho and Namibian Bills will be qualified to reflect the South African developments in this regard.<sup>197</sup>

However, it is submitted in respect of all three Bills that in the instances where the P.I procedure will apply, it will be pivotal in the making of a decision on the

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<sup>193</sup>To be specifically provided for in Schedules to the Child Justice Bill. The Bill (as introduced in Parliament in 2002) provides for three Schedules which may be revised in line with these debates.


<sup>194</sup>Odongo (n 192 above) 2. Indeed it has been stated that the final Bill is most likely to adopt the position that children charged with specified serious offences will proceed for trial in court without the holding of a P.I as they will be excluded from the possibility of diversion. See Sloth-Nielsen, J "Paperweight or Powertool: A Critical Appraisal of the Potential of the Proposed Preliminary Inquiry Procedure" (2004) 6(2) *Article 40* 3-5 at 3-4. For a similar observation, see Skelton, A "The South African Child Justice Bill: Transition as an Opportunity?" in Jensen, E and Jepsen, J (2004) *Comparative Juvenile Justice* Copenhagen: Danish Institute of Human Rights (forthcoming).

<sup>195</sup>To be exercised in each and every case taking into account the circumstances of the child and the interests of the society. The current provisions of the Bills adopt this approach. For an analysis of the South African Bill in this regard, see Stout and Wood (n 87 above) 121.

<sup>196</sup>This would require an individualised consideration whether a child should be diverted. Such a process should place reliance on social inquiry reports on the background and circumstances of a child. See section 5.5, above.

<sup>197</sup>Owing to the absence of a similar public debate on the respective Bills. Hence the final content of the Bills will only be known upon enactment.

appropriateness of diversion. This is based on the fact that the pre-trial assessment reports on children would be required for all children appearing in the P.I. Although the decision on referrals to diversion will still vest in the prosecution, the proposed P.I procedure allows for other juvenile justice role players such as, inquiry magistrates, probation officers and the police to play a role in this decision. In cases where prosecutorial discretion may be exercised improperly, the court's power of judicial review of this decision could play a central role as the emerging South African case law indicates.<sup>198</sup>

In addition to the referral procedure under the proposed P.I procedure, the Bills all provide for procedures to be followed in the case of a child's failure to comply with the conditions of diversion.<sup>199</sup> These include sanctions and consequences that a non-compliant child offender may incur.  It is submitted that these provisions will emphasize the value of provisions legislating diversion by sending out the message to criminal justice role players (police, prosecutor, inquiry magistrates) that diversion should not be considered as a 'soft option' but rather as a useful alternative to the process of criminal process with well-defined procedures that demand compliance by the child offender.

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<sup>198</sup>South African case law in this regard is discussed in section 5.6.1, above. It is submitted that due to the general nature of judicial review on the exercise of (administrative) actions in common law systems (of which Lesotho and Namibia are a part), these South African decisions may be of comparative persuasive relevance in this regard. For a discussion on judicial review in South Africa generally, see de Ville, J.R (2003) *Judicial Review of Administrative Action in South Africa* Durban: Butterworths.

<sup>199</sup>Lesotho Bill, section 121; Namibian Bill, section 68 and South African Bill, section 40; (on failure to comply with a family group conference plan).

### 5.7.3.2 Provision for a range of innovative diversion options

The three Bills set out a range of diversion options by proposing three ‘levels’ of diversion for child offenders. The options available once a decision to divert has been taken operate at these different levels, depending on the seriousness of the offence.<sup>200</sup>

Level one diversions comprise the least onerous options in the Bills.<sup>201</sup> This level is enacted as suitable for children aged ten years old and above and represents orders which allow the child to remain in the family or community.<sup>202</sup> These comprise of a range of options including orders placing a child under a good behaviour order, a family time order, supervision and guidance order, a compulsory school attendance order, a reporting order and a positive association order.<sup>203</sup> It is instructive that apart from complying with the obligation at international law on the need for diversion, these options are also pragmatically suitable for the three countries on account of the fact that they can be implemented with little fiscal and monetary resources as they rely on the role played by the child’s own family, community or school.<sup>204</sup>

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<sup>200</sup>Stout and Wood (n 87 above) 121, Wood (n 2 above) 4-6. In this regard the three Bills take the approach adopted by recent legislation in some western jurisdictions (such as the New South Wales (Australian) approach discussed in section 5.4, above) where diversion options such as police cautions are used for offences considered less serious, and FGCs are resorted to for other offences deemed more serious. It is of note that in relation to the South African Bill, the ongoing Parliamentary process has notably leaned in favour of two levels of diversion as opposed to three levels. This restriction of the range of diversions to two levels further confirms the intention to exclude certain categories of child offenders from the P.I and hence diversion as considered in section 5.7.3.1, above.

<sup>201</sup> Lesotho Bill, section 159; Namibian Bill, section 106; South African Bill, section 64.

<sup>202</sup> Lesotho Bill, section 159; Namibian Bill, section 106; South African Bill, section 64.

<sup>203</sup> Lesotho Bill, section 133; Namibian Bill, section 51; South African Bill, section 47.

<sup>204</sup>Mbambo (n 87 above) 85 explaining in respect of South African Bill that “Level one diversions do not typically require sophisticated infrastructure”. See too, Wood (n 2 above) 6 explaining that a number of diversion options in levels one and two constitute “inexpensive diversion orders which hold

Level two diversions comprise any of the level one diversion options but with an extended duration (for up to six months). They also include options such as orders for monetary compensation and community service to victims of crimes or the child's immediate community. Prominently included as level two diversion options are restorative justice options such as referral of the child to family group conference (FGCs) or victim offender mediations (VOMs).<sup>205</sup> The intention is to enact a tiered approach in which level two diversions apply to more serious offences in respect of which level one diversion may not be appropriate.<sup>206</sup>

Third level (level three) diversions are the most intensive and are intended for cases of serious or repeat offending.<sup>207</sup> Two explicit conditions contained in the three Bills justify this view. The first is the provision that for level three diversions to apply, the child offender must be 14 years of age or older. The second is the condition that level three diversions would apply only where a court, upon conviction of a child, “would impose a sentence involving detention of the child for a period exceeding six months”.<sup>208</sup> The South African Law Commission's Report motivated level three diversions on the need for “‘tough’ options so as to provide the possibility of

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particular relevance for under-resourced areas where formal diversion options are currently not available and where resources for embarking upon interventions are scarce.”

<sup>205</sup>Lesotho Bill, section 133; Namibian Bill, section 51; South African Bill, section 47(5).

<sup>206</sup>Wood (n 2 above) 6, Mbambo (n 87 above) 85.

<sup>207</sup>Wood (n 2 above) 6.

<sup>208</sup>Lesotho Bill, section 133(5); Namibian Bill, section 51(4); South African Bill, section 47(5). However in respect to the South African Bill, the State Law Adviser (charged with the drafting of Bill now serving before Parliament) changed this provision to read that level three diversions would apply where a court would impose a custodial sentence for a period not exceeding six months. It is submitted that the effect of this changed provision is that it restricts the application of level three diversions to less serious cases (petty offences) than was originally intended.

diversion in a wider range of cases (including more serious cases)".<sup>209</sup> In all three Bills, level three diversions include referrals to a diversion programme involving a residential component, performance of duties without remuneration, and referral to counselling or therapeutic sessions.<sup>210</sup> The South African Law Commission's Report has alluded to the novelty of the proposed level three diversions in South Africa because diversion programmes which entail a residential period in a facility have not hitherto been used in South African diversion practice.<sup>211</sup>

Apart from the three levels of diversion, the Bills' provisions in relation to a wide range of alternative sentences may be used as post-trial diversion options. This is similar to the example of Ghana, Kenya and Uganda discussed in sections 5.7.1 and 5.7.2, above. The three Bills make provisions for an array of 'community-based' sentences and sentences with a restorative justice element.<sup>212</sup> The latter involve the power of courts to sentence a child to attend a family group conference or victim offender mediation. In addition, the Bills' provisions relating to the conditional postponement of any sentence may be used as a basis for referring a child to diversion.<sup>213</sup>

It has been asserted that the different levels of diversion outlined above offer an innovative way of dealing with different children based on the pre-trial assessment of

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<sup>209</sup> South African Law Commission *Report* (n 179 above) Para 7.31.

<sup>210</sup> Lesotho Bill, section 133(5); Namibian Bill, section 51(4); South African Bill, section 47(5).

<sup>211</sup> South African Law Commission *Report* (n 179 above) Para 7.31. This view was expressed five years ago. The position remains the same, see Mbambo (n 87 above) 78-79.

<sup>212</sup> Lesotho Bill, Part XVII (on Sentencing); Namibian Bill, Chapter 10; South Africa Bill, Chapter 8 (on Sentencing). These are discussed in detail in Chapter 7, section 7.5.4.1.

<sup>213</sup> Lesotho Bill, section 159; Namibian Bill, section 111; South African Bill, section 70. These are considered in detail in Chapter 7, section 7.5.4.1.

their individual needs and circumstances.<sup>214</sup> This ensures that a wider range of cases are referred to diversion in accordance with the CRC and international standards which call for the use of diversions “whenever appropriate”.<sup>215</sup>

### **5.7.3.3 Legislating for and augmenting procedures for restorative justice oriented diversion options**

All three draft Bills legislate in detail on family group conferences (FGCs), victim offender mediation and ‘any other’ restorative justice options. In this regard, the Bills link diversion with restorative justice processes.<sup>216</sup> In expressing the aims of diversion, both the Namibian and South African Bills expressly provide that where ‘reasonably possible’, diversion options “must include a restorative justice element which aims at healing relationships”.<sup>217</sup> Further, they must “include an element which seeks to ensure that the child understands the impact of his or her behaviour on others, including the victims of the offence. This may include compensation or restitution”.<sup>218</sup> The Lesotho Bill enacts identical provisions.<sup>219</sup>

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<sup>214</sup>Mbambo (n 87 above) 79.

<sup>215</sup>See Skelton, A “The Child Justice Bill from a Restorative Justice Perspective” in Maepa (ed) (n 87 above) 129-135, 134 (in relation to the South African Bill). See section 5.5, above on a discussion of international law.

<sup>216</sup>For an analysis of the South African Child Justice Bill from a restorative justice perspective, see Skelton (as above) 129-135; Skelton, A and Frank, C “Conferencing in South Africa: Returning to Our Future” in Morris and Maxwell (eds) (n 48 above) 103-119; Skelton, A “Developing a Juvenile Justice System for South Africa: International Instruments and Restorative justice” in Keightley, R (ed) (1996) *Children’s Rights* Kenwyn: Juta and Co 184.

<sup>217</sup>Namibian Bill, section 48(4) (b); South African Bill, section 45(4) (b).

<sup>218</sup>Namibian Bill, section 48(4) (c). South African Bill, section 45(4) (c),

<sup>219</sup>Lesotho Bill, section 131(7) (f).

The provisions of both Lesotho and Namibian Bills regarding FGCs, VOMs and restorative justice options draw from those of the South African Bill.<sup>220</sup> In turn, the provisions in the South African Bill were drawn from those of the 1989 New Zealand Children, Young Persons and their Families Act (CYPFA) which was discussed earlier in this Chapter.<sup>221</sup> This influence relates to the procedural detail relating to the inclusion of clauses concerning the procedures for referral to FGCs and VOMs, the time frames within which such conferences must be convened, who may attend, and what must be specified in any agreements or plans arising from a conference or victim offender mediation forum.<sup>222</sup> Much as these provisions were influenced by the New Zealand system, it has been recorded that ideas drawn from restorative justice (which have now been included in the Bills) resonate with African concepts which emphasize the values of reconciliation and harmony.<sup>223</sup>




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<sup>220</sup>On the introduction of levels of diversion in Namibian Bill, Schulz and Hamutenya (n 89 above) 17 note that the decision to introduce levels of diversion in the Namibian draft was based on the post 1997 practice with diversion in Namibia “but not without taking into consideration experience in neighbouring countries, in particular, South Africa.” In relation to Lesotho, see Kimane (n 178 above) generally.

<sup>221</sup>Discussed in section 5.4, above. The South African Law Commission *Report* (n 179 above) Para 7.35 explicitly acknowledges the influence of New Zealand CYPFA on the detailed procedures regarding FGCs, VOMs and other restorative justice options. See also, Skelton (n 215 above) 129-135; Skelton and Frank (n 216 above) generally.

<sup>222</sup>South African Bill, sections 48 and 49.

<sup>223</sup>See Skelton (n 215 above) 130, citing the objective clause of the South African Child Justice Bill which includes as one of the Bill’s objectives the aim of fostering the traditional ethos of *ubuntu* (restoration and harmony). See also, Skelton and Frank (n 216 above) 104 noting that these provisions also draw from traditional models of adjudication which are still practiced in South Africa in the rural areas “and are similar to aboriginal traditions in many countries such as New Zealand and Canada. Stout and Wood (n 87 above) 119 (citing Department of Welfare (1997) *White Paper for Social Welfare: Principles, Guidelines, Recommendations, Proposed Policies and Programmes for Developmental Social Welfare in South Africa* Pretoria: Department of Welfare 4) explain the rationale behind the inclusion of the concept of *ubuntu* in the South African Bill as rooted in the premise that: “Each individual’s humanity is ideally expressed through his or her relationship with others and theirs



All three Bills are identical in their provisions regarding who may attend FGCs, the time frames for the conferences and what must be specified in the conferencing plans that result from the process.<sup>224</sup> The only difference between the three Bills relates to the convener of FGCs or VOMs. While this role is vested on a probation officer to be appointed by the inquiry magistrate in a preliminary inquiry in the South African Bill,<sup>225</sup> Namibia's Bill provides that this role may be performed by a child worker or any other suitable person "with appropriate experience or training designated by the Ministers (in charge of justice and social services).<sup>226</sup> By contrast, the Lesotho Bill tasks the chairperson of newly created "village child justice committees" (a form of local courts) with the convening and facilitation of FGCs and VOMs. The creation of a role for local courts in the restorative justice process in the Lesotho Bill is reminiscent of a reliance on the local community structures which was a feature of the approach in Ghana and Uganda.<sup>227</sup>



In light of the foregoing discussion, it is firstly submitted that the restorative justice orientation of the three proposed juvenile justice systems is drawn from western models, especially the use of FGCs and VOMs in New Zealand. However, there is considerable deference to the local circumstances of the respective countries and restorative justice oriented values in Africa.

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in turn through recognition of the individual's humanity. *Ubuntu* means that people are people through other people". For views in similar vein in relation to the Namibian Bill, see Schulz and Hamutenya (n 89 above) 29. Due to the identical nature of the three Bills in relation to the restorative justice oriented provisions, it is submitted that these insights apply equally in respect of the Lesotho Bill.

<sup>224</sup>Lesotho Bill, sections 126 and 129; Namibian Bill, Part III; South African Bill, sections 48 and 49.

<sup>225</sup>South African Bill, sections 48 and 49.

<sup>226</sup>Namibian Bill, section 62.

<sup>227</sup>See section 5.7.2, above. This is in further support of the argument that the Lesotho Bill seeks to incorporate African traditional mechanisms of adjudication as expressed in n 223 above.

#### 5.7.3.4 Enacting minimum standards and other provisions aimed at regulating diversion

In view of the dangers for abuse of human rights safeguards in diversion processes, the Lesotho, Namibian and South African Bills provide for ‘general principles’ and ‘minimum standards relating to diversion’.<sup>228</sup> Before a decision can be made on the referral to pre-trial diversion, the willingness of the child to acknowledge responsibility for the offence is a mandatory requirement.<sup>229</sup> The same provisions specify that one of the relevant factors to be considered is the possible infringement of a child’s procedural rights. Corporal punishment, the performance of community service for children aged under fourteen years (thirteen in the case of Lesotho<sup>230</sup>) and where such service conflicts with a child’s schooling, public humiliation and diversion measures which require payment by a child or parent for eligibility, are all specifically prohibited in the process of diversion.<sup>231</sup> In addition, both the South African and Namibian Bills contain an identical provision to the effect that:

“Any diversion option that has a predetermined content and duration and either involves a service to groups of children or offers a service to individual children on a regular basis, which service is presented by government or a non-governmental organisation, must be registered...”<sup>232</sup>

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<sup>228</sup>Lesotho Bill, sections 131(7) (8) and 132; Namibia Bill, section 48; South African Bill, section 45.

<sup>229</sup>Lesotho Bill, section 132 (b); South African Bill, section 39(1) (d); Namibian Bill, section 50(1) (b).

<sup>230</sup>Lesotho Bill, section 131(6).

<sup>231</sup>Lesotho Bill, sections 131 and 132; Namibia Bill, section 48; South African Bill, section 45.

<sup>232</sup>Namibian Bill, section 48(5); South African Bill, section 45(5).

It is submitted that this provision is aimed at forestalling the development of unregulated diversions with attendant risks of violation of child offenders' human rights.<sup>233</sup> The rationale given by the South African Law Commission on this point is as follows:

“[t]he Commission was mindful of various risks if diversion was not properly regulated - risks such as the use of diversion options which are disproportionately severe, which contravene basic human rights, which are harmful and exploitative to the children concerned, or which are actually intended to further the sectoral or personal interests of the diversion service provider.”<sup>234</sup>

While the minimum standards applicable in relation to diversion are comparable to provisions in similar vein in the Ghanaian, Kenyan and Ugandan legislation,<sup>235</sup> this provision in relation to registration is unique to the Namibian and South African Bills. The provision therefore constitutes an additional attempt to safeguard children's legal and procedural rights in the course of diversion processes.

## 5.8 Conclusion

Diversion became an integral feature of juvenile justice systems particularly in western jurisdictions since the 1970s. The provisions of the CRC and other relevant international law instruments (particularly, the Beijing Rules) as interpreted by the CROC now affirm that diversion should be a feature of all States' juvenile justice

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<sup>233</sup>For similar view, see Mbambo (n 87 above) 81, Stout and Wood (n 87 above) 121.

<sup>234</sup>South African Law Commission *Report* (n 179 above) Para 7.7.

<sup>235</sup>As discussed in sections 5.7.1 and 5.7.2, above.

systems. Although international law does not specifically detail how diversion is to be given effect in domestic juvenile justice systems, it provides for a number of standards. These include the need for viable diversionary measures, the availability of diversion at any point of decision-making by juvenile justice officials and all stages of the juvenile justice procedure, the consideration of diversion in each and every case including where more serious offences are alleged to have been committed by the child and equal and non-discriminatory access to diversion. Further, any diversionary options must respect children's human rights and procedural safeguards.

This Chapter considered that before the recent juvenile justice law reforms, there was limited scope for the use of post-trial diversion in the six countries under study.<sup>236</sup> In contrast, the history of pre-trial diversion in these countries is a fairly recent one. In the case of Ghana, Kenya, Lesotho and Uganda, the experimentation with pre-trial diversions started with the advent of the recent child law reforms discussed in this thesis. In addition, before the new and proposed juvenile justice laws in all the six countries under study, pre-trial diversion was not accorded legal recognition. It was however considered that, in Namibia and South Africa, pre-trial diversions were established and practiced in the 1990s through the exercise of prosecutorial discretion (in favour of diversion). Diversion has mainly been conducted through the involvement of NGOs in funding and service delivery.<sup>237</sup> In South Africa, this has resulted in judicial approval for diversion, which it is submitted, partly remedied the lack of legal provisions to this effect.

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<sup>236</sup>'Limited' in the sense that while there were legal provisions for alternative sentences in the former laws of the countries, these were rarely used because of the predominant reliance on institutionalization. This is further considered in Chapter 7, section 7.3.3.

<sup>237</sup>With limited governmental support and funding.

In view of the absence of legal provisions in recognition of diversion in the majority of the countries under study, and in light of the limited availability of diversion,<sup>238</sup> the Chapter considered that the new and proposed juvenile justice laws are a considerable advance in the endeavour to comply with international children's rights law.<sup>239</sup> Three diverse approaches characterise the new laws and Bills regarding diversion. Through 'indirect' provisions, the Kenyan Children's Act holds promise for the establishment, access to and regulation of diversion. This is in relation to the provisions restricting the use of detention at all stages of juvenile justice procedure, the broad powers of the National Council for Children Services and provisions legislating for a wide range of alternative sentences which can be used to enable post-trial diversion measures. However, the Act adopts an approach that still gives considerable leeway to prosecutorial authority on access to diversion. It was therefore argued that there remains an implicit danger for the abuse or non-exercise of such discretion. The Kenyan approach also fails to include more direct provisions on when pre-trial diversions may be used. However, the Chapter considered that the on-going pilot diversion programme is illustrative of the impact of the Act in relation to the need for alternatives to the formal justice system, in accordance with international law.<sup>240</sup>

The second approach considered was that by the new juvenile justice laws in Ghana and Uganda. Both new laws are similar in making provision for community participation and affording a prominent role to village courts or community panels in the adjudication of some child offending cases. The Chapter considered that the aim

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<sup>238</sup>In South African and Namibian practice.

<sup>239</sup>In relation to the need for diversions in juvenile justice systems whenever appropriate.

<sup>240</sup>Despite its teething problems.

of this approach is to channel child offenders away from the formal criminal justice system. Besides compliance with the requirement in international law for diversion, the use of local courts for specific less serious offences ensures that there is wide scope for community-based diversion programmes which allow the child to remain in his or her community. This is explained by the fact that the local courts are legislatively made the courts of first instance in relation to minor offences. Hence, the decision to refer child offenders to these courts does not hinge on the exercise of prosecutorial discretion. In addition, the new Ghanaian and Ugandan laws make explicit provision for the possibility of post-trial diversions by virtue of an array of alternative sentences. This would be a useful diversion mechanism for children whose cases are not dealt with by the local courts.

The third approach considered was that represented by the Lesotho, South African and Namibian Bills. These Bills propose diversion as central to the envisaged new juvenile justice systems. It was discussed that the three Bills seek to comply with international law in a number of respects. Firstly, the Bills all envisage provisions which introduce a new pre-trial forum (the P.I) so as to strengthen referral procedures for diversion by involving role-players other than the prosecutor alone.<sup>241</sup> It was submitted that this will ensure the development and growth of pre-trial diversion and assure uniformity in the process of referral. Secondly, a wider access to diversion is envisaged through provision for a wide range of innovative diversion options by the introduction of different levels of diversion and an array of alternative sentences. In this regard, it was also discussed that the different levels of diversion encourage the development of innovative diversion practices which may be not be cost intensive.

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<sup>241</sup>Such as judicial officers, probation and social workers and the police

This is highly relevant in light of scarcity of resources in these countries and the need for diversion practice in rural areas where diversion programmes may be rare, if not non-existent. Thirdly, the three Bills propose a legislative framework for restorative justice diversion practices such as family group conferences (FGCs) which, while drawing from practices in western juvenile justice systems, resonate with African concepts of restorative justice and reconciliation.<sup>242</sup>

In addition, the Chapter has considered that the inclusion of minimum standards and human rights safeguards in relation to the different diversion approaches is further testimony of the influence of international children's rights law in this sphere.

However, the Chapter noted that the one criticism that stands out in relation to four countries under study<sup>243</sup> is the potential for a bifurcated system of diversion which would potentially totally exclude certain categories of child offenders from being considered for diversion. The Chapter discussed that these new laws and Bills limit the use of diversion by prescribing that certain categories of offenders (related to the offence with which they have been charged) must be dealt with within the traditional formal juvenile justice system. It was discussed that this is seemingly contrary to the gist of international standards, which require a decision on the appropriateness of

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<sup>242</sup>As considered in section 5.7.3.3, above.

<sup>243</sup>With the exception of Lesotho and Namibia which still reflect the original South African position (prior to the Parliamentary debates expected to result in the automatic exclusion of specified serious cases from diversion). As the Lesotho and Namibian Bills currently stand, the decision on whether to divert or not will be made at the P.I following the pre-trial assessment of each and every child upon arrest by the police. The position in the Lesotho and Namibian Bills is therefore such that the appropriateness of diversion would (upon enactment of the laws) be decided on each individual case, taking into consideration the circumstances of the child. For discussion in this regard, see section 5.7.3.1, above.

diversion to be made in each individual case, taking into consideration both the circumstances of the child and the interests of society.





## CHAPTER 6

### THE REQUIREMENT RELATING TO SEPARATE PROCEDURES AND COURTS APPLICABLE IN THE PRE-TRIAL AND TRIAL STAGES OF THE JUVENILE JUSTICE SYSTEM

#### 6.1 Introduction

A 'juvenile justice system' requires the institution of separate laws, procedures and institutions that apply specifically to children in conflict of law in contrast to or alongside but distinct from the criminal justice system applicable to adult offenders. This is the requirement of the CRC in Article 40(3) as was highlighted in Chapter 2.<sup>1</sup> The requirement of separation relates to numerous aspects spanning the pre-trial, trial and the post-trial phases. Thus from the moment of a child's arrest through to subsequent phases of the criminal procedure, international law requires a "system" which is unique to child offenders and substantially different from that relating to adults in the criminal justice system.

Chapter 3 dealt with the requirement relating to the need for separate laws to underpin the juvenile justice system.<sup>2</sup> The Chapter that follows this (Chapter 7) discusses the sentencing regimes, including proposals on the use of (child-specific) custodial institutions, in the new laws. Consequently, both these issues (the enactment of laws

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<sup>1</sup>Chapter 2, section 2.8.1. CRC, Article 40(3) provides: "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 penal law."

<sup>2</sup>Chapter 3, section 3.5.

and alternative dispositions) are not considered in this Chapter, albeit that they form part of the requirements of Article 40(3) of CRC.

This Chapter will consider how the new (and proposed laws) in the countries under study seek to reflect the requirement of separate procedures and courts applicable to children at the pre-trial and trial stages.<sup>3</sup> In order to set the stage for the substantive discussions on these countries, the first section of the Chapter examines the position at international children's rights law on the requirements for a juvenile justice system with separate procedures and courts at pre-trial and trial levels. The second section of the Chapter will highlight the practice on the absence of a separate juvenile justice system applicable to children at the pre-trial and trial stages in the countries under study prior to the law reforms. The third section of the Chapter will then focus on how the new laws have made provision for pre-trial procedures in relation to arrest, pre-trial detention and procedures for releasing children from detention before trial. In addition, the novelty of a new pre-trial procedure (the Preliminary Inquiry) in the proposed laws of Lesotho, Namibia and South Africa, will be discussed in this section. The last (fourth) section will examine the different approaches by the countries under study in relation to the requirement of separate procedures and courts at the trial stage. Discussion in this last section will consider the jurisdiction of specialised courts for children, the ambiance and procedures in these courts and the protection of children's rights and due process safeguards before and during trial.

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<sup>3</sup>The Chapter considers provisions at both pre-trial and trial levels together based on the fact that the past practice of the countries under study, as will be discussed in section 6.3, below, shows that the problem of pre-trial detention has been largely due to, and deeply influenced by, the lack of separate procedures and specialised courts at the trial level. Further, it is submitted that the need for provisions at the pre-trial level (on arrest and pre-trial detention) which are specifically applicable to children as opposed to adults, is part of the requirement on separate procedures in Article 40(3) of CRC.

This Chapter's discussions will be comparative in nature and will therefore highlight the differences and commonalities in the approaches of the reforms in the countries under study. This comparative discussion will however be undertaken with a view to showing how and the extent to which the discussed law reforms seek to comply with international children's rights law on these issues.

## **6.2 International children's rights law on separate procedures and courts at both the pre-trial and trial stages**

### **6.2.1 International law requirements regarding arrest and detention at the pre-trial stage**

An overarching principle of the juvenile justice provisions in the CRC is the rule that the arrest, detention or imprisonment of children must be considered as a last resort, and if nevertheless ordered, be limited to the shortest period of time.<sup>4</sup> This rule is the first of its kind and has no counterpart in earlier international human rights instruments.<sup>5</sup> The ICCPR only provides for a much more general standard prescribing that there should be no general rule for the detention of persons awaiting trial.<sup>6</sup> It does not prescribe the 'last resort principle'. It has therefore been asserted that the CRC

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<sup>4</sup>Article 37(b) of the CRC providing that "arrest, detention or imprisonment of children 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".

<sup>5</sup>Van Bueren, G (1995) *The International Law on the Rights of the Child* Dordrecht/Boston/London: Martinus Nijhoff Publishers 210.

<sup>6</sup>ICCPR, Article 9(3) provides in part thus: "...It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement."

standard is much stricter than the standard for pre-trial detention of adults prescribed by the ICCPR.<sup>7</sup>

The import of the principle of arrest and detention as a last resort and, when resorted to, for the shortest period of time, is that alternative measures to arrest and detention must be used at all stages of the juvenile justice procedure including in relation to pre-trial detention. This principle aims to restrict institutionalization in two regards; in quantity (“last resort”) and time (“minimum necessary period”).<sup>8</sup> One of the implications of this rule is that:

“Alternatives to arrest such as summons may have to be found. The use of bail also has to be considered. Children or their families are often unable to meet bail, and are deprived of their liberty as a consequence of their poverty, not because of relevant factors in criminal justice.”<sup>9</sup>



According to the Beijing Rules (on which the CRC’s provisions on juvenile justice were predicated) juvenile justice law, policy and practice (by juvenile courts, police and other juvenile justice authorities) must consider options, *in lieu* of pre-trial detention such as police or court-ordered bail or bond, community supervision, placement of a child in conflict with the law with his or her family or the child’s unconditional release pending trial.<sup>10</sup> The Commentary to this Rule further notes that:

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<sup>7</sup>Van Bueren (n 5 above) 210.

<sup>8</sup>Commentary to Beijing Rules, Rule 19(1).

<sup>9</sup>United Nations (1999) *The United Nations and Juvenile Justice: A Guide to International Standards and Best Practice* New York: United Nations 11. One of the ‘relevant factors’ in criminal justice factors alluded to here is the gravity or seriousness of the offence.

<sup>10</sup>Beijing Rules, Rule 13(2).

“The danger to juveniles of “criminal contamination” while in detention pending trial must not be underestimated. It is therefore important to stress the need for alternative measures. By doing so, Rule 13.1 encourages the devising of new and innovative measures to avoid such detention in the interest of the well-being of the juvenile.”<sup>11</sup>

The term ‘detention’ must be construed in the widest meaning possible. This is in light of the UN JDL Rules.<sup>12</sup> These Rules adopt an expansive definition of detention thus governing “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”.<sup>13</sup> This definition would therefore encompass placements in police cells, prisons or residential facilities such as ‘places of safety’, ‘schools of industry’, ‘reform schools’ as in South Africa or ‘approved or reform’ schools and ‘borstals’ as in Kenya and Uganda. In addition, it has been emphasized that deprivation of liberty is an intentionally broad concept, and may include diversion procedures which involve a residential element, that is, where a child is to serve diversion while in a residential facility.<sup>14</sup>

The Committee on the Rights of the Child (CROC) has endorsed this all-encompassing definition of deprivation of liberty. This is evident in its general guidelines on the preparation of State Reports to be submitted to it.<sup>15</sup>

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<sup>11</sup>Commentary to the Beijing Rules, Rule 13.1.

<sup>12</sup>Dealing with rules concerning all forms of detention or ‘deprivation of liberty’.

<sup>13</sup>UN JDL, Rule 11(b).

<sup>14</sup>United Nations (n 9 above) 11.

<sup>15</sup>CROC, “Guidelines Regarding the Form and Content of Initial Reports to be submitted by States Parties under Article 44 (1)”, CRC/C/5, 15 Oct 1991 and the revised version, CRC/C/58, 20 Nov 1996. The first guidelines (the “1991 Guidelines”) include juvenile justice as part of ‘special protection measures’ in Para 23. The updated guidelines (the “1996 Guidelines”) cover juvenile justice issues

The CROC also had opportunity to comment on detention with an emphasis on pre-trial detention in its General Day of Discussion on ‘juvenile justice’ held in 1995.<sup>16</sup> In interpreting the obligations of State Parties under the CRC in this regard, the Committee recommended that:

“...Deprivation of liberty, in particular pre-trial detention, should never be unlawful or arbitrary and should only be used once all other alternative solutions have proved to be inadequate...”<sup>17</sup>

This emphasizes that detention at the pre-trial and trial levels may only be considered after recourse to options such as police cautioning and community supervision. Additional criminal justice factors (such as exceptional circumstances where the offence in question is a serious or violent one involving personal injury or violence or aggravated circumstances, and repeat offending) could also be brought into the reckoning.

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more comprehensively under ‘children involved with the system of administration of juvenile justice’ in Paras 132-148. The CROC in defining detention expressly refers to the all-encompassing definition of the term ‘deprivation of liberty’ in Rule 11(b) of the UN JDL Rules, see CROC, “the 1996 Guidelines”, Para 138.

<sup>16</sup>In accordance with Rule 75 of its Provisional Rules of Procedures, the Committee on the Rights of the Child has decided to periodically devote one day of general discussion to a specific article of the Convention or to a child rights theme. This practice is similar to that of other UN treaty monitoring bodies such as the Human Rights Committee (ICCPR) and the Committee on Economic, Social and Cultural Rights (ICESCR) of dedicating annual days of general discussion aimed at pursuing thematic aspects of the respective treaties in detail. At the CROC’s 10<sup>th</sup> Session held in November 1995, the Committee dedicated the day to an in-depth discussion on the CRC obligations relating to juvenile justice.

<sup>17</sup>CROC, “Recommendations from the Day of General of Discussion on Juvenile Justice” (Excerpted from CROC “Report on Tenth Session, CRC/C/43, Annex VIII, 10<sup>th</sup> Session, 13 November 1995) Para 227.

The State obligation regarding detention as a last resort has been consistently affirmed by the CROC in its examination of State Reports.<sup>18</sup> This obligation has been affirmed and elaborated on by the Committee in its latest General Comment as follows:

“...Where detention is exceptionally justified for other reasons, it shall be conducted in accordance with article 37(b) of the Convention that requires detention to conform to the law of the relevant country and only to be used as a measure of last resort and for the shortest appropriate period of time. In consequence, all efforts, including acceleration of relevant processes, should be made to allow [at all stages of the juvenile justice procedure] for the immediate release of ...children from detention and their placement in other forms of appropriate accommodation.”<sup>19</sup>

Although the expansive definition of deprivation of liberty would on the face of it appear to suggest that referral to all forms of detention are treated in the same way in light of the principle of detention as a last resort, there seems to be a hierarchy in

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<sup>18</sup>See generally, Abramson, B “An Analysis and Commentary on Issues of Juvenile Justice in the Concluding Observations of the UN Committee on the Rights of the Child, 1993-2000” in Defence for Children International (2001) *Juvenile Justice: ‘The Unwanted Child’ of State Responsibilities* Geneva: Defence for Children International.

<sup>19</sup>CROC, *General Comment No. 6* (2005) “Treatment of Unaccompanied and Separated Children Outside their Country of Origin” CRC/GC/2005/6 (Unedited Final Version) (Adopted at the 39<sup>th</sup> Session on 3 June 2005) Para 61 [emphasis added]. It is submitted that although this General Comment provides an exposition of the State obligations specifically in relation to separated and unaccompanied children in refugee or internal displacement situations, its interpretation on juvenile justice provisions, in particular on article 37 in relation to detention are relevant due to the general nature of the CROC’s interpretation and in light of the permeability and inter-dependence of the CRC’s provisions. See Abramson, B (2003) “Two Stumbling Blocks to CRC monitoring: The Four ‘General Principles’ and the Definition of the Child” (Unpublished paper submitted as ‘comment’ to the CROC in relation to the Committee’s Draft *General Comment No. 5* (2003) on “General Measures of Implementation for the CRC”) at p 1-21 (Abramson emphasizes a ‘holistic’ interpretation of the CRC that avoids a piecemeal reading of the CRC provisions as individually isolated from each other).

international law on the forms of detention. An examination of the Beijing Rules reveals that in the event that detention is decided on (as a last resort), other alternatives should first be resorted to in place of police or prison pre-trial detention, which should only be used as the very last resort.<sup>20</sup>

The Commentary to the Beijing Rules emphasizes that the principle restricting detention “makes the appeal that if a juvenile must be institutionalized, the loss of liberty must be restricted to the least possible degree, with special institutional arrangements for confinement”.<sup>21</sup> The Commentary further suggests that in the event of detention, “children should be placed in other forms of appropriate placement”. Priority should be given to “open” over “closed” institutions.<sup>22</sup> Preference should therefore be towards child-specific institutions with an orientation of child care as an alternative to prisons or police cells. This is supported by the UN JDLs which recommend the establishment of open detention facilities with no or minimal security measures, “so as to avoid some of the negative effects of imprisonment”.<sup>23</sup> This position has been further confirmed by the CROC thus:

“In the exceptional case of detention, conditions of detention must be governed by the best interests of the child and pay full respect to the [CRC] and other international obligations. Special arrangements must be made for living quarters that are suitable for children and that separate them from adults, unless it is considered in the child’s

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<sup>20</sup>Beijing Rules 13(2).

<sup>21</sup>Commentary to the Beijing Rules, Rule 19.1.

<sup>22</sup>Commentary to the Beijing Rules, Rule 19.1 (adding that “any (such) facility should be of a correctional or educational rather than of a prison type”).

<sup>23</sup>UN JDL, Rule 30. Rule 17 is however clear that detention of children before trial should be avoided ‘to the extent possible’, and be limited only to ‘exceptional circumstances’.



best interests not to do so. Indeed, the underlying approach to such a program should be ‘care’ and not ‘detention’... ”<sup>24</sup>

The CROC has however warned of the dangers of abuse of children’s rights in detention under the guise of ‘welfare’ or ‘child care’. It has noted concern in this regard that children may be placed in institutions

“... [u]nder a welfare pretext, without taking into due consideration the best interests of the child nor ensuring the fundamental safeguards recognized by the CRC, including the right to challenge the decision of placement before a judicial authority, to a periodic review of the treatment provided to the child and all other circumstances relevant to the child’s placement and the right to lodge complaints.”<sup>25</sup>



In the event of detention, the whole gamut of children’s rights and minimum standards applicable to children deprived of their liberty must be respected.<sup>26</sup>

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<sup>24</sup>CROC, *General Comment No.6* (n 19 above) Para 63.

<sup>25</sup>CRCOC “Recommendations on the Day of General Discussion on Juvenile Justice” (n 17 above) Para 228.

<sup>26</sup>In *General Comment No.6* (n 19 above) Para 63 the CROC confirms this in the following words:

“...Facilities should not be located in isolated areas where culturally-appropriate community resources and access to legal aid are unavailable. Children should have the opportunity to make regular contact and receive visits from friends, relatives, religious, social and legal counsel and their guardian. They should also be provided with the opportunity to receive all basic necessities as well as appropriate medical treatment and psychological counselling where necessary. During their period in detention, children have the right to education which ought, ideally, to take place outside the detention premises in order to facilitate the continuance of their education upon release. They also have the right to recreation and play as provided for in article 31 of the Convention. In order to effectively secure the rights provided by article 37(d) of the Convention ... children deprived of their liberty shall be provided with

Where the police exercise the choice to the arrest as a last resort, the Beijing Rules provide for their duty to notify the child's parents within the shortest possible time thereafter'.<sup>27</sup> These Rules further prescribe that contact between the law enforcement agencies and a juvenile offender shall be managed in such a way as to respect the legal status of the juvenile, promote the well-being of the juvenile and avoid harm to her or him, with due regard to the circumstances of the case,<sup>28</sup> and that the police dealing with juvenile justice "shall be specially instructed and trained".<sup>29</sup> In the pre-trial stage, the police must also allow "prompt access to legal or other appropriate assistance" to a child who is deprived of his or her liberty.<sup>30</sup> Children deprived of their liberty also need to be treated "with humanity and respect in a manner which takes account of the needs of persons of their age", and "consistent with the promotion of the child's sense of dignity and worth".<sup>31</sup>



Specific further standards apply in respect of detention including the rule which requires the separation of children from adult detainees unless it is in the child's best interests not to do so.<sup>32</sup> The CRC also establishes the right of a child 'not to be

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prompt and free access to legal and other appropriate assistance, including the assignment of a legal representative".

<sup>27</sup>Beijing Rules, Rule 10(1).

<sup>28</sup>Beijing Rules, Rule 10(3).

<sup>29</sup>Beijing Rules, Rule 12(1).

<sup>30</sup>CRC, Article 37(d).

<sup>31</sup>CRC, Articles 37(c) and 40(1).

<sup>32</sup>ICCPR, Article 10(2) (b), CRC Article 37(a). This is one of the oldest rule in relation to international law on juvenile justice, having been included in Rule 8(d) of the 1955 UN Standard Minimum Rules on the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the United Nations Economic and Social Council in Resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977. It is submitted that a potential argument is that a considerable majority of States now considers this rule to be customary international law. In this regard, it may be argued that the requisite

separated from his or her parents against their will, except when competent authorities subject to judicial review determine in accordance with applicable law and procedures' the necessity of such separation in the best interests of the child.<sup>33</sup>

In sum it can be concluded that international children's rights law generally restricts the mechanisms of arrest and pre-trial detention of children in conflict with the law and prescribes their use only as a last resort. A further premise is that in the event that arrest and detention are resorted to in exceptional circumstances, this corpus of law

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*opinion juris* is evident in the inclusion of the rule in international law instruments starting with the 1955 UN Standard Rules on the Treatment of Prisoners, the ICCPR (1966) and eventually, the CRC (1990). Evidence of State Practice (*usus*) over time demonstrating the separation of child from adult detainees may be said to constitute the other requirement of international law. For a general discussion on the application of custom as a source of public international law, see Brownlie, I (1995) *Principles of Public International Law (4<sup>th</sup> Edition)* Oxford: Clarendon Press 4-11. Despite the argument on the customary international law nature of this rule, it is to be noted that a number of States (such as Australia, Canada, Cook Islands, Iceland, Japan, Malaysia, the Netherlands, New Zealand and the UK ) have entered reservations on the CRC to Article 37(a) which provides for the rule. These States have cited the unfeasibility of this obligation due to a limitation or inadequacy of separate facilities for the detention of children. See List of reservations to the CRC available at < <http://www.ohchr.org/english/countries/ratification/11.htm#reservations> > (last accessed 22 July 2005). In the determination of whether these States are bound by this rule in light of its 'potential' customary international law status and in spite of their reservations, it would be useful to consider whether the States have been "persistent objectors" to the application of this rule. The potential practical effect of these reservations have been witnessed, for example in Canada, where as a result of Canada's reservation, "[government] authorities continue to remand or hold children in adult correctional facilities" due to the desire of the Canadian government to "want to avoid having to build more youth detention centres", see Denov, S "Children's Rights or Rhetoric? Assessing Canada's *Youth criminal Justice Act* and its Compliance with the UN Convention on the Rights of the Child" (2004) 12(1) 1-20 at 11-12 (adding that Canada's reservation is "said to have more to do with economic policy and budget limitations" than the principle or desirability of separation of children).

<sup>33</sup>CRC, Article 9. Article 9(4) further affirms the principle against separation from parents where such separation results from any action initiated by a State party such as the detention, imprisonment, exile, or deportation of the child.

details specific standards that govern the treatment of children in detention, whether in the hands of police, prison authorities or (public or private) residential care facilities.

### **6.2.2 International law and the requirement of a separate juvenile justice system**

In Chapter 2 it was contended that the ideal of separation of young offenders from the adult criminal justice system has been an overriding philosophy of juvenile justice as evident in the practice of States in establishing separate laws and juvenile courts. In that Chapter it was also discussed that the establishment of separate laws, courts and institutions (such as reformatories) started in the 19<sup>th</sup> century and continues to this day.<sup>34</sup> The inclusion in Article 40(3) of the CRC of a requirement on separate laws, procedures and institutions therefore amounts to giving binding force to the entrenched practice of States.



The requirement of separate procedures and courts applicable to children has been described as being “a means for the fulfilment of the aims of juvenile justice in international law”.<sup>35</sup> The rationale is that “a separate juvenile justice system can be attuned to the specific needs of children and can better ensure their successful reintegration”.<sup>36</sup> In this regard, the requirement of separation at the pre-trial and trial levels is intricately linked with the objectives of a juvenile justice system which entails the adoption of measures for the reintegration and rehabilitation of child

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<sup>34</sup>Chapter 2, section 2.2.

<sup>35</sup>Van Bueren (n 5 above) 175.

<sup>36</sup>Van Bueren (n 5 above) 175. Van Bueren however emphasizes caution on the excesses of a ‘welfarist’ oriented separate juvenile justice system that may be in denial of a child’s due process rights, as was highlighted in the U.S seminal case of *Re Gault* discussed in Chapter 2, section 2.3.

offenders.<sup>37</sup> It is therefore submitted that the essence of these principles is that the idea of separation cannot be used, for example, to justify more punitive purposes.

### 6.2.2.1 The CRC requirement regarding separate courts or tribunals

The question arises whether the provisions in article 40(3) of CRC legally binds States Parties to establish specialised judicial courts for juvenile justice. Van Bueren points out that the drafting of Article 40 of CRC (including Article 40(3)) on the ideal of separate courts and procedures) was informed by “the diversity in the types of juvenile proceedings throughout the world”.<sup>38</sup>

Therefore, States have ‘a margin of discretion’ whether to establish specialised courts or whether to adopt a different approach.<sup>39</sup> Hence different approaches for the determination of children’s criminal responsibility, including the use of specialised (juvenile courts) on the one hand, or adult courts and or non-judicial bodies<sup>40</sup> on the

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<sup>37</sup>Van Bueren (n 5 above) at 172.

<sup>38</sup>Van Bueren (n 5 above) 179. For a similar view, see Detrick, S (1999) *A Commentary on the United Nations Convention on the Rights of the Child* The Hague: Martinus Nijhoff Publishers 700 adding that at the time of the drafting Article 40(3) of CRC, “it was felt that non-imperative language should be used so as to enable States Parties to achieve a balance between the desirability and the advisability of introducing these measures into their legal systems”.

<sup>39</sup>Van Bueren (as above) 179, Detrick (n 38 above) 700.

<sup>40</sup>Such as the much-heralded Scottish children’s hearings or inquiry presided over by lay tribunals rather than judicial courts. For a discussion of the Scottish children’s hearings system, see generally Norrie, K.M (1997) *Children’s Hearings in Scotland* Edinburgh: Sweet and Maxwell, Hallett, C “Ahead of the Game or Behind Times? The Scottish Children’s Hearings Systems in International Context” (2000) 14(31) *International of Law, Policy and the Family* 1-15; Hallet, C and Hazel, N (1998) *The Evaluation of Children’s Hearings in Scotland Volume 2: The International Context: Trends in Juvenile Justice and Child Welfare* Edinburgh: Scottish Office Central Research Unit;

other are in keeping with this ‘margin of discretion’. The overall emphasis is to be placed on the competence of the forum and whether its procedure adheres to the aims of a juvenile justice system in international law.<sup>41</sup>

One scholar explains in this regard that:

“In fact, no international standards go as far as to require explicitly the establishment of a separate set of courts specifically for juveniles. This is explained simply by reality. A surprising number of countries have never made such a distinction, and would never have accepted such a rule...”<sup>42</sup>

However, despite the margin of discretion accorded to States, “... [t]here is none the less more or less implicit presumption that something so different as to warrant the name “juvenile justice system” is necessary in order to comply with current norms.”<sup>43</sup>

Abramson records that the CROC has routinely been disapproving of legislative

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Janeksela, G.M “Descriptive Analysis of Five Juvenile Justice Systems: United States, Scotland, England, India and South Africa”, in (1991) 21 *International Review of Modern Sociology* 1-19.

<sup>41</sup>This is also in keeping with the Beijing Rules, Rule 14(1) which provides: “Where the case of a juvenile offender has not been diverted (under Rule 11), she or he shall be dealt with by the competent authority (court, tribunal, board, council, etc) according to the principles of a fair and just trial”. Detrick explains that: “In the Commentary to this rule it is noted that it is difficult to formulate a definition of the competent body or person that would universally describe an adjudicating authority. The term ‘competent authority’ in Rule 14.1 is meant to encompass those who preside over courts or tribunals (composed of a single judge or of several members), including professional and lay magistrates as well as administrative boards or other more informal community and conflict resolution agencies of an adjudicatory nature...” See Detrick (n 38 above) 692.

<sup>42</sup>Cantwell, N “Juvenile Justice” in UNICEF (1998) *Innocenti Digest No. 3 on Juvenile Justice* Florence: UNICEF 10. For a similar view see Cappelaere, G, Grandjean, A and Naqvi, Y (2005) *Children Deprived of Liberty: Rights and Realities* Amsterdam: Defence for Children International 51-52.

<sup>43</sup>Cantwell (as above) 10.

provisions and practice in many States which permit children accused of crimes to be tried in regular courts rather than specialised juvenile courts.<sup>44</sup> Although the reasons for the Committee's disapproval are not always made clear, Abramson's analysis of the CROC's views over an eight-year period concludes that:

“...u]ndoubtedly, what the Committee wants to say is that whenever children are accused of violating criminal law their cases should be handled in the juvenile courts, and never in the regular criminal courts, the so-called “adult” criminal courts.”<sup>45</sup>

It is therefore submitted that to ensure compliance with the CRC, Article 40(3) expresses the desirability, as a general rule, of specialised juvenile courts or other fora to deal with cases of children in conflict with the law. In limited instances where jurisdiction is vested on adult (regular) courts, States Parties must ensure that the CRC standards apply fully to the proceedings. Abramson elaborates on this point thus:

“Under article 1 of the CRC, everyone under the age of 18 in the State's jurisdiction has all CRC rights at all times; there is no exception when a minor's case is handled in the regular criminal courts (the “adult” court). [However] as long as States continue to try [children] in regular criminal courts the [CRC standards] must be kept visible. There are many factors that can work together during a criminal case to undermine CRC rights, such as the court's traditional procedures and the presence of the public. Only by hammering away at the core message that CRC rights always

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<sup>44</sup>Abramson (n 18 above) 9 (citing the CROC *Concluding Observations: Morocco* CRC/C/15/Add.60, 30 October 1996 Para 16 where the CROC expressed concern that “children between 16 and 18 years are treated as adults” in the justice system).

<sup>45</sup>Abramson (n 18 above) 9.

apply to minors in “adult” courts can we [child rights activists] defend those rights against the inevitable pressures”.<sup>46</sup>

Further, the Beijing Rules emphasize the need for specialised training for the officials in charge of juvenile justice administration (including judicial officers).<sup>47</sup> This requirement has been considered most vital in realizing the need for separate courts which apply to children.<sup>48</sup> There is thus an implied presumption that the use of adult (criminal justice) procedures and courts must take into account a child rights-centred approach which draws from the CRC.<sup>49</sup>

In light of the absence of a direct obligation on States to establish specialised (children’s or juvenile) courts, the issue arises whether transfer and waiver provisions comply with international children’s rights law.<sup>50</sup> It is submitted that in line with the




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<sup>46</sup>Abramson (n 18 above) 10. For a similar conclusion, see Cantwell (n 42 above) 10 and Detrick (n 38 above) 692.

<sup>47</sup>That international law requires a juvenile justice system separate from the criminal justice system which applies to adults is further evident in rules that require specialization on the part of a host of juvenile justice officials, Beijing Rules, Rule 12.1, requires that “in order to best fulfil their functions, police officers who frequently or exclusively deal with juveniles or who are primarily engaged in the prevention of juvenile crime shall be specially instructed and trained. In large cities, special police units should be established for that purpose”. Rule 22.1 provides that “professional education, in-service training, refresher courses and other appropriate modes of instruction shall be utilized to establish and maintain the necessary professional competence of all personnel dealing with juvenile cases”.

<sup>48</sup>O’Donnell, D “Juvenile Justice and the Rights of the Child, Defence for Children International” (A paper prepared for the Seminar on Human Rights and Juvenile Justice, Barbados, 1989) cited in Van Bueren (n 5 above) 179 (arguing that “it would be difficult if not impossible for a tribunal which does not include a trained judge or magistrate to meet this requirement.”).

<sup>49</sup>United Nations (n 9 above) 9 (pointing out that the CROC has called for the adoption of child-oriented systems for child criminal justice that “stress the need for all actions concerning children to be guided by the best interests of the child as a primary consideration.”).

<sup>50</sup>Transfer and waiver laws vest jurisdiction in regular (adult) courts for the trials of categories of child offenders deemed to have committed offences considered serious, such as murder and aggravated



‘margin of discretion’ accorded to States in this regard, transfer and waiver provisions cannot of themselves be interpreted to be in violation of article 40(3) of CRC which requires separate procedures and courts. However, a violation of this obligation ensues in instances where the procedures in the adult (regular) criminal courts to which the children are referred, fail to take into account the CRC standards that reflect greater concerns for the well-being of a child offender.<sup>51</sup> The next sub-section considers the CRC standards upon which a juvenile justice system should be predicated.

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robbery with violence. For example, Denov (n 32 above) 12 records that under the recently enacted Canadian Youth Criminal Justice Act (2003) that replaces the Youth Offenders Act (1984), children as young as 14 years old (a reduction from the age of 16 years under the old Youth Offenders Act) who commit certain offences such as murder, attempted murder, manslaughter, aggravated sexual assault or repeat violent offences) can, at the option or discretion of the prosecutorial authority, be tried in adult courts with attendant criminal law procedures in these courts and be subjected to adult sentences. For a detailed account of the operation and impact of waiver and transfer provisions in the juvenile justice philosophy in the United States, see Feld, B C “Criminalizing the Juvenile Court” in Schwarz, I (ed) (1992) *Juvenile Justice and Public Policy* New York: Lexington Books, UNICEF (n 42 above) 10, Feld, B.C ‘The Juvenile Court Meets the Principle of the Offence: Legislative Changes in Juvenile Waiver Statutes’ (1978) 78(3) *Journal of Criminal Law and Criminology* 471-533, Melli, M “Juvenile Justice Reform in Context” (1996) *Wisconsin Law Review* 375.

<sup>51</sup>For a different conclusion to the effect that transfer and waiver provisions can, of themselves, be regarded as a violation of the CRC provision requiring separation from the adult system, see Denov (n 32 above) 12 in relation to the transfer provisions in Canada’s Youth Criminal Justice Act, 2003. Denov’s conclusion is that such transfer provisions, “erode[s] the boundaries between the youth and adult criminal justice systems and is contrary to the spirit of the CRC”. It is to be noted that this conclusion by Denov is preceded by her description of the relevant provisions of this legislation which does not seem to extend the application of CRC standards to regular courts to which children may be transferred. It is therefore submitted that this failure to extend the applicable CRC standards to regular courts, rather than the transfer and waiver provisions in and of themselves, is what constitutes a violation of the CRC.

### 6.2.2.2 International law standards applicable to juvenile justice systems

The underlying aim of every juvenile justice system should be the right of every child in the system “to be treated in a manner consistent with the promotion of the child’s sense of dignity and worth....and that these systems must also take into account the child’s age and the desirability of promoting the child’s reintegration and helping the child to assume a constructive role in the society”.<sup>52</sup>

Secondly, the principle of proportionality must be reflected in the decisions taken at all levels of the juvenile justice system. This principle requires that ‘any reaction’ to juvenile offending (police arrest, detention, diversion, conduct of trial, sentencing etc) must be proportionate to the circumstances of both the offender and the offence.<sup>53</sup>



Third, a child rights-centred approach is encouraged. This approach should ensure the centrality of the child’s well-being,<sup>54</sup> that a child in the juvenile justice system maintains contact with his family,<sup>55</sup> the right of the child to participate in the adjudication process and proceedings,<sup>56</sup> and that the best interests of the child is a paramount consideration in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies.<sup>57</sup>

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<sup>52</sup>CRC, Article 40(1).

<sup>53</sup>CRC, Article 40(4), Beijing Rules, Article 5(1).

<sup>54</sup>Beijing Rules, Rule 5(1).

<sup>55</sup>Beijing Rules, Rule.

<sup>56</sup>CRC, Article 12.

<sup>57</sup>CRC, Article 3.

Van Bueren asserts that at the heart of these principles is “a duty on States Parties to maintain a balance between informality of proceedings [on the one hand] and [on the other] the protection of the fundamental rights of the child”.<sup>58</sup> A number of provisions are further relevant in this regard.

The first of these provisions is Article 40(2) (vii) of the CRC which stipulates the right of the child “to have his or her privacy fully respected at all stages of the proceedings”.<sup>59</sup> The Beijing Rules go as far as prohibiting the publication of information which may lead to the identification of a juvenile offender.<sup>60</sup> As with the theoretical justification of diversion on the need to avoid stigmatisation of the child,<sup>61</sup> the Commentary to the Beijing Rules refers to criminological studies which provide evidence of the detrimental effects resulting from the identification or labelling of a child as a delinquent.<sup>62</sup>



The premise is therefore that a public trial may impede the child’s rehabilitation and reintegration back into society. Supportive court jurisprudence on this point may be drawn from the cases of *T v UK* and *V v UK*<sup>63</sup> considered by the European Court on Human Rights. The court found that the right of the child defendants in a criminal

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<sup>58</sup>Van Bueren (n 5 above) 172 [emphasis and underlining added] citing the provision of Article 40(3) (b) of CRC which requires the respect of human rights and legal safeguards of children in juvenile justice procedures.

<sup>59</sup>Also the subject of the Beijing Rules, Rule 8.

<sup>60</sup>Beijing Rules, Rule 8.1.

<sup>61</sup>See discussion in Chapter 5, section 5.3.

<sup>62</sup>Van Bueren, G and Tootell, A “United Nations Standard Minimum Rules for the Administration of Juvenile Justice” (Unpublished Commentary submitted to the Defence for Children International) available at < [http://child-abuse.com/childhouse/childrens\\_rights/dci\\_bei.html](http://child-abuse.com/childhouse/childrens_rights/dci_bei.html) > (last accessed 30 September 2005).

<sup>63</sup>(No. 24724/94) and (No. 24888/94), 16 December. 1999 (discussed in Chapter 4, section 4.2.2.1).

trial (to a fair trial under article 6(1) of the European Convention on Human Rights (ECHR)) were violated because the domestic court procedures had not been sufficiently modified to take account of their age and maturity.<sup>64</sup> According to the European Court, the public nature of the trial, was particularly in violation of the applicant children's fair trial rights since the applicants were rendered unable to effectively participate in their trial.<sup>65</sup> In this regard, it has been pointed out that the respondent government's "arguments in favour of a public trial and open justice were rejected in favour of a greater concern for the well-being of the defendants".<sup>66</sup>

In addition, the due process rights which apply to both adults and child offenders are included in the CRC and the Beijing Rules. In non-exhaustive lists, both the Beijing Rules and the CRC provide for the right not to be charged under the penal law for acts or omissions which were not prohibited by law at the time they were committed, the right to a presumption of innocence, the right to be promptly notified of the charges, the right to remain silent, the right to counsel (legal representation), the right to

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<sup>64</sup>Abramson (n 18 above) 10.

<sup>65</sup>At Paras 77-88 of judgment. This decision specifically confirmed the application of Article 6(1) of the ECHR which provides that judgments in domestic criminal trials must be pronounced publicly but that "the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice". It is submitted here that "childhood" was therefore considered by the European Court as a special circumstance where according publicity to a criminal process would be prejudicial.

<sup>66</sup>Gelsthorpe, L and Morris, A "Something Old, Something Blue, Something Borrowed but Something New: A Comment on the Prospects for Restorative Justice under the Crime and Disorder Act 1998" (2000) *Criminal Law Review* 210, 213 (adding that "the Court further noted that the applicants could not effectively participate in the domestic trial because the proceedings were 'incomprehensible' and 'intimidating' to them as children").

confront and cross examine witnesses and the right to appeal to a higher authority at all stages of proceedings.<sup>67</sup>

Another fundamental principle of international law that must guide the treatment of children in the juvenile justice process is that of speed.<sup>68</sup> The ICCPR provides for juveniles to be brought “as speedily as possible” to adjudication.<sup>69</sup> In relation to children deprived of their liberty during the adjudication process, the need for speedy adjudication is also inherent in the principle of detention as a last resort and for the shortest period of time as contained in the CRC and discussed in the preceding section of this Chapter. The Beijing Rules further reinforce this need for speedy adjudication by recommending that each case should be handled, “expeditiously without any unnecessary delay”.<sup>70</sup> The emphasis that emerges from these provisions is that speedy finalisation of the criminal procedure is consistent with the best interests of the child and limiting any period of deprivation of liberty.

The upshot of discussions in this and the previous sub-section is that there should be separate specialised courts that uphold the aims of the juvenile justice system. These courts must strive for informality of proceedings such as may be sensitive to the need for effective participation by children and to prevent the stigmatisation of children. In striving for such informality however, the procedures in these courts must incorporate children’s due process and fundamental procedural rights.

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<sup>67</sup>Beijing Rules, Rule 7(1); CRC, Article 40(2). Detrick (n 38 above) 683-699 discusses that the CRC’s *travaux préparatoires* show that the inclusion of these rights was based on similar provisions in the ICCPR, Articles 14 and 15.

<sup>68</sup>Van Bueren (n 5 above) 175.

<sup>69</sup>ICCPR, Article 10(2) (b).

<sup>70</sup>Beijing Rules, Rule 20.

The next sections of this Chapter will consider, firstly, the legislative and practical positions obtaining in relation to arrest and detention at the pre-trial stage and the need for separate juvenile justice systems in the countries under study in the period before recent juvenile justice law reforms. Secondly, the section will consider how these issues are dealt with in the new juvenile justice laws of these countries with an analysis of the extent to which the different approaches comply with international children's rights law as discussed in this section.

### **6.3 The practice in relation to pre-trial detention and separate juvenile justice systems in the countries under study prior to the law reform processes**

Extensive pre-trial detention has been a long-standing area of concern in juvenile justice practice globally. Prior to the CRC's adoption in 1990 a comparative study of children in adult prisons throughout the world revealed that a common feature in all the national surveys was the lack of protection for children in the pre-trial stages of criminal proceedings.<sup>71</sup> This study recorded that:

“Extensive powers of the police, vague provisions for the protection of rights of arrested or detained persons and practically non-existent accountability of officials directly or indirectly responsible for ill-treatment of children caused the taking of children into custody and their pre-trial detention to be emphasized as a primary concern for the protection of children.”<sup>72</sup>

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<sup>71</sup>Tomasevski, K (ed.) (1986) *Children in Adult Prisons: An International Perspective* London: Frances Printer 103.

<sup>72</sup>Tomasevski (as above) 103.

This has not radically changed in the aftermath of the adoption of the CRC. The problem of pre-trial detention remains a concern. At a general level, the CROC has partly attributed the over reliance on institutionalization (during pre-trial and trial stages) on the lack of a separate system for dealing with juvenile justice. The Committee observed in 1995 that:

“[State] reports revealed that special justice systems were often non-existent, that judges, lawyers, social workers, or personnel in institutions were often not given special training and that information on fundamental rights and legal safeguards were not provided to children... For those reasons, and contrary to the Convention, deprivation of liberty was not used as a last resort or for the shortest period of time possible as called for in the Convention...”<sup>73</sup>



The problem of pre-trial detention of children has been recorded in the case of the African countries under study. Thus in Kenya, frequent recourse to police arrest (instead of alternatives such as summons and police bail), sometimes with excessive and even deadly force, has been documented in relation to children in conflict with the law.<sup>74</sup> The majority of these arrests are not only in violation of international child rights law in terms of the restriction on first recourse to arrests but also because of their arbitrary nature. A pointer to this is the overwhelming number of arrests of street

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<sup>73</sup>CROC, “Recommendations from the Day of General of Discussion on Juvenile Justice” (n 17 above) Para 219. The problem of excessive use of deprivation of liberty has been documented in all parts of the world. As of July 2004, there were an estimated one million children in closed establishments throughout the world. This number is probably much higher due to the lack of reliable statistics in many countries and a lack of research on this issue. See Cappelaere, Grandjean and Naqvi (n 42 above) 44-45.

<sup>74</sup>Human Rights Watch (1997) *Juvenile Injustice: Police Abuse and Detention of Street Children in Kenya* New York: Human Rights Watch 21-33.

children for no reason other than that they are in “need of care and protection”.<sup>75</sup> Arbitrary arrests and violation of the rights of children living and or working in the street (street children) has been particularly noted in relation to the practice of the Kenyan police.<sup>76</sup>

The CROC has observed that street children are, due to their low status, frequently confronted with general social exclusion and stigmatization, including ill treatment by police officials.<sup>77</sup> The CROC has, in addition to criticism of the general reliance by States on arrests and pre-trial detention of children, discredited the practice of arresting and detaining children under the guise that they need ‘protection’.<sup>78</sup> The Kenyan example is therefore a practical illustration of this concern by the Committee.



<sup>75</sup>Human Rights Watch (as above) 52-53 noting as at 1997 that: “Confusing overlaps exist between criminal offences and ‘protection and discipline matters’...Thus the distinction between children charged with criminal offences and children ‘in need of protection and discipline’ is obscured and the categorization is in many ways arbitrary.....It is no wonder, considering that street children are apprehended and beaten by police, held in lock ups usually with adult criminal offenders, and processed in regular courts”. For a similar observation see also, Gallinetti, J “Diversion” in Sloth-Nielsen, J and Gallinetti, J (eds) (2004) *Child Justice in Africa: A Guide to Good Practice* Bellville: Community Law Centre 66-73, 66.

<sup>76</sup>Human Rights Watch (n 74 above) 52-53. This study by Human Rights Watch adopted a definition of street children formulated by the Inter-NGO Programme for Street Children and Street Youth, cited in Ennew, J (1994) *Street and Working Children: A Guide to Planning* London: Save the Children 15 as follows: “Street children are those for whom the street (in the widest sense of the word, i.e. unoccupied dwellings, wasteland etc.) more than their family has become their real home, a situation in which there is no protection, supervision or direction from responsible adults.”

<sup>77</sup>CROC, “Recommendations from the Day of General of Discussion on Juvenile Justice” (n 17 above) Para 218.

<sup>78</sup>Abramson (n 18 above) at 11 citing CROC, *Concluding Observations: Uruguay*, CRC/C/15/Add.62, 11 October 1996 Para 14. Abramson explains that the logic that underlies the Committee’s view is that such categories of children need social interventions other than police arrest.



In addition to the over-reliance by the Kenyan police on the use of arrests, the arbitrary detention of children has also been recorded as common throughout Kenya. The Human Rights Watch study conducted in 1997 in Kenya noted violations of the international law standards that ought to govern the circumstances when detention is resorted to. The study noted that:

“The manner in which [the children] were detained grossly violated children’s fundamental rights. Children often stayed in police station lock-ups for days or even weeks, without being formally charged with an offence, with no assistance to suggest that the child’s welfare was a motive for the detention, and without having the legality of their detention reviewed by judicial or other authorities. [While in detention] they were often beaten and almost always held with adults...They were not informed of their rights, not provided with legal counsel, and often beaten by police during questioning and in cells.”<sup>79</sup>



The above situation is not limited to Kenya. The 1997 survey for the South African juvenile justice law reform process noted the:

“Widespread attention... devoted over recent years to the continued pre-trial detention of children under the age of 18, despite the existence of several mechanisms designed to facilitate pre-trial release once a child has been arrested”.<sup>80</sup>

South African research on the issue of juvenile detention showed at the time that in many cases, bail amounts then being set by police and courts were such that children

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<sup>79</sup>Human Rights Watch (n 74 above) 34.

<sup>80</sup>South African Law Commission (1997) *Issue Paper on Juvenile Justice* Paras 6.3 and 6.4.

(or their parents) could not pay, thereby necessitating the child remaining in detention.<sup>81</sup>

In South Africa, sharp increases in rates of pre-trial detention of children since 1995 have led to the development of a number of policies, legislative interventions and diversion programmes to address this problem during this period.<sup>82</sup> In 1994, an amendment to section 29 of the South African Correctional Services Act, 1959<sup>83</sup> put a blanket ban on the pre-trial detention of any person under the age of eighteen, after an initial forty-eight hour period in police custody, which was permissible pending a first appearance in court.<sup>84</sup> Further, this amendment placed a total ban on the detention of children under the age of fourteen in prison. It also limited their detention in police custody to twenty-four hours before first appearance in court. It was envisaged that children awaiting trial would be detained in more humane welfare institutions (places of safety) rather than prisons.



This legislation was put into force in early 1996 without proper planning in terms of the adequacy of alternative facilities and the capacity of government officials in these facilities to take over the duty of handling the custody of awaiting trial children (from prisons). This led to chaos both in the South African child and youth care and criminal

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<sup>81</sup> South African Law Commission *Issue Paper* (as above) Para 6.19.

<sup>82</sup>Community Law Centre (1998) *Children in Prison in South Africa: A Situational Analysis* Bellville: Community Law Centre 5, Muntingh, L “Children in Prison: Some Good News, Some Bad News and Some Questions” (2005) *Article 40* 8-9.

<sup>83</sup>This regulated South African prisons before repeal by the Correctional Services Act 111 of 1998.

<sup>84</sup>For a detailed discussion on the history, content and effect of this and subsequent amendments, Sloth-Nielsen, J “Pre-trial detention of children revisited: Amending section 29 of the Correctional Services Act” (1996) 9 *South African Journal of Criminal Justice* 61, Sloth-Nielsen, J “The Contribution of Children’s Rights to the Reconstruction of Society: Some Implications of the Constitutionalization of Children’s Rights in South Africa”, (1996) *The International Journal of Children’s Rights* 323, 332.

justice systems. Staff at places of safety could not effectively discharge their new role,<sup>85</sup> children appeared in court only to be released onto the streets and a few of them re-offended. In addition, the public and mass media profiled the situation as getting out of hand. This led to a *volte face* on the part of the government which had by then become wary of a possible public backlash.<sup>86</sup> As a result, there was an amendment to the same provision of the Correctional Services Act in 1996<sup>87</sup> providing for limited circumstances when children over fourteen years, but younger than eighteen years, could be detained in prisons while awaiting trial. Since the promulgation of this legislation to-date, the average number of children in prison (awaiting trial) has slowly escalated. In the period between 1996 and 2003, South Africa witnessed the number of children awaiting trial in prison increase from fewer than 600 to over 2,000, despite the efforts of government departments and non-governmental organisations. It has been said that the escalation in the numbers of awaiting trial child detainees “degenerated from a manageable problem into a crisis that South Africa has become accustomed to”.<sup>88</sup>

In relation to Uganda, it has been recorded that prior to the reforms that culminated in the 1996 Children’s Statute, the juvenile justice situation was characterised by,

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<sup>85</sup>In part due to the lack of vacancies in places of safety to place children awaiting trial and due to their lack of expertise on issues of crime and dealing with child offenders.

<sup>86</sup>Sloth-Nielsen (n 84 above) 332.

<sup>87</sup>This came into force in May 1996 and applies to date (having not been repealed by the Correctional Services Act, 1998), pending the enactment of the Child Justice Bill (2002), discussed in this thesis.

<sup>88</sup>Muntingh (n 82 above) 8. However, since 2003 to-date, Muntingh notes a trend showing recent decline in the numbers of children in custodial facilities awaiting trial. This is in part due to the increased use of diversions as was considered in Chapter 5, section 5.6.

amongst other factors, excessive remands in custody, stringent bail conditions and long periods of detention without regard for the nature of the offence alleged.<sup>89</sup>

Current and pre-child law reform practice in Namibia regarding the arrest and pre-trial detention of children in conflict with the law is similar to that in Kenya, South Africa and Uganda. The current Namibian system (which the new law reforms seek to change) relies predominantly on arrest and detention as the primary methods of securing the attendance of children in court.<sup>90</sup> This is despite the standard in article 37(c) of CRC which emphasizes the use of arrest and detention as a last resort. The provisions regarding release available for use by the police under the current system, such as police bail and release on the condition of a written notice that an accused child will appear in court, are of very limited application despite the wide discretion availed to police officers who effect the arrest of children.<sup>91</sup> Further research has revealed that extended periods of pre-trial detention for several months can be observed.<sup>92</sup>

The above practices and violations of CRC standards in relation to pre-trial procedures (arrest and detention) are partly reflective of the lack of a separate and dedicated system for children in conflict with the law in the countries under study.

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<sup>89</sup>Kakama, P (1999) "Juvenile Justice in Uganda" (Unpublished paper presented at a seminar on Juvenile Justice held in Lilongwe, Malawi, 25-25 November 1999) available <[http://www.penalreform.org/english/vuln\\_jjuganda.htm](http://www.penalreform.org/english/vuln_jjuganda.htm)> (last accessed 1 August 2005).

<sup>90</sup>Schulz, S and Hamutenya, M (2004) "Juvenile Justice in Namibia: Law Reform towards Reconciliation and Restorative Justice?" (Unpublished Paper on file) 13.

<sup>91</sup>Schulz and Hamutenya (as above) 13-14.

<sup>92</sup>Albert, H (1997) *Crime, Criminal Justice, and Law Reform* Ministry of Justice: Windhoek cited in Schulz and Hamutenya (n 90 above) 13.

Before the enactment in Kenya of the Children’s Act (2001), no separate procedures were made for children in conflict with the law (in relation to arrest, detention and release) even though the repealed legislation provided for the establishment of “juvenile courts” to deal with criminal charges against children (except where they were jointly charged with adults).<sup>93</sup> It was the legislative intention that these courts must sit in a different building or on different days or at different times from regular courts for adults, and that they should be closed to the general public.<sup>94</sup> However, in the past, practice has run counter to this provision. Thus only one separate juvenile court in Kenya’s capital, Nairobi, existed (and still exists) in Kenya.<sup>95</sup> Human Rights Watch noted that in other parts of the country *ad hoc* courts are convened in regular courthouses; the policy is that courtrooms should be cleared of adults before children’s cases are heard, or the cases should be heard *in camera*.<sup>96</sup> However, in many of these *ad hoc* courts, cases have been heard in open court rooms and children are mixed with adult offenders.<sup>97</sup> Even in Kenya’s capital, Nairobi (which hosts the one and only physically distinct juvenile court) children have instead been taken to ordinary city courts and regular courts including the High Court where they are mixed with adults and tried in open court.<sup>98</sup> This has exacerbated the already clogged court

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<sup>93</sup>Section 3(1) of the Children and Young Persons Act, 1969 of Kenya which was repealed by the new Children’s Act, 2001 (discussed in this thesis) made such provision which also included the courts’ civil jurisdiction of care and protection, adoption, maintenance issues etc.

<sup>94</sup>Children and Young Persons Act, 1969 of Kenya (repealed) (as above) section 4.

<sup>95</sup>ANPPCAN *Hearing on Street Children in Kenya* cited in Human Rights Watch (n 74 above) 57.

<sup>96</sup>Human Rights Watch (n 74 above) 49.

<sup>97</sup>This is confirmed by a recent study by a Kenyan NGO; see The Cradle and Odhiambo, M (2003) *Juvenile Justice Journal: after the Promise - A Situational Analysis of Child Rights Protection under the Children’s Act* Nairobi: The Cradle 13-17.

<sup>98</sup>Human Rights Watch (n 74 above) 49.

calendars, and hence, inordinately long periods of time elapse before the finalisation of many of the cases. This lengthens the pre-trial detention of children.<sup>99</sup>

Further, the juvenile justice system in Kenya was criticized in 1998 after the finding that “along with the lack of legal representation for children and the presiding magistrates’ limited understanding of the law or the procedures of the juvenile court, it is doubtful whether the rights of accused children are being upheld in practice”.<sup>100</sup> The same concerns and the child-unfriendliness of most of Kenya’s *ad hoc* juvenile courts have been recorded in a recent survey on the practice in Kenya’s juvenile justice system.<sup>101</sup>

Similarly, pending the enactment of the South African Child Justice Bill (2002), only token provisions exist in the current South African criminal justice system applying to children in conflict with the law.<sup>102</sup> The South African Law Reform Commission documented the position as follows:

“There is no separate criminal court for juveniles in South Africa. In some urban areas where there are sufficient numbers of accused persons under the age of eighteen to warrant it, a court is set aside to deal exclusively with such cases and these courts are referred to administratively as juvenile courts. In areas where there is a lower population all criminal cases are channelled through the same courts. Trials of

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<sup>99</sup>Human Rights Watch (n 74 above) 56-58.

<sup>100</sup>African Network for the Protection and Prevention against Child Abuse and Neglect (ANNPCAN) (Kenya) (1998) *Children in the Dock: A Situation Analysis of the Juvenile Justice System in Kenya* Nairobi: ANNPCAN 31.

<sup>101</sup>The Cradle and Odhiambo (n 97 above) 13-17.

<sup>102</sup>Community Law Centre (1995) *Law, Practice and Policy: South African Juvenile Justice Today* Bellville: Community Law Centre.

juveniles are required by law to be held in camera, regardless of which court they are appearing in. In the present system, courts at all three levels (district, regional and high court) can and do have jurisdiction over cases where juveniles are accused. The choice of forum usually depends on the seriousness of the charge and the sentencing powers of the courts.”<sup>103</sup>

Some existing statutory provisions have also meant, at least in theory, that certain children’s rights are protected and promoted under the current South African criminal justice system.<sup>104</sup> These relate to holding criminal court proceedings in camera in order to protect the child’s right to privacy and enable the child to participate in a non-intimidating atmosphere.<sup>105</sup>

With regard to the current South African practice, the South African Law Commission noted that:




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<sup>103</sup>South African Law Commission *Issue Paper* (n 80 above) Paras 8.1 and 8.2. The South African Children’s Courts are established under the Child Care Act 74 of 1983. However, these courts’ jurisdiction excludes criminal matters, unlike the Kenyan example of a juvenile court which were vested with both criminal and civil jurisdiction. For discussions on the South African Children’s Court system, see Mathias, C and Zaal, N “Can We Build a Better Children’s Court? Some Recommendations for Improving the Processing of Child Removal” in Keightley, R (1996) *Children’s Rights* Cape Town: Juta 51, Van Oosten, F.W and Louw, A.S “Children, Young Persons and the Criminal Law” in Robinson, J (ed) (1997) *The Law of Children and Young Persons* Durban: Butterworths 123. Also see generally, South African Law Commission (1998) *First Issue Paper (No. 13) on the Review of the Child Care Act*.

<sup>104</sup>South African Law Commission *Issue Paper* (n 80 above) Para 8.3; Skelton, A, “Children, Young Persons and the Criminal Procedure” in Robinson (n 103 above) 106 (citing provisions in the South African Criminal Procedure Act No. 51 of 1977 which give special procedural concessions to child offenders).

<sup>105</sup>Skelton (as above) 106.

“It would appear that the courts have not succeeded in promoting the dignity and worth of young people appearing before them, their proper growth and development and their reintegration into society, as is required by the international instruments. Some problems relate to the physical appearance of court rooms, with elevated benches and an absence of a child friendly environment. In addition there are a number of specific concerns which have been noted.... These relate to procedural problems such as the lack of legal representation of children in the criminal courts, long delays in the finalisation of trials involving juveniles and problems with the separation of young offenders from adult co-accused persons. In addition personnel working with young offenders are not specially qualified or trained for this work and there is a high turnover of staff.”<sup>106</sup>

Namibian practice pending the enactment of the country’s Child Justice Bill mirrors the South African position.<sup>107</sup> In Uganda, no legislative provision for the establishment of “Children’s Courts” existed prior to the child law legislation of 1996.<sup>108</sup> Even though the first and probably the only juvenile court was set up in Kampala, Uganda’s capital in 1973,<sup>109</sup> child offenders continued to be tried in adult courts where they were (inconsistently) accorded a few concessions in criminal procedures such as separation from adults and the holding of criminal proceedings in camera.<sup>110</sup> The practice before the recent child law reforms therefore mirrored the Kenyan and South African examples of resorting to the use of regular courts as *ad hoc*

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<sup>106</sup>South African Law Commission *Issue Paper* (n 80 above) Para 8.4.

<sup>107</sup>Schulz and Hamutenya (n 90 above) 18.

<sup>108</sup>Kakama (n 89 above) 1.

<sup>109</sup>On the basis of a proposal in a draft Ugandan Children and Young Persons Bill of the same year (1973). The Bill was later not enacted into law.

<sup>110</sup>Save the Children UK, *et al* (2003) *Towards a Strengthened Juvenile Justice and the Family and Children’s Courts in Uganda* Kampala: Save the Children 9.



juvenile courts, but without ensuring compliance with a wide array of international standards.<sup>111</sup>

It is submitted that these piecemeal legislative provisions and half hearted attempts in the countries under study fell short of the CRC requirement in article 40(3) relating to the need for separate procedures and courts. The physical unfriendliness of *ad hoc* juvenile courts in these countries also does not accommodate the need for significant re-organisation of these courts so that they can comply with international standards in the CRC in relation to the ambiance of the courts and the procedures used.

The next sections of this Chapter proceed to consider how and the extent to which the juvenile justice law reforms in the countries under study seek to address the problems identified in relation to police procedures and release policies and pre-trial detention as well as the CRC ideal of separate procedures and courts. These discussions will highlight the impact of international children's rights law on these issues.<sup>112</sup>

## **6.4 The approach in the law reform initiatives in the countries under study**

### **6.4.1 Provisions on pre-trial procedures in relation to arrests, detention and release policies**

As with the issue of diversion (discussed in the last Chapter), provisions of the six laws and Bills under study are diverse but in essence represent two approaches. On the one hand are the new laws of Ghana, Kenya and Uganda which are similar and in

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<sup>111</sup> Kakama (n 89 above) 1-2.

<sup>112</sup>The requirements of international law on these issues are discussed in section 6.2 above.

some cases, identical in their provisions. On the other hand are provisions in the Lesotho, Namibian and South African proposed laws which are almost identical in their approach.<sup>113</sup> These two diverse approaches in relation to arrest, pre-trial detention and release of children are considered in this sub-section.

#### **6.4.1.1 The new juvenile justice laws of Ghana, Kenya and Uganda**

Firstly, these three laws restrict the discretion of the police upon arrest by providing for the right of arrested children to be brought to court within a fixed period of time, unless they are released from police custody.<sup>114</sup> In addition, these laws confer discretion on the police to release children *in lieu* of pre-trial detention. Both Ghana's and Uganda's laws include provisions for the police cautioning of a child upon arrest, or release on free bond or the child's own recognisance.<sup>115</sup> On the other hand the Kenyan Act requires that arrested children must be brought by the police before a (juvenile) court 'forthwith'. The Act also provides that before plea is taken, the child should be released either upon the court's or police's inquiry, pending trial<sup>116</sup> on the child's or the parent's recognisance with or without sureties.<sup>117</sup>

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<sup>113</sup>This is in part due to the influence of the South African Bill on the Lesotho and Namibian counterparts. For an acknowledgement of this influence, see Kimane, I (2004) "The Children's Law Reform Process in Lesotho" (Unpublished Paper on file with author) 4 (on Lesotho) and Schulz and Hamutenya (n 90 above) 26 (on Namibia).

<sup>114</sup>Ghanaian Act, section 15(2); Kenyan Act, Child Offender Rules (5<sup>th</sup> Schedule to the Act) Rule 4(1), (Both of which require the child to be brought to court within 24 hours of arrest), Ugandan Statute, section 90(7) (which provides for the child to be brought to court within 48 hours).

<sup>115</sup> Ugandan Children Statute, section 90; Ghanaian Act, sections 12 and 14.

<sup>116</sup>Unless the charge is one of murder, manslaughter or other grave crime, or where it is in the child's interests to be removed from associating with any 'undesirable persons' or where such release would defeat the ends of justice, see Rule 5 of the Child Offender Rules under the Kenyan Act.

<sup>117</sup>Kenyan Act, Child Offender Rules, Rule 5.

Secondly, these three laws introduce new legislative guidelines on the judicial determination of any pre-trial detention. This proceeds from the provisions which will ensure that in the event that a child is to be detained as a last resort before or during the trial process, the police's and the prosecution's decision to detain the child must be subjected to judicial scrutiny. This principle finds expression, firstly, by empowering courts to grant bail under enabling conditions.<sup>118</sup>

An exception to the granting of bail is, however, included in the Ghanaian and Kenyan laws in the cases of a charge of murder or manslaughter or other grave crimes, or where it is in the interests of the child to be removed from undesirable association or for the 'interests of the end of justice'.<sup>119</sup> These provisions are in contrast to the Ugandan Statute where the general rule which encourages the granting of bail is not limited to the gravity or seriousness of offences, but to the test whether "there is serious danger to the child".<sup>120</sup>




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<sup>118</sup>Ghanaian Act, section 21(3); Kenyan Act, Child Offender Rules, Rule 5 and Ugandan Act, section 91(1). The new laws enact the power of courts to grant bail to accused children on conditions such as on a court bond on the child's own or the parents' or relatives' recognizance, releasing the child on bail with sureties preferably to the child's parents, and in the Ghanaian Act there is specific provision that "the amount of bail shall be fixed with due regard to the circumstances of the case and shall not be excessive or harsh". In both the Ghanaian and Ugandan laws the child's right to appeal to higher courts on a decision of the lower court to deny bail is guaranteed (Ghanaian Act, section 21(6); Ugandan Act, section 91(2)). Even in the event that bail is denied, all the three laws still require that the court to consider alternatives to remand such as to "parents or other fit persons" or involving "close supervision or placement with a counsellor or fit person determined by the court on recommendation of probation or children's officer" (Ghanaian Act, section 23(1); Kenyan Act, Child Offender Rules, Rule 10(6) and Ugandan Act, section 92(9)).

<sup>119</sup>Ghanaian Act, section 21(1); Kenyan Act, Child Offender Rules, Rule 5 (a)-(c).

<sup>120</sup>Ugandan Statute, section 91(1). It is submitted that this is a more restricted basis for allowing for pre-trial detention and hence allows for a child's release on favourable bail conditions even in cases of serious offences (depending on factors such as the circumstances of the child). This is in line with the international law principle of detention as a last resort, discussed in section 6.2.1, above.

The Ghanaian and Kenyan approach of defining instances when detention may be used, based primarily on the gravity of the offence without taking into account the circumstances of the child and the offence has been criticised by the CROC during its discussions on one State Party's Report. During the Committee's discussion of Nigeria's Initial State Report it stated thus:

“[t]he expression ‘detention as a last resort’ in article 37 of CRC is often misunderstood as referring to the [permissibility] of detaining children [accused of or found guilty] of serious crimes... it in fact means that [detention] could be resorted to only if there was no other way of giving the child the protection needed [even for children committing serious offences]”.<sup>121</sup>

It is submitted that with the exception of the restrictions on the use of bail for serious offences in the Ghanaian and Kenyan Acts, the provisions in relation to bail directly domesticate the principle of detention as a last resort in these countries' juvenile justice systems.

The principle allowing for the judicial determination on pre-trial detention is also manifested in the time limits fixed by three laws in relation to the permissible time for remand or detention before and during trial.<sup>122</sup> The Kenyan and Ugandan laws specify that a child's remand in custody shall not exceed six months in the case of a capital offence or three months in the case of any other offence.<sup>123</sup> In the case of capital

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<sup>121</sup>CROC Discussion on Initial Report of Nigeria, CROC, SR. 323, Para 56 recorded in Hodgkin, R and Newell, P (2002) *Implementation Handbook for the Convention on the Rights of the Child* New York: UNICEF 550.

<sup>122</sup>These provisions are a novelty in all three countries.

<sup>123</sup>Kenyan Act, Child Offender Rules, Rule 10(4); Ugandan Statute, section 92(5).

offences, in the event that the case is not finalised after the maximum period of remand of six months, the child shall automatically be entitled to a release on bail.<sup>124</sup> Further, the new Kenyan law provides for a principle aimed at the swift completion of criminal cases involving children through the provision obliging the dismissal of any cases that are not completed within three (3) months after the child's taking of plea (except for capital or serious offences which can be dismissed only after 12 months from the date of plea).<sup>125</sup> In the new Ghanaian law there is a provision relating to the duty of courts to dismiss any case (including serious or grave offending cases) involving children in the event that a case is not finalised after six months from the date of the child's first appearance in court.<sup>126</sup>

It is submitted that these provisions relating to time periods within which a matter must be finalised give effect to the principle requiring detention for "shortest period of time" included in the CRC.<sup>127</sup>



It is significant that the above provisions relating to time limits in the Kenyan Children's Act have already arisen for judicial consideration (and this is of comparative relevance to similar laws of the other countries). This occurred in the recent case of *R v S.A.O (a Minor)*,<sup>128</sup> a criminal case that came for review in Kenyan High Court. In this case the child in question was a girl aged 13 years who was alleged to have committed the serious offence of murder when she was 12 years old.

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<sup>124</sup>Kenyan Act, Child Offender Rules, Rule 12(3); Ugandan Statute, section 92(5).

<sup>125</sup>Kenyan Act, Child Offender Rules, Rule 12(2) and (4).

<sup>126</sup>Ghanaian Act, section 33.

<sup>127</sup>CRC, Article 37, discussed in section 6.2.1, above.

<sup>128</sup>In the High Court of Kenya, Criminal Case Number 236 of 2003 Reported at [2004] *eKLR* available at < [www.kenyalawreports.or.ke](http://www.kenyalawreports.or.ke) > (last accessed 5 August 2005).

It is not clear whether the doctrine of *doli incapax* was considered in this case. Under Kenyan law this doctrine provides that a child between the ages of 8 and 14 can only be subjected to a criminal trial if he or she is proven to have had the capacity to commit a crime.<sup>129</sup> In this case, the child brought an application to the High Court for an order that the case be dismissed or, alternatively, that she be released from custody on bail pending the finalisation of the trial.

The application was based *inter alia* on Rule 10(4) (a) of the Child Offender Rules under the new Children's Act which require the release on bail of any child held in custody for more than 6 months before the finalisation of trial in serious offences cases like murder, and on Rule 12((4) on the duty of the court to dismiss a criminal case involving a child accused of serious crimes after 12 months from the date of plea in instances when the case is not finalised by then.



The Court, while affirming the applicability of the Children's Act and the Child Offender Rules, over and above the general Kenyan penal law embodied in the Kenyan Penal Code,<sup>130</sup> noted that 9 months had elapsed since the child had pleaded in the trial court. Thus, although the Court could not dismiss the case as 12 months had not elapsed in accordance with Rule 12(4), it held that the child accused had been in remand for a longer period than prescribed by law (a maximum of 6 months according to Rule 10(4)).

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<sup>129</sup> See discussion of this doctrine in the Kenyan context in Chapter 4, section 4.8.1.

<sup>130</sup> Chapter 63, Laws of Kenya.

According to the court, the fact of “who was responsible for the delay in the finalising the case” did not matter.<sup>131</sup> Hence the court affirmed the applicability of Rule 10(4) and the relevance of the principle of the best interests of the child in section 4(2) of the Act.<sup>132</sup> Consequently, it ordered the immediate release of the child applicant on “free bond”.

The decision to release the child on (free) bail is a landmark in affirming the provisions of the new Act. Also, in the context of Kenyan criminal procedure law, it emphasizes the difference between child and adult offenders. Under general Kenyan criminal procedure, murder and other capital offences such as treason and robbery with violence are not bailable.<sup>133</sup> It is therefore clear that this decision demonstrates the influence of international children’s rights law in relation to the principle requiring detention as a last resort and for the shortest period of time. In the judge’s words:



“The [Kenyan Children’s] Act was enacted to make specific provisions in respect of children, who in my humble view, must be considered as a special class of the society. In addition they are indisputably vulnerable members of the society. The legislature, to give effect to the principles of the CRC and the African Charter on the Rights and Welfare of the Child enacted this Act.”<sup>134</sup>

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<sup>131</sup>At p 3 of judgment.

<sup>132</sup>The Court cited this provision which provides thus: “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”, at 2.

<sup>133</sup>Constitution of the Republic of Kenya, Act 5 of 1969 (as amended), section 72 and the Criminal Procedure Code, Chapter 75 Law of Kenya. It is of note that the Kenyan constitutional review process is currently ongoing and as of the time of writing, the proposed Draft Constitution of Kenya, 2004 awaits the final stage of adoption or rejection through a public referendum scheduled for 21 November 2005. For the text of the children’s rights clause it proposes, see Chapter 3, section 3.5.2.

<sup>134</sup>At p 3 of judgment.

In the event of pre-trial detention of children, the Ghanaian, Kenyan and Ugandan laws prohibit the remand of children in adult prisons. Instead, there are provisions for pre-trial detention in remand homes or safe places of custody for children.<sup>135</sup> It is submitted that this prohibition arises from the view that prisons are the most restrictive form of deprivation of liberty and because of the documented dehumanising effect of prisons especially for young persons.<sup>136</sup> Hence, all three laws favour specialised “open” facilities as demanded by international law.<sup>137</sup>

In further compliance with international law standards in relation to arrest and pre-trial detention, the three laws provide for children’s rights to be treated with humanity and respect for the child’s dignity, prompt notification of parents, guardians and legal representatives (and require their presence during police interviews and any pre-trial court proceedings), a prohibition upon torture and other cruel, inhuman and degrading treatment and corporal punishment. They also make provision for the rights relating to the child’s welfare (adequate food, medical treatment, and contact with the family through visits by parents, guardian and legal representatives).<sup>138</sup>

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<sup>135</sup>Ghanaian Act, section 23(6); Kenyan Act, section 190(1) and Child Offender Rules, Rule 10(1); Ugandan Statute, section 92(6). The Ghanaian Act provides in the limited or short duration or instance of detention in police custody there must be separate or specialised facilities for children (section 15(1)).

<sup>136</sup>In accordance with Beijing Rules, Rule 13.2. See also Stapleton, A (2003) “Regional Co-operation and the Spread of New Ideas and Practices” (Unpublished paper on file) 17 arguing that “although public opinion is generally highly judgmental and intolerant against those who offend...few people, however, would admit to agreeing that a prison is in the best interests of the child.”

<sup>137</sup>Discussed in section 6.2.1, above.

<sup>138</sup>Ghanaian Act, section 15; Kenyan Act, sections 3-19 and Child Offender Rules, Rule 4; Ugandan Statute, sections 4 and 5 (and 1<sup>st</sup> Schedule to the Statute on “Guiding Principles”).



It is submitted that besides the attempt in the legislative provisions discussed in this section to domesticate the international law principle which limits pre-trial detention, they also constitute evidence of domestic examples of putting in place separate procedures applicable to children in conflict with the law (at the pre-trial stage) as called for by article 40(3) of CRC.

#### **6.4.1.2 The provisions in the proposed laws of Lesotho, Namibia and South Africa**

As with the new laws of Ghana, Kenya and Uganda, these three proposed laws seek to fundamentally restrict the police powers in relation to arrests and the subsequent pre-trial detention that has ensued in the past.<sup>139</sup>



In relation to arrests and release by the police, the draft Bills of Lesotho, Namibia and South Africa make provision for the issuance of police summons or a written caution or warning, accompanied by the release of a child as alternatives (*in lieu* of arrest) for securing the attendance of a child in a Preliminary Inquiry (the first forum in which a child will be involved in each of the proposed new juvenile justice systems).<sup>140</sup> In addition, a police official may not arrest a child for an offence specified in Schedule 1 to the Namibian and South African Bills.<sup>141</sup> These offences include assault without

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<sup>139</sup> See section 6.3, above.

<sup>140</sup> Lesotho Bill sections, 98 and 105; Namibia Bill, section 11 and South African Bill, section 6(1). The Preliminary Inquiry is discussed in section 6.5.1, below.

<sup>141</sup> Namibian Bill, section 12(1) and South African Bill, section 7(1). The South African Bill however states that the mechanism of arrest may be used where there are “compelling reasons justifying an arrest” for Schedule I offences. It is of note however that the Lesotho Bill, while including identical Schedules (I, 2 and 3) of Offences to the Namibian and South African counterparts, does not prohibit

occasioning grievous bodily harm, injury to property, trespass, ordinary theft, conspiracy, incitement or an attempt to commit any of these offences.<sup>142</sup> It has been submitted that these offences constitute the core areas of child delinquency in these countries and hence their exclusion from the mechanism of arrest will offer the potential for a significant decrease in the number of child detainees.<sup>143</sup>

In relation to the Namibian Bill, commentators have observed that the total prohibition of police arrest in respect of Schedule 1 offences, “emulates the CRC and goes even a step further” than the restriction on the use of arrests as ‘a last resort’ according to article 37 of CRC.<sup>144</sup> The Bill rules out the use of police arrest for these particular offences altogether. In addition, the same commentators argue in regard to this prohibition that it challenges the deeply entrenched assumption in the Namibian criminal justice system that the alleged commission of an offence always warrants the arrest of a criminal suspect. The authors comment on the possible effect of the prohibition on arrest and detention as being the avoidance of:

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the arrest of children accused of Schedule 1 offences. In the Namibian Bill (section 12(3)), even for Schedule 2 offences which include most of the balance of offences (not included in Schedule 1), but which exclude murder, rape and certain cases of robbery (part of Schedule 3 of the Namibian Bill), the police must consider alternative methods such as the issuance of a summons to secure the attendance of a child in a preliminary inquiry. Arrest may only be considered for these Schedule 2 offences if the police believe on reasonable grounds that such arrest is necessary to prevent a continuation or repetition of the offence or the commission of another offence, to prevent concealment, loss or destruction of evidence relating to the offence, or that the youth is likely not to appear at a preliminary inquiry or before a juvenile justice court in response to a summons or an attendance notice.

<sup>142</sup>The offences included in the Schedules to the South African Bill may change due to the on-going Parliamentary deliberations where some debate ensued on this theme.

<sup>143</sup>For example, Schulz and Hamutenya (n 90 above) 14 (in respect of Namibia) and Muntingh, L.M (2003) *Children in Conflict with the Law: A Compendium of Child Justice Statistics: 1995-2001* Cape Town: National Institute for Crime Prevention and Reintegration of Offenders 1-2 (on South Africa).

<sup>144</sup> Schulz and Hamutenya (n 90 above) 15.

“Not only the adverse results of institutionalization, and further introduction into delinquency, [but also ensuring that] the constitutional presumption of innocence will eventually be taken seriously.”<sup>145</sup>

Further, the potential for long periods of detention in police custody is restricted by provisions in all three Bills to the effect that a child’s appearance at a preliminary inquiry must take place within 48 hours of arrest.<sup>146</sup>

The use of Schedules in limiting or restricting pre-trial detention as a last resort, borrows from the legislative efforts in the South African juvenile justice law pre-reform period as was discussed in a previous sub-section of this Chapter.<sup>147</sup> The same goes for the three Draft Bills’ prohibition of prison detention (at the pre-trial and trial stages) for children aged 14 years and below.<sup>148</sup>



The provisions in the laws of Ghana, Kenya and Uganda<sup>149</sup> which explicitly state provisions on enabling bail conditions for a child to be released by the court or the inquiry including on enabling terms such as a child’s own recognisance or free bond,

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<sup>145</sup>Schulz and Hamutenya (n 90 above) 15.

<sup>146</sup>Lesotho Bill, section 111(1); Namibian Bill, section 16 and South African Bill, section 7(5).

<sup>147</sup>Section 6.3, above.

<sup>148</sup>Lesotho Bill, section 119 (4); Namibian Bill, section 37(4) and South African Bill, section 36(4). (All these provisions only permit pre-trial detention of children aged 14 and below in prison subject to the application of a rigorous test which involves establishing that the child has committed a Schedule 3 offence such as murder, what is in the best interests of the child, and the requirement that such detention in prison is only effected where there are no places of safety within reasonable distance of the court or child’s locality and that the child would be a danger to the other children in such places of safety). There is a similar prohibition of prison detention for children under the age of 14 at the post-trial (sentencing) stage. This is discussed in the next Chapter (7) (on Sentencing).

<sup>149</sup>Discussed in section 6.4.4.1, above.

are similarly included in the Bills of Lesotho, Namibia and South Africa.<sup>150</sup> However, according to all three Bills, children arrested and detained for Schedule 3 offences (such as murder and aggravated robbery with violence) may not be released under these enabling conditions. This is similar to the positions in the Ghanaian and Kenyan Acts discussed earlier.<sup>151</sup> It is submitted that, as was observed in regard to the new laws of Ghana and Kenya, the decision whether to release a child offender on pre-trial bail should not be primarily linked to the gravity of the offence without consideration of the individual circumstances of the child.<sup>152</sup>

The proposed laws of Namibia and South Africa provide for time limits within which a trial of a child must be finalised. These provisions are similar to the ones in the laws of Ghana, Kenya and Uganda.<sup>153</sup> Thus, unless the case involves the offence of murder, rape and robbery with violence in Schedule 3, any child must be released from custody before or during trial (whether in a place of safety, secure care or prison) where a case is not finalised within six (6) months.<sup>154</sup> It is submitted that as

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<sup>150</sup>Lesotho Bill, section 135(1); Namibian Bill, sections 35 and 36 and South African Bill, sections 33, 34 and 35.

<sup>151</sup>Lesotho Bill, section 119(2) (d); Namibian Bill, section 29(1) and South African Bill, section 15.

<sup>152</sup>The CROC has criticised the view that the principle of detention as a last resort may be interpreted to mean the permissibility of detaining children accused of committing serious violent crimes without looking at the individual circumstances, including the child's age, his or her circumstances and the circumstances in which he or she committed the crime. See CROC Discussions in respect of Nigeria's Initial Report (n 121 above).

<sup>153</sup> Discussed in section 6.4.1.1, above.

<sup>154</sup>Namibian Bill, section 95 and South African Bill, section 58. The Lesotho Bill, despite its vast similarities with the juvenile justice provisions of these two Bills, does not include these time limits in relation to the conclusion of trials. Although the effect of this omission is ameliorated with the possible implementation of far-reaching rules restricting detention of children before and during trial and the provision of new rules on diversion diversion, it is submitted that this omission fails to take compliance

with the example of Ghana, Kenya and Uganda, the provisions setting time limits for the conclusion of trials domesticate the international law principle requiring the expeditious disposition of cases involving children, besides contributing to a limit on the length of detention of a child (hence promote detention for the shortest period of time as required in article 37 (c) of CRC).<sup>155</sup>

As with the example of the new laws of Ghana, Kenya and Uganda, in the event of pre-trial detention, preference is given to detention in child specific ‘open’ facilities- ‘places of safety’ or ‘secure care facilities’ *in lieu* of police or prison custody. Further, the monitoring of conditions in pre-trial detention is encouraged by the provision that such places of safety should preferably (subject to there being a vacancy) be within reasonable distance from the place where the child has to appear for a preliminary inquiry. This also mirrors the approach followed by the new laws of the three countries discussed in the last section.



The right of the child to be treated with humanity and dignity during arrest and detention is protected in the three proposed laws.<sup>156</sup> This extends to the duty requiring

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with the relevant CRC principles as far as the Namibian and South African Bills do. Parliamentary discussions in South Africa indicate that the time limit issues may not survive in the final end.

<sup>155</sup>For a similar conclusion in respect of the three other countries under study, see section 6.4.1.1, above.

<sup>156</sup>In the event that a child is arrested as a last resort, peremptory provision is made that any further detention must be carried out in such a way that a child must be separated from adults and from persons of the opposite gender. Further all three draft Bills expressly guarantee that, whilst in detention, the children’s rights that must be respected and protected, and this include the right to have access to adequate food and water, medical treatment, reasonable visits by parents, guardians and legal representatives, reading and educational material, adequate exercise and the child must be provided with adequate clothing, sufficient blankets and bedding (Lesotho Bill, section 107(4); Namibian Bill, section 21 and South African Bill, section 3).

the presence of the parents or guardians or legal representatives during police interview and the presence of these persons in the subsequent proceedings such as the preliminary inquiry.<sup>157</sup> In particular, the police must promptly notify the child's parent or guardian and thereafter refer the child to the process of an assessment by a probation or social welfare officer (within 24 hours of arrest).<sup>158</sup>

## 6.5 Separate procedures

### 6.5.1 The Preliminary Inquiry in the Lesotho, Namibian and South African Bills

In contrast to the three laws of Ghana, Kenya and Uganda, these three Bills propose the introduction of a pre-trial procedure, termed 'Preliminary Inquiry' ('P.I'). This pre-trial procedure has no precedent in the past and present criminal (juvenile) justice procedures of Lesotho, Namibia and South Africa. The P.I will be a pre-trial stage in all criminal cases involving children, and will be mandatory before a matter can be diverted<sup>159</sup> or to criminal trial.<sup>160</sup>

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<sup>157</sup>Lesotho Bill, section 107; Namibian Bill, section 21; South African Bill, sections 3 and 7.

<sup>158</sup>Lesotho Bill, sections 84 and 104; Namibian Bill, section 15 and Chapter 5 and South African Bill, section 7 and Chapter 5.

<sup>159</sup>See Chapter 5, section 5.7.3.1. See also Wood, C (2003) *Diversion in South Africa: A Review of Policy and Practice, 1990-2003* Institute for Security Studies (ISS) Paper 79 Pretoria: ISS 5.

<sup>160</sup>Lesotho Bill, section 111(1) (requiring the holding of a preliminary inquiry in all cases involving children, within forty eight (48) hours where a child is arrested by the police and within seventy two (72) hours where a child is to be brought to a P.I following the exercise of alternatives to arrests such use of summons, warnings, cautions, etc). Namibian Bill, section 70(1) and South African Bill, section 25(1). (These provisions provide that a P.I "must be held in respect of every child prior to plea" within 48 hours of arrest).

However in the South African context, it has been observed that the on going Parliamentary deliberations<sup>161</sup> on the Child Justice Bill may result in the position that children charged with specified serious offences will proceed to court without the holding of a P.I as they will be excluded from the possibility of diversion.<sup>162</sup> There is also the possibility that children charged with petty offences who have already been diverted by a prosecutor would also be exempted from attending a P.I. All other child-accused will experience a P.I, as the procedure will be mandatory in their cases.<sup>163</sup>

The respective provisions of the three Bills on the objects of the P.I are identical and express the purpose of the P.I as follows:

“to ascertain whether the child has been assessed by a social worker, in other words whether a social history report has been compiled, and



to establish whether the matter can be diverted without the necessity of a criminal trial, and

where a child does not admit responsibility for the offence (in a P.I), to refer the matter to the prosecution for the trial to be commenced, and

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<sup>161</sup>As discussed in Chapter 3, section 3.5.3.

<sup>162</sup>Sloth-Nielsen, J “Paperweight or Powertool: A Critical Appraisal of the Potential of the Proposed Preliminary Inquiry Procedure” (2004) 6(2) *Article 40* 3-5 at 3-4 (pointing out that the Parliamentary Portfolio Committee on Justice which is in charge of deliberations on the Bill seem to favour this position). See also Wood (n 159 above) 5-6. See also, Chapter 5, section 5.7.3.1

<sup>163</sup>Sloth-Nielsen (as above) 4.

to establish that there is sufficient evidence upon which a trial can proceed,  
and

to determine the release or placement of the child pending the conclusion of the P.I; appearance of the child in a court; or transfer of the matter to a children's court to be dealt with as a welfare rather than a juvenile justice (child offending) issue.”<sup>164</sup>

According to all the draft Bills, a child must be brought to the P.I within forty eight hours of arrest by a police officer and subsequent to the procedure of a child's assessment by a probation officer or social worker.<sup>165</sup>

The Bills all provide that the P.I will be presided over by a judicial officer - the inquiry magistrate.<sup>166</sup> In this regard, it is noteworthy that the intention will entail

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<sup>164</sup>Lesotho Bill, section 110(3); Namibian Bill, section 70(1) and South African Bill, section 25 (3).

<sup>165</sup>Lesotho Bill, section 111(1) (requiring the holding of a preliminary inquiry in all cases involving children, within forty eight (48) hours where a child is arrested by the police and within seventy two (72) hours where a child is to be brought to a P.I following the exercise of alternatives to arrests such use of summons, warnings, cautions, etc). Namibian Bill, section 70(1) and South African Bill, section 25(1). (Both providing that a P.I “must be held in respect of every child prior to plea” within 48 hours of arrest). At the same time, the Lesotho Bill, section 84; Namibian Bill, Chapter 5 and South African Bill, Chapter 5. All task probation and social welfare officers to carry out an assessment of the child and prepare an assessment report on, among other things, the actual or estimated age of the child for further purposes of the juvenile justice system such as assessing prospects for diversion.

<sup>166</sup>Lesotho Bill, section 111; Namibian Bill, section 70 and South African Bill, section 25. It will have to be attended by a wide range of persons including the child, the child's parents or guardians together with probation or social workers and any other persons whose attendance may be required at the P.I Lesotho Bill, section 111; Namibian Bill, section 70 and South African Bill, section 27, all stipulating that these persons “must” attend the P.I. Additionally, according to these sections legal representatives, police officials or any researcher “may” attend the P.I.



adaptation of existing judicial officers rather than investment in more resources for the creation of new structures and employment of personnel.<sup>167</sup>

The P.I will be inquisitorial rather than adversarial in nature.<sup>168</sup> The P.I has been hailed as the most striking and significant innovation in the South African Bill. On its intended inquisitorial nature, it has been commented thus:

“The notion of the [P.I as an inquisitorial procedure]... in the overwhelmingly adversarial procedure prevailing in South Africa is derived from the need to entrench diversion, as well as the idea that in a model juvenile justice system, somebody or some official should bear primary responsibility for promoting the rights of the child. This is true especially where a range of departments and institutions are involved in different aspects of the justice process.”<sup>169</sup>



Besides its compliance with article 40(3) requiring distinct procedures applying to children in conflict with the law, the P.I procedure also seeks domesticate the principle of (pre-trial) detention as a last resort. This draws from the fact that its main

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<sup>167</sup>See for an explicit mention of this intention in South African Law Commission (1998) *Discussion Paper on Juvenile Justice* Para 9.1 in part thus: “...the Commission has chosen to propose a model which entails adapting existing structures, and utilising the current infrastructure and available human resources, while at the same time maximising the potential for the use of diversion and restorative justice.”

<sup>168</sup>Section 25(5) of the South African Bill for example provides thus, “the inquiry magistrate must conduct the proceedings in an informal manner by asking questions, interviewing persons at the inquiry and eliciting information”.

<sup>169</sup>Sloth-Nielsen, J “The Juvenile Justice Law Reform Process in South Africa: Can a Children’s Rights Approach Carry the Day?” (1999) 18(3) *Quinnipiac Law Review* 469-489, 482. See too Stout, B and Wood, C “Child Justice and Diversion: Will Children’s Rights Outlast the Transition” in Dixon, E and Van der Spuy, E (2004) *Justice Gained? Crime and Crime Control in South Africa’s Transition* Cape Town, UCT Press 119.

aim will be on the decision on whether to divert a matter or not and linked with this, the suitability of custody at this pre-trial phase. The three Bills envisage that through the P.I, chances for committing children to diversion programmes will be widened and hence a higher probability for release from any form of pre-trial detention will obtain.<sup>170</sup> Further, the P.I may only be remanded or adjourned twice (for a further 48 hours) and the second adjournment is only to be limited to the making of a decision regarding an appropriate diversion option.<sup>171</sup> During the entire process of the P.I, the inquiry magistrate is tasked with the additional duty of inquiring into the possibility of releasing any child who may still be in pre-trial detention during the process of the inquiry.<sup>172</sup>

The inclusion of the P.I procedure in the South African Bill (which in turn influenced its inclusion in the Lesotho and Namibian Bills) also takes cognisance of comparative developments in the practice of some western juvenile justice systems such as New Zealand and Australia, where the growth of diversion has necessitated the creation of pre-trial fora where this decision is to be taken.<sup>173</sup>

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<sup>170</sup>See Chapter 5, section 5.7.3.2.1 (since the decision whether to divert or not will be based on the P.I procedure and not entirely on the discretion of the prosecutors as is current practice). See also Wood (n 159 above) 5.

<sup>171</sup>Lesotho Bill, section 118; Namibian Bill, sections 79 and 80 and South African Bill, section 37. (These provisions also detail the purposes of the first remand or postponement as including securing the attendance of a person necessary for the inquiry's conclusion, conducting an assessment or further assessment of a child, finding alternatives to pre-trial detention and planning a diversion option).

<sup>172</sup>Lesotho Bill, section 117; Namibian Bill, section 36; and South African Bill, section 35.

<sup>173</sup>For a discussion of the introduction of similar pre-trial procedures in New Zealand and Australia, see Bargaen, J, *et al* "Regulating Police Discretion: An Assessment of the impact of the New South Wales Young Offenders Act, 1997" (2005) *Criminal Law Journal* 130, Maxwell, G.M and Morris, A "Deciding About Justice for Young People in New Zealand: The Involvement of Family, Victims and Culture" in Hudson, J and Galloway, B (eds) (1995) *Child Welfare in Canada: Research and Policy Implications* Wellington: Thompson Educational Publishing, Australian Law Reform Commission

The assertion has been made that the success of the P.I will depend on, among other factors, the effort and willingness to see the procedure work in practice.<sup>174</sup> At a theoretical level, however, it is submitted that the rationale and intentions underlying the introduction of the P.I. as a separate pre-trial procedure in the proposed juvenile justice systems significantly comply with article 40 of CRC which requires a distinct system that is applicable to juvenile justice. Further, the P.I offers considerable promise as a crucial procedure for the realization of diversion and the principle advocating pre-trial detention as a last resort.

## 6.6 Specialised courts in all the laws and proposed laws

In all the six new juvenile justice (and proposed) laws, there is acceptance of the need for specialized courts for the trials of children in conflict with the law. Due to the centrality of diversion in all these new laws, as was discussed in Chapter 5, it is submitted that these courts will generally be used in instances where a matter is not referred to diversion and specifically for exceptional cases of serious (violent) and repeat offending.

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(1997) *Seen and Heard: Priority for Children in Legal Processes ALRC Report No. 84* Chapter 18. See South African Law Commission (2000), *Report on Juvenile Justice* Para 8.2 discussing the influence of these western juvenile justice systems on the proposed P.I in the South African Bill. Rather than create entirely novel institutions akin to the ones in these foreign jurisdictions, the three proposed draft laws suggest the use of existing judicial structures and existing judicial officials to play the role of inquiry magistrate (albeit envisaging some specialization). This, it is submitted, is in light of the need for pragmatism that acknowledges the position of these countries as developing countries with scarce fiscal, human and other resources, see SALC *Report* Para 8.2. The Report also notes that the proposed P.I procedure should tap onto existing judicial structures since “providing for completely new structures may prove too expensive and therefore unrealistic. Therefore, the model proposed entails adapting existing infrastructure and human resources.”

<sup>174</sup>Sloth-Nielsen (n 162 above) 4, Wood (n 159 above) 5.

Following on the margin of discretion accorded to States Parties to the CRC on the nature of specialisation, it is apparent that all the six new laws do not envisage a radical departure from the current practice of these States in using regular courtrooms as *ad hoc* children's courts.<sup>175</sup> However, there is a significant strengthening of issues relating to jurisdiction, specialization of those who staff these courts, national reach, the ambiance and respect for children's due process safeguards during proceedings in these courts.<sup>176</sup> It is submitted that the proposals in this regard are aimed at giving effect to the desirability of having children tried in courts or fora which are sensitive to their age.

#### **6.6.1 Jurisdiction, national reach and specialization in these courts**

The six new and proposed laws provide for specialised courts to deal with cases involving children. In some instances, these specialised courts are vested with both civil and criminal jurisdiction (Kenya, Lesotho and Uganda). In others these courts are empowered to deal only with criminal cases (South Africa, Namibia and Ghana).<sup>177</sup>

<sup>175</sup>See discussion on CRC's obligations on this point in section 6.2.2.1, above.

<sup>176</sup>Lesotho Bill, sections 139, 142 and 149; Ghanaian Act, sections 16 and 22; Kenyan Act, sections 186 and 188; Namibian Bill, sections 90, 91 and 97; South African Bill, sections 52, 53 and 60 and Ugandan Act, section 103.

<sup>177</sup>Ghanaian Act, sections 16 and 17 (on 'Juvenile Courts'), Kenyan Children's Act, sections 73-76 (on 'Children's Courts'); Namibian Bill, section 85 (on 'Child Justice Courts'); Lesotho Bill, section 137 (on Children's Courts'); South African Bill, section 50 (on Child Justice Courts) and Ugandan Statute, sections 14-17 (on 'Family and Children's Courts'). It is to be noted in respect of both Namibia and South Africa that although there already exist Children's Courts with a civil jurisdiction over issues of child welfare and other issues such as adoption, child care and protection, the new juvenile justice laws opted not to go with the proposal that the criminal jurisdiction also be vested in these courts. No explanations are given for this resistance (a fact evident from the premise that the options put forward

As a general rule, the Lesotho, Namibian and South African draft Bills advocate for separation of trials of children in conflict with the law in all cases including where they are jointly charged with adult co-accused.<sup>178</sup> The only exceptions are where the interests of justice call for a joint trial in courts other than the specialized courts and in the Namibian Bill, in cases of trial involving Schedule 3 offences such as murder, treason and rape.<sup>179</sup> On the other hand, in the new laws of Ghana, Kenya, and Uganda, the transfer of child offenders to be tried in courts other than the specialized courts is limited to instances of capital offences and where child offenders are jointly accused with adults.<sup>180</sup>

The specialized children's courts in Uganda are also deprived of jurisdiction where a matter is within the jurisdiction of the local council courts vested with powers to adjudicate over the case of child offending and render restorative justice oriented outcomes aimed at promoting diversion, as was discussed in the last Chapter.<sup>181</sup>

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by the South African Law Commission for consideration did not even include a proposal for the extension of criminal jurisdiction to Children's courts). However, it is submitted that this decision was influenced by the reality that the Children's Court system has over time developed practice on civil child care and protection matters and hence would not be appropriate for juvenile justice adjudication. These courts' heavy case load and limited resources could yet be another factor that militated against a dual jurisdiction encompassing juvenile justice. For a detailed discussion on these points, see South African Law Reform Commission *Discussion Paper on Juvenile Justice* (n 167 above) Chapter 10.

<sup>178</sup> Lesotho Bill, section 144; Namibian Bill, section 85 and South African Bill, section 57.

<sup>179</sup> Namibian Bill, section 85 and South African Bill, section 57 (stipulating that joinder of charges must be after an application is made to the child justice court and such joint trial will only be possible where "it is in the interests of justice").

<sup>180</sup> Ghanaian Act, section 17; Kenyan Act, sections, 73 (b) and 184 and Ugandan Statute, sections, 94 and 104. The death penalty for juveniles is, however, specifically prohibited in respect of all these countries. See Chapter 7, section 7.4.1.

<sup>181</sup> Ugandan Statute, sections 93 and 94. The role of local council courts in relation to diversion is discussed in Chapter 5, section 5.7.2.

Even in the limited cases where there is a joint trial in a court other than the specialized courts, there are express provisions in all six new (and proposed) juvenile justice laws for the application of children's rights in the proceedings.<sup>182</sup> The Ghanaian, Kenyan and Ugandan Acts further provide that in cases of transfer to regular courts and the High Court, the child must be remitted back to the specialised court for sentencing.<sup>183</sup> It is thus submitted that through the retention of a child rights-centred process in the transfer provisions, a significant degree of compliance with the obligation in article 40 of CRC is achieved. It is further submitted that the new laws under study are different from transfer and waiver provisions witnessed in some western juvenile justice systems, and which generally entail the trial of children in adult (regular) courts without the application of the standards prescribed in international law.<sup>184</sup>



The South African and Namibian Bills seek to establish the concept of “One-Stop Child Justice centres”.<sup>185</sup> As evident from the provisions in these Bills, these centres will include in one main facility not only the child justice courts, but other offices and facilities for use by key juvenile justice role players. These other facilities will include an office for use by probation officers, members of the police service, facilities for the temporary accommodation of children pending conclusion of P.I and may also

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<sup>182</sup>Ghanaian Act, section 2 (expressly enacting the paramouncy of the best interests of the child principle in all and any matter concerning children. The Act does not however expressly extend the ideal of separation to trials in regular or adult courts unlike the other 5 new or proposed laws). See the Kenyan Act, section 185(5); Lesotho Bill, section, 144(1); Namibian Bill section, 94(4); South African Bill, section 57(4) and Ugandan Act, section 105 (3) (all expressly extending the applicability of special procedures, due process safeguards and rights of the child to proceedings in regular courts).

<sup>183</sup>Ghanaian Act, section 18(1); Kenyan Act, section 185(1) (except for the offence of murder) and Ugandan Act, sections 101(3) and 105(2).

<sup>184</sup>See section 6.2.2.1, above.

<sup>185</sup> Namibian Bill, section 86; South African Bill, section 51.

comprise offices for use by a child's legal representative, diversion service providers, officials to trace children's families, *et cetera*.<sup>186</sup> The provision for One-Stop Child Justice centres in the South African Bill draws from experimentation with pilot centres in particular regions of South Africa in the period before and during the law reform.<sup>187</sup> It is submitted that through the effective implementation of One-Stop Child Justice centres, the ideal of separate procedures in article 40 of CRC will substantially be realized in the proposed juvenile justice systems in Namibia and South Africa. This is premised on the extent to which this concept enhances compliance with the ideal of separation in international juvenile justice law through the centralisation of specialised 'juvenile justice service delivery' evidenced in the hosting of separate facilities and services (such as police, probation, judicial, legal aid and diversion programmes) for children in conflict with the law within one facility.



The practice in some of the juvenile justice systems in the countries under study such as Kenya and Uganda where there was only one specialized court operating in the whole country situated in the capital<sup>188</sup> is partly addressed by the attempt to provide for the specialised courts nationally.<sup>189</sup>

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<sup>186</sup>Namibian Bill, section 86; South African Bill, section 51.

<sup>187</sup>See South African Law Commission, *Report* (n 173 above) Para 9.19. For documented examples of One Stop centres in South Africa see, "Manguang - the most recent One-Stop Child Justice Centre" in (2002) 4(4) *Article 40* 1-3, "Update on Port Nolloth One-Stop Child Justice Centre" (2003) 5(2) *Article 40* 1-3, Inter-Ministerial Committee on Young People at Risk (IMC) (1998) *Report on the Pilot Projects* Pretoria: IMC 43-47.

<sup>188</sup> See section 6.3, above.

<sup>189</sup>For example, Namibian Bill, section, 85(5) and South African Bill, section 50(2) require that the head of each (judicial) administrative region "must as far as is reasonably practicable provide a court room for a child justice court". In all the examples, the new "specialized courts" are created within the existing court structures of these countries. It is submitted that this will have the practical effect that these courts are courts of first instance. Consequently, the courts will in practice be easily accessible

Implicit in the provisions of the new laws establishing specialized courts for children is the need to have specialized personnel staffing these courts. In the Namibian context this expressly legislated for in the Bill.<sup>190</sup> Schulz and Hamutenya explain the rationale behind this clause as follows:

“It is planned that child justice courts, as far as possible, must be staffed by specially selected and trained personnel. In practice the provision will be rather of a programmatic nature. But the clause is commendable, because it is an acknowledgment in principle that young people are not just little adults. [They] have special needs in respect of communication, but also participation in the proceedings. Often such needs are not acknowledged by ordinary persons, who are not sensitised to such issues.”<sup>191</sup>



### **6.6.2 Ambiance and procedures of the specialized children’s courts**

All the six new laws and Bills have been informed by the practical concern that the conduct of the proceedings and procedure in courts in past and present juvenile justice practice has fallen short of the minimum standards prescribed by international children’s rights instruments, including the CRC.<sup>192</sup> This is especially in relation to the ambiance and procedures of most of the courts. The requisite physical changes to existing courtrooms to make them child friendly or the building of new child friendly

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being on the lower end of the structures. Their decisions will still be amenable to challenge to higher courts such as the High Courts.

<sup>190</sup>Namibian Bill, section 85(5) which tasks the country’s Chief Justice with the duty to designate child justice courts and further providing that as far as possible they must “be staffed by specially selected and trained personnel”.

<sup>191</sup>Schulz and Hamutenya (n 90 above) 18.

<sup>192</sup>See Discussion in section 6.3, above.



courts will depend on the political goodwill in these countries in addition to a change in the attitude on the part of court and justice officials. Nevertheless, the new laws all make provisions that characterise a common desire to inculcate child friendly orientation of the specialized courts.

All the new laws and Bills therefore contain provisions which place an emphasis on the informality of the proceedings to encourage adequate participation by a child, his or her parents and other people.<sup>193</sup> The Ghanaian and Kenyan Acts specifically call for these courts to sit either in a different building or room from that in which sittings of other courts are held or on different days.<sup>194</sup> The Ghanaian Act also furthers the requirement of informality through the provision that “a police officer in the court shall not be in uniform”.<sup>195</sup>



The South African and Namibian Bills specifically enact the principle that the child justice court must protect a child from “hostile cross examination where such an examination is prejudicial to the well-being of the child or fairness of the proceedings”<sup>196</sup>. Further, these two draft Bills provide for an inquisitorial role of the presiding officer, who must actively participate in the proceedings in order to elicit relevant evidence from the child or any person where this “would be in the best interests of the child”.<sup>197</sup> The Ugandan Statute encourages the use of simple language in these courts and provides for a child’s right to access an interpreter so as to enable

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<sup>193</sup>Ghanaian Act, section 16; Kenyan Act, section 188; Lesotho Bill, section 142(3); Namibian Bill, sections 85(6), 91(4); South African Bill, sections 50(1)(b), 53(4) and Ugandan Act, section 17(1)(c).

<sup>194</sup>Ghanaian Act, section 16(1); Kenyan Act, section 74.

<sup>195</sup>Ghanaian Act, section 16(3).

<sup>196</sup>Namibian Bill, section 91(5); South African Bill, section 53(5).

<sup>197</sup>Namibian Bill, section 91(5); South African Bill, section 53(3).

the child to effectively follow the proceedings of the court.<sup>198</sup> A recent study on Uganda's specialized courts further explains the rationale of the Ugandan Statute in relation to the ambiance of the specialized court in Uganda thus:

“It is envisaged that the...procedure is by inquiry rather than by exposing the child to adversarial procedures. The Magistrate presiding sits at the same table with the child, the child's parent or guardian, child's legal representative (if any), the complainant or prosecutor and the Probation and Social Welfare Officer. The evidence is not [to be] given from the witness box and the Magistrate presiding may impose any other safety precautions as may be necessary.”<sup>199</sup>

All the new laws and Bills enact the provision that, apart from the presence of indispensable parties (such as the officers of the court, parties to the case, other persons specifically authorised by the court to attend) in a case involving a child, the proceedings shall be held *in camera*.<sup>200</sup> This provision also extends to the prohibition on the disclosure of the child's name and identity in line with criminological theory which suggests that such disclosure may unduly stigmatise a child and eventually inhibit the process of the child's rehabilitation and reintegration. The protection of this right is in line with a similar recognition in the CRC and Beijing Rules.<sup>201</sup>

The establishment of the specialised aspects of courts to reflect the above provisions on ambiance and procedures will await and follow the passage of legislation in the

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<sup>198</sup>Ugandan Statute, section 17.

<sup>199</sup>Save the Children, UK *et al* (n 110 above) 10.

<sup>200</sup>Ghanaian Act, section 16(2); Kenyan Act, sections 74 & 186; Lesotho Bill, section 149; Namibian Bill, section 97; South African Bill, sections 50(2) (a) and 60; Ugandan Act, sections 17(2) and 103.

<sup>201</sup>Discussed in section 6.2.2.2, above.

case of Lesotho, Namibia and South Africa where legislation still awaits enactment.<sup>202</sup> In the rest of the countries where the new laws are now undergoing implementation (Ghana, Kenya and Uganda), there remains the daunting challenge of putting in place fully operational child-friendly courts. This has been recorded in the case of the Kenyan Act where the commendable act of gazetting and training of children's courts' judicial officers countrywide has been lauded but the dearth of child friendly courts in the whole country remains.<sup>203</sup> Similarly, in Uganda, a study carried out in 2003 found that although specialised courts had been gazetted countrywide, many of these courts were not operational. In fact, only two of these courts were found to meet all the requirements of the Statute.<sup>204</sup>

### **6.6.3 Protection of children's rights and due process safeguards in the juvenile justice systems**



While the new laws emphasize informality so as to realize the child's right to effectively participate in the proceedings, provisions are also made for the protection of due process rights in the court proceedings. It is submitted that the inclusion of these provisions is in compliance with the balance sought at international law between informality of proceedings in the specialized courts, on the one hand, and the

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<sup>202</sup>Except as noted earlier in this section that in South Africa there are already pilot One-Stop Child Justice Centres in place in anticipation of passage of the Bill.

<sup>203</sup>See *The Cradle and Odhiambo* (n 97 above) 13-15 (discussing the trends in the process of realizing the ideal of child-friendly courts in Kenya and noting that Nairobi's Children's Courts remain the country's only full fledged specialised courts for children ).

<sup>204</sup>*Save the Children UK, et al* (n 110 above) 6 (Adding that of the selected districts, only 43% of the courts were partially operational). The challenges to implementing the new juvenile justice laws are the subject of Chapter 8 of this thesis.

protection of children's rights, on the other.<sup>205</sup> The due process guarantees and procedural rights provided for have a bearing on the incorporation of international standards in the new juvenile justice systems.

Included in the new laws and Bills are the rights of the child to be informed promptly and directly of criminal charges against him or her, to determination of the matter without delay,<sup>206</sup> not to be compelled to give testimony, to have free assistance of an interpreter and to appeal to a higher court.<sup>207</sup>

The Ghanaian, Kenyan and Ugandan Acts provide for the child's right to have a parent, guardian, relative or probation officer present at the entire proceedings.<sup>208</sup> In similar vein, the Lesotho, South African and Namibian Bills all expressly enact the child's right to parental assistance in the proceedings at the specialised courts.<sup>209</sup> The Namibian and South African Bills couch this provision in mandatory terms and the requirement of parental presence can only be dispensed with where a parent or other 'appropriate adults' cannot be traced without further delaying a case, or where a court exempts the attendance of a parent in the best interests of the child and expressly

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<sup>205</sup>See discussion in section 6.2.2.2, above.

<sup>206</sup>For example, Kenyan Act, section 186; South African Bill, section 58. This is also a pointer to the influence of international law standards with reference to the requirement of speedy trial and in relation to provisions on speedy resolution of cases in the new juvenile justice systems, discussed in section 6.2.2.1, above.

<sup>207</sup>The approach taken in all the examples is that of applying the general due process safeguards provided primarily in the Bills of Rights of the respective countries' Constitutions. The six laws and Bills also incorporate specific aspects such as the right of the child to privacy and confidentiality of the proceedings, the right to legal representation (including legal aid at states' expense where appropriate), see South African Bill, sections 53, 60 73-75; Ghanaian Act, section 22; Kenyan Act, section 186; Lesotho Bill, section 139; Namibian Bill, sections 91(1), 97, 98-102.

<sup>208</sup>Ghanaian Act, section 22(b); Kenyan Act, section 74 (c) and Ugandan Act, section 17(d).

<sup>209</sup>Lesotho Bill, section 140; Namibian Bill, section 90; South African Bill, section 52.

states the reasons for such exemption.<sup>210</sup> In particular, the South African Bill provides for the inadmissibility of any evidence of a child obtained through a confession or an admission in an identification parade where such evidence is obtained in the absence of a child's parent or an appropriate adult or legal representative.<sup>211</sup>

As further evidence of inclusion of due process safeguards in the new or proposed juvenile justice systems in compliance with the demands of international law, all the six new laws and Bills contain provisions on the right to legal representation. This is considered in the last sub-section that follows below.

#### **6.6.3.1 The right to legal representation**

All six laws and proposed laws expressly provide for the child's right to legal representation.<sup>212</sup> The right to legal representation will especially be of relevance to children subjected to the formal criminal justice processes in the new or proposed juvenile justice systems.

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<sup>210</sup>Namibian Bill, section 90; South African Bill, section 52.

<sup>211</sup>South African Bill, section 54. The provisions on the courts' obligation to ensure parental assistance mirror previous or existing law. For example, South African courts have affirmed the inadmissibility of confessions or admissions obtained in the absence of legal representatives or parents of a child. See for example, *S v M* 1993 (2) SACR 487 (A) where the court held that the parental provisions under the South African Criminal Procedure Act (51 of 1977) applies from the time of arrest.

<sup>212</sup>Ghanaian Act, section 22(c); Kenyan Act, section 186(b); Lesotho Bill, sections 139(1)(e), 151-153; Namibian Bill sections 98-102; South African Bill, sections 73-76 and Ugandan Bill, section 17(1)(e). The provisions in the Lesotho, Namibian and South African Bills all acknowledge the applicability of this right not only in the context of the proceedings of the specialized courts, but also at all stages of the juvenile justice process including at the level of arrest and pre-trial procedures relating to police investigation, detention and preliminary inquiry.

The problem of lack of legal representation has been noted to be endemic in the context of the countries under study. Thus, the realization of this right has almost been non-existent with the exception of South Africa where there have been piecemeal efforts to provide legal aid within current limitations to children in conflict with the law (among other competing indigent groups) where they are unable to afford legal representation.<sup>213</sup> In the context of Eastern Africa (including Kenya and Uganda) the position has described as follows:

“...A number of common problems transcend the implementation of children's rights in the region with particular focus on juvenile justice issues. It is apparent that at the apex of these common constraints is the issue of lack of legal representation for children accused of committing crimes or child victims of crime... Current efforts on the part of a number of civil society organisations in providing free legal services to children in the [East African countries of Kenya, Tanzania and Uganda] has been noted and appreciated. However, it is evident that institutionalised legal aid schemes, not only for children, but also for the general populace is markedly non-existent and still ranked low in these regional governments’ priorities. The ambivalence on the part of the respective governments towards this aspect of children’s rights is made all the more glaring by the case of equally lethargic and indifferent legal professions in the three jurisdictions. Thus, in all three countries, very few lawyers are willing to take up cases on the basis of voluntary legal aid or assistance...”<sup>214</sup>

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<sup>213</sup>See Zaal, N and Skelton, A “Providing Effective Legal Representation for Children in a New Constitutional Era: Lawyers in the Criminal and Children’s Courts” (1998) 14(4) *South African Journal on Human Rights* 539-559 (generally discussing the limited provision of State-sponsored legal aid (through the Legal Aid Board) to children in Criminal and Children’s courts and suggesting proposals to make legal representation child-specific).

<sup>214</sup>Odongo, G.O “The Birth of a Regional Juvenile Justice Network in East Africa” (2004) 6(1) *Article* 40 10.

It is submitted that the foregoing observation reflects the position of the other four countries considered in this thesis due to the commonalities identified in the discussion of the current juvenile justice practices in all six countries.<sup>215</sup>

The inclusion of children's right to legal representation at the State's expense in certain instances is in line with the guarantee of this right at international law. An example of such an instance (which is common to all laws and Bills) is where a child or a child's parent cannot afford legal representation.<sup>216</sup> In the three draft Bills of Lesotho, Namibia and South Africa, the child's right to be provided with legal

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<sup>215</sup>See discussion in section 6.3, above, Zaal and Skelton (n 213 above) 539-540 noting in respect of South Africa at the time that, "...South Africa can hardly claim to be at the cutting edge of the provision of legal representation for vulnerable groups of children."

<sup>216</sup>Lesotho Bill, section 139(1) (e); Kenyan Act, sections 77 and 186(b); Namibian Bill, section 100(3) and South African Bill, section 75(1) and supported by section 35(3) (g) of the South African Constitution, 1996 establishing a right "to have a legal practitioner assigned by the State, and at the State expense, in criminal matters,...if substantial injustice would otherwise occur." This provision is general in nature and obviously applies to children in criminal matters. All the three Bills give the task of vetting who qualifies for legal aid at the State's expense to Legal Aid Boards. The practical non-existence of a Legal Aid Board in Kenya is partly to explain for the silence of the Kenyan Act in this regard. It is submitted that as a result of this omission, the duty of ensuring that government provides legal aid to indigent children in conflict with the law appearing before Kenyan Children's (or regular) Courts will be incumbent on the presiding magistrates and the prosecution. This is supported by section 77(1) of the Kenyan Act which provides that "where a child is brought before a court in proceedings under this Act or any other written law, the court may, where the child is unrepresented order that the child be granted legal representation". Section 77(2) provides that "any expenses incurred in relation to [such] legal representation shall be defrayed out of monies provided by Parliament". In contrast to the four other new laws, the Ghanaian Act, section 22(c) and Ugandan Statute, section 17(1) (e) legislate in the general words that "the child shall have a right to legal representation" and do not refer to State sponsored legal aid in certain situations such as indigence. It is however submitted that recognition of this right encompasses the State's obligations to provide legal aid in the case of indigent children. This would be in line with international law. For a similar view, see Zaal and Skelton (n 213 above) 539. It is to be noted however that the ongoing parliamentary process may result in the retention of far more limited provisions on legal representation since the Parliamentary has already indicated a reluctance to support the provisions as presently constituted. The actual limitation of these provisions will only be clear upon the public release of the eventual Bill.

representation is also extended to all instances where a child is in detention pending trial,<sup>217</sup> when a child under the age of 14 is subjected to prosecution after the *doli incapax* presumption is discharged on proof by the prosecution,<sup>218</sup> or where, as a sentencing option, a child is likely to be sent to custody.<sup>219</sup>

The laws of Ghana, Kenya and Uganda are very brief in their guarantee of the right to legal representation. They simply provide that “every child has a right to legal representation...”<sup>220</sup> In contrast, the Lesotho, Namibian and South African Bills are very detailed in their proposals in this regard. Specifically, they give effect to a child rights-orientated recognition of this right to legal representation. Thus among the principles in the three Bills are provisions is the duty of legal representatives to allow, “as far as is reasonably possible for the child to give independent instructions concerning the case”<sup>221</sup>. While the precise practical effect of this provision will have to await the actual implementation of these new laws, it is clear that the inclusion of this principle was inspired by the principle of child autonomy now forming part of international law.<sup>222</sup> The three Bills also include the child’s right to waive legal

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<sup>217</sup>Lesotho Bill, section 152(9); Namibian Bill, section 100(1) and South African Bill, section 75(1).

<sup>218</sup>Discussed in Chapter 4, section 4.8.3.

<sup>219</sup>Lesotho Bill, section 152(9); Namibian Bill, section 100(1) and South African Bill, section 75(1).

<sup>220</sup>Ghanaian Act, section 22(c) Kenyan Act, sections 77 and 186(b); and Ugandan Statute, section 17(1) (e).

<sup>221</sup>Lesotho Bill, section 151(2); Namibian Bill, section 98(1) (a) and South African Bill, section 73(1) (a).

<sup>222</sup>By virtue of article 12 of the CRC providing for the right of the child to participate in decisions affecting him or her. For a practical dimension on this right, see Lucker-Babel, M.F “The Right of Children to Express their Views and to be Heard: An Attempt to Interpret Article 12 of the UN Convention on the Rights of the Child” (1995) 3 *The International Journal on Children’s Rights* 398. On child participation in legal representation in the context of UK, see Masson, J (2000) “Participation, Placation and Paternalism: Young People’s Experiences of Representation in England and Wales”



representation.<sup>223</sup> This, it is submitted, is also in line with the child's right to participate in legal representation and lend his or her voice on whether he or she needs such legal representation.

The three Bills further provides for the requirements which must be complied with by legal representatives representing children. One of these requirements include the duty of the representative to “promote diversion where appropriate, but without unduly influencing the child to acknowledge responsibility for an alleged crime”.<sup>224</sup> In regard to these obligations, it is submitted that three proposed laws will radically transform the traditional understanding of the lawyer-client relationship where the lawyer is usually afforded considerable leeway in pursuing a client's case. It is further submitted that these proposals are not only aimed at giving primacy to the child's right to participation as pointed out above but also to ensure legal representatives have an obligation “to promote diversion where appropriate”.<sup>225</sup>

The provisions of these three Bills in relation to legal representation will therefore, if enacted into law, be in accordance with international children's rights law in a number

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(Unpublished Paper presented at the Conference of the International Society of Family Law held in Brisbane, 2000).

<sup>223</sup>Lesotho Bill, section 153; Namibian Bill, sections 99(1) and 102; South African Bill, sections 75(1) and 76. This right to waive legal representation is only suspended in specified instances such in cases of pre-trial or on trial detention of a child, the trial of a child under the age of 14, and in cases involving serious offences (such as Schedule 3 offences).

<sup>224</sup>Lesotho Bill, section 151(2); Namibian Bill, section 98(1) (c) and South African Bill, section 73(1) (c).

<sup>225</sup>Diversion was discussed in Chapter 5.

of respects, including in regard to the child's right to legal representation, the right to participation and the requirement of diversion.<sup>226</sup>

## 6.7 Conclusion

This Chapter has discussed the principle of international child rights law requiring the establishment of separate procedures, authorities and courts specifically applicable to children. The ideal of separate procedures commences at the pre-trial phase, where the principle of pre-trial detention is emphasized as a last resort and for the shortest period of time (article 37 of CRC). This ideal continues through to the trial phase where international law emphasizes the need to establish separate procedures and courts which apply to children in conflict with the law. While considerable margin of discretion is accorded to State Parties to the CRC on the issue of separate juvenile justice systems, international juvenile justice instruments and the jurisprudence of the CROC provide considerable minimum standards with which any system or approach adopted by individual States must comply. These relate to the desirability of specialised courts so as to realize the aims of juvenile justice and the need to balance informality in juvenile justice proceedings with protection of due process safeguards. Further, in instances when courts or tribunals other than specialised courts are used, these standards should be applicable.

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<sup>226</sup>In relation to the South African Bill, a lack of wide support on the part of the members of the Parliamentary Portfolio Committee on Justice (in charge of final deliberations on the Bill) regarding the provisions on legal representation has been noted, with the possibility that these provisions may not survive intact. For access to the minutes of the Committee's hearings, see < [www.pmg.org.za](http://www.pmg.org.za) > (last accessed 30 September 2005).

In the discussion of police arrest and subsequent release procedures, it is evident that the principle of detention as a last resort has had considerable influence in shaping the new laws and Bills of the countries under study. This is in relation to provisions on the police powers to use alternatives to arrest and detention, guidelines for the judicial determination and restriction of the use of pre-trial detention, enabling bail conditions and general provisions on the release of children.

The examples discussed evidence attempts by the different countries under study to ensure compliance with the need for separate procedures and courts. The ideal of having distinct procedures that are child rights-centred is clearly evident in the novel introduction of an inquisitorial procedure – the P.I - in otherwise adversarial legal systems of Lesotho, Namibia and South Africa. This also points to an example of further incorporation of international child law standards in these three proposed juvenile justice systems since the P.I is not only intended to widen access to diversion but also to limit reliance on the use of detention in general<sup>227</sup> and pre-trial detention in particular.<sup>228</sup>

The discussion on the establishment of ‘specialized courts’ reveals a clear intention on the part of all countries under study to put in place systems that will be sensitive to a child’s ability to participate in proceedings. However, there is reluctance in all six countries to establish ‘truly’ (physically) separate systems of courts. It is contended that while this cautious approach is no doubt motivated by the substantial investment of resources that a completely separate system with physically separate distinct courts,

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<sup>227</sup>Through an increased diversion of majority of cases from the formal justice system.

<sup>228</sup>Through an obligation of the P.I and the Inquiry Magistrate to review any pre-trial detention of a child appearing before a P.I.

buildings and personnel may entail, it is still in keeping with the considerable leeway that international law accords to States in regard to the form of separate procedures and courts they adopt. It is significant that the new laws all seek to give a national reach to the concept of specialised courts in contrast to past practice where these courts were either non-existent (Namibia and South Africa) or limited to the capitals (Ghana, Kenya, Lesotho and Uganda).

Further, the influence of international standards is clear in the provisions relating to the exclusive jurisdiction accorded to the re-organized specialized courts and requirements in relation to specialization in these courts. The example of legislative provision for One-Stop Child Justice centres in two of the case studies (Namibia and South Africa) point to an endeavour to comply not only with the requirement of separate institutions, personnel and courts, but also the requirement of detention as a last resort and for the shortest period of time. This premise draws from the fact that these centres will be specifically dedicated to children and will aim for co-ordination between all the juvenile justice role players – the police, probation, residential care facilities, prosecutors and court officers, all hosted in one building.

Finally, the influence of international law is evident through the incorporation of relevant standards in relation to the ambiance and procedures in these courts and due process guarantees, including the child's right to legal representation in all the six different laws or Bills discussed. The proposed provisions in the new Bills of Lesotho, Namibia and South Africa challenge the traditional understanding of lawyer-client representation in order to give primacy to the notion of child autonomy. These provisions also seek promote the practice of diversion through legal representation.

Indeed it was pointed out that the very recognition of the child's right to legal representation (in certain cases at the State's expense) in all the countries under study is a landmark achievement having regard to an endemic lack of legal representation in current and past juvenile justice practice in these countries.

Overall, this Chapter has contended that the discussed country-specific examples represent commendable attempts at domesticating the obligation in article 40(3) of the CRC which emphasizes the need for a separate juvenile justice system.



## CHAPTER 7

### SENTENCING AND ALTERNATIVE SENTENCING REGIMES IN THE COUNTRIES UNDER STUDY

#### 7.1 Introduction

A child rights-oriented juvenile justice system requires the limitation of certain sentences and the need for alternative sentences applicable to child offenders. This is one of the requirements of the CRC in Article 40 that was highlighted in Chapter 2.<sup>1</sup> This Chapter will discuss the approach of the new laws of the countries under study in relation to sentencing and alternative sentencing regimes. The Chapter will ascertain whether (and the extent to which) the provisions relating to sentencing and alternative sentencing regimes in the new juvenile justice laws of the countries under study incorporate the requirements of international law on the sentencing of child offenders.

The content of international law regarding States' obligations on the sentencing of children will be discussed in the first section of this Chapter. This discussion will examine the provisions of CRC and other international juvenile justice instruments, principally the Beijing Rules. The second section of the Chapter will discuss juvenile sentencing laws and practices in the countries under study prior to recent juvenile justice law reforms. The discussion of past law and practice in this section of the Chapter will be done with a view to highlighting the compliance and or non-compliance of the past sentencing laws and practices in the countries under study with

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<sup>1</sup>Chapter 2, section 2.8.1.

the principles of international law. In the final section, this Chapter will examine the approach in the juvenile justice law reforms in the countries under study in relation to sentencing and the rationale behind these proposals.

## **7.2 International law in the area of juvenile sentencing**

Decisions about sentencing and punishment of criminal offenders (children and adults alike) have traditionally been within the sovereignty of each nation state.<sup>2</sup> This is not true any more.<sup>3</sup> International standards for criminal justice are now common and cover areas that have no international dimension.<sup>4</sup> The applicable standards are included in a number of UN and regional human rights instruments. In relation to sentencing of children, the standards in international children's rights law<sup>5</sup> are applicable in two respects. The first involves the principles which should underpin and provide the aims of sentencing. Secondly, international law places restrictions and prohibitions on sentences that may be imposed on children. These two aspects of international children's rights law are considered in the next sub-sections below.

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<sup>2</sup>Kurki, L "International Standards for Sentencing and Punishment" in Tonry, M and Frase, S (eds) (2001) *Sentencing and Sanctions in Western Countries* New York: Oxford University Press 331-378 at 331.

<sup>3</sup>Kurki (as above) 331.

<sup>4</sup>Kurki (n above) 331.

<sup>5</sup>In reference to the CRC and the Beijing Rules on which the CRC's juvenile justice provisions were modelled.

### 7.2.1 International law standards on the aims and principles of juvenile sentencing

A number of fundamental guiding principles have been included in both the CRC and Beijing Rules that are relevant to the sentencing of children. The first comprehensive expression of the fundamental guiding principle appears in Rule 17 of the Beijing Rules. This Rule provides that the reaction taken in the adjudication and disposition of a case involving a child should be in proportion to the gravity of the offence, the circumstances and needs of the child, and the needs of society.<sup>6</sup> The ‘principle of proportionality’ has been included in the CRC which provides that the adjudication and dispositions in the administration of juvenile justice must aim to “to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence”.<sup>7</sup>



Van Bueren explains that “the principle of proportionality implies that the circumstances of the individual child should influence the manner and the form of the reaction in the juvenile justice system”.<sup>8</sup> To ensure that a juvenile justice court, authority or personnel is acquainted with all the circumstances of the child, the Beijing Rules recommend that social enquiry or pre-sentence reports detailing a

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<sup>6</sup> Rule 17(1) (a).

<sup>7</sup> CRC, Article 40(4). Van Bueren emphasizes that the concept of proportionality is a basic principle of general international human rights law and was included in earlier general international human rights treaties such as the UN ICCPR, see Van Bueren, G (1995) *The International Law on the Rights of the Child* Dordrecht, Boston, and London: Martinus Nijhoff Publishers 183.

<sup>8</sup> Van Bueren (as above) 183.



child's background and circumstances should be considered in the final disposition of all cases involving children except minor cases.<sup>9</sup>

The Commentary on Rule 17 of the Beijing Rules explains that the main difficulty in formulating guidelines for the adjudication of children in conflict with the law was caused by unresolved conflicts between various approaches by different States.<sup>10</sup> This Commentary notes, in relation to sentencing of children, that the conflict between rehabilitation versus just desert; assistance versus punishment; and general deterrence versus individual loss of liberty, is more pronounced in juvenile sentencing than it is with regard to the sentencing of adults.<sup>11</sup> According to Van Bueren, the CRC resolves the conflict in the different approaches of states by establishing a common principle that should serve as the aim of juvenile justice.<sup>12</sup> Juvenile justice should aim at ensuring that children are treated in a manner consistent with their "age and the desirability of promoting the child's reintegration and his or her assuming of a constructive role in society".<sup>13</sup> In realizing this aim, the CRC emphasizes the "promotion of the child's sense of dignity and worth".<sup>14</sup> It has been asserted that a State Party to the CRC which adopts a sentencing policy for children which is punitive and primarily aimed at general deterrence cannot attain this aim.<sup>15</sup> In addition, the principle in Article 3 of CRC requires a primary consideration for the

<sup>9</sup>Van Bueren (n 7 above) 183-184 citing the Beijing Rules, Rule 16.

<sup>10</sup>Detrick, S (1999) *A Commentary on the United Nations Convention on the Rights of the Child* The Hague: Martinus Nijhoff Publishers 703.

<sup>11</sup> Detrick (as above) 703.

<sup>12</sup>Van Bueren (n 7 above) 183. See also, Cappelaere, G Grandjean, A and Naqvi, Y (2005) *Children Deprived of Liberty Rights and Realities* Amsterdam: Defence for Children International 75-84.

<sup>13</sup>Van Bueren (n 7 above) 183 citing the CRC, Article 40, see also Cappelaere, G *et al* (as above) 317.

<sup>14</sup>CRC, Article 40.

<sup>15</sup>Van Bueren (n 7 above) 183. See also Cappelaere, G "Juvenile Punitive Law" in Cappelaere, G (ed) (1990) *The Future of the Juvenile Justice System* Amersfoort: Acco 275-284, 275.

best interests of the child in all matters concerning a child, including sentencing in relation to child offenders.

The principle that deprivation of liberty,<sup>16</sup> if used at all, should only be used as a measure of last resort and for the shortest period of time must also be reflected in the sentencing policy of any State Party to the CRC. This principle is expressed in Article 37(b) of CRC and recommended by the Beijing Rules.<sup>17</sup> As highlighted in the last Chapter, this principle limits institutionalisation in two ways: in quantity and in time.<sup>18</sup> It also implies an emphasis on the use of alternatives to institutional care to the maximum extent possible. Detrick writes that the aim of this standard is to avoid incarceration in the case of children, unless there is no other appropriate response that would protect the public safety.<sup>19</sup> If, however, a child must be institutionalised, the loss of liberty should be restricted to the least possible degree.<sup>20</sup> Although the restriction on deprivation of liberty applies to both prisons and child-specific residential facilities,<sup>21</sup> priority should nevertheless be given to ‘open’ over ‘closed’

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<sup>16</sup>The concept of ‘deprivation of liberty’ has been widely defined in Rule 11(b) of the UN JDL Rules to encompass institutionalisation in prisons and residential facilities of a public and private nature and the definition includes institutionalisation in welfare settings; see discussion in this regard in Chapter 6, section 6.2.1.

<sup>17</sup>CRC, Article 37(b) provides that: “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 period of time”. Beijing Rules, Rule 17(1) (b) provides that: “Restrictions on the personal liberty of the juvenile shall be imposed only after a careful consideration and shall be limited to the possible minimum.”

<sup>18</sup>Chapter 6, section 6.2.1.

<sup>19</sup>Detrick (n 10 above) 704.

<sup>20</sup>Detrick (n 10 above) 704.

<sup>21</sup>In line with the broad definition of the term “deprivation of liberty’ in Rule 11(d) of the UN JDL Rules, discussed in n 16, above.

institutions.<sup>22</sup> In particular, the Beijing Rules recommends that the use of imprisonment as a sentence should not only adhere to the principle of deprivation of liberty as a measure of last resort and for shortest period of time but also to the restriction that it should not be imposed unless the child:

“...is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response.”<sup>23</sup>

By virtue of the restriction upon deprivation of liberty, international law thus makes it clear that different sentencing policies should apply to children in contrast to adults.

The Committee on the Rights of the Child (CROC) has expressed concern at custodial sentences for children.<sup>24</sup> It has also criticised the imposition of lengthy and indeterminate sentences.<sup>25</sup>

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<sup>22</sup>Detrick (n 10 above) 704 (adding that “...any facility should be of a correctional or educational nature rather than a prison type.”).

<sup>23</sup>Beijing Rules, Rule 17(c).

<sup>24</sup>Hodgkin, R and Newell, P (2002) *Implementation Handbook for the Convention on the Rights of the Child* New York: UNICEF 551.

<sup>25</sup>UNICEF, Hodgkin and Newell (as above) 151 (Citing the CROC, *Concluding Observations: Burkina Faso*, CRC/C/3/Add. 19, 15 July 1993, Para 11 thus: “The Committee notes that the sanctions set forth in the legislation as regards juvenile offenders, especially in cases carrying the death penalty or life imprisonment, reduced respectively to life imprisonment or to 20 years imprisonment, are excessively high....and not in conformity with Articles 37 and 40 of the Convention.”) and in respect of Nigeria, CROC, *Concluding Observations: Nigeria*, CRC/C/8/Add. 26, 21 August 1995, Paras 21 and 40 thus: “...The Committee is also concerned that the provisions of national legislation by which a child may be detained at [the President’s pleasure] may permit the indiscriminate sentencing of children for indeterminate periods. The Committee wishes to emphasize that the Convention requires that detention be a measure of last resort and for shortest period of time. The institutionalization and detention of

In order “to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence”, a variety of dispositions are required, including alternatives to institutional care. States Parties are required under Article 40(4) of CRC to make available “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”.<sup>26</sup>

The principle of proportionality, the restriction on the use and period of detention and the duty on a State Party to take into account the child’s well-being, all provide the backbone of the international law concerning the aims, restrictions and prohibitions on the sentencing of children.<sup>27</sup>



The principle of proportionality and an emphasis on the well-being of a child reflect an individualised approach to sentencing. Therefore, sentences that are of a mandatory nature<sup>28</sup> would be in violation of states’ obligation under the CRC. Also in violation

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children must be avoided as much as possible and alternatives to such practices must be developed and implemented...”).

<sup>26</sup>Detrick (n 10 above) 704 further points out the influence of the Beijing Rules on the juvenile justice provisions of the CRC by the assertion that: “The CRC’s *travaux préparatoires* reveal that these examples are directly taken from Rule 18 of the Beijing Rules.”

<sup>27</sup>Van Bueren (n 7 above) 183, Cappelaere, G *et al* (n 12 above) 415-416.

<sup>28</sup>By definition these are sentences which curtail judicial discretion in relation to the consideration of the individual circumstances of an offender. Mandatory minimum sentencing legislation “was first introduced in Washington State in December 1993. Legislation followed shortly thereafter in California, which adopted an even tougher law”, per Sloth Nielsen, J “Case Reviews of Minimum Sentences for Children” (2001) *Article 40* 3 (2) 2 (adding that “the most familiar variant of mandatory sentencing is indeed the Californian model of minimum sentences, known as ‘three strikes and you’re in’”). For detailed overviews on these sentences, see Sloth-Nielsen, J and Ehlers, L (2005) “A Pyrrhic Victory? Mandatory Sentences in South Africa” (Institute for Security Studies (ISS) *ISS Occasional*

of the CRC would be the concept of minimum sentences.<sup>29</sup> The United Nations Committee on the Rights of the Child (CROC) has criticised countries where children are liable to be sentenced under minimum sentencing laws.<sup>30</sup> One scholar explains the incompatibility of minimum sentences with international children's rights law as follows:

“Minimum sentences contravene a range of internationally accepted principles, such as the principle of proportionality, the principle of incarceration as a matter of last resort, and the principle (in Article 40 (2) (b) (v) of the UN Convention on the Rights of the Child) that juvenile sentences should be able to be reviewed by a higher competent independent and impartial authority or judicial body according to law. A prescribed minimum sentence (in the true sense) is by definition not susceptible to being altered on appeal...”<sup>31</sup>




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*Paper 111* of July 2005); Terblanche, S “Mandatory and Minimum Sentences: Considering Section 51 of the Criminal Law Amendment Act, 1997” in Burchell, J and Erasmus, A *Criminal Justice in a New Society* Cape Town: Juta 194-220, Van Zyl Smit, D “Mandatory Minimum Sentences and Departures From Them in Substantial and Compelling Circumstances” (1999) 15 *South African Journal of Human Rights* 270-276 (on South Africa). On a discussion in this regard in relation to Canada, see Gabore, T and Crutcher, R (1997) *Mandatory Minimum Penalties: Their Effect on Crime, Sentencing Disparities and Criminal Justice Expenditure* Ottawa: Canadian Department of Justice.

<sup>29</sup>‘Minimum sentences’ are a specific type of mandatory sentences which entail the setting of the minimum terms of imprisonment with respect to designated offences and offenders. Judicial discretion is curtailed in the sense that the sentencing officer must impose the prescribed sentence and may not take into account other factors, such as the individual circumstances of an offender in mitigation. See Van Zyl Smit (as above) 270.

<sup>30</sup>See CROC, *Concluding Observations: Australia* CRC/C/15/Add.79, 21 October 1997 Para 22.

<sup>31</sup>Sloth-Nielsen (2001) *Article 40* (n 28 above) 2.

## 7.2.2 International law and the prohibition of certain sentences

### 7.2.2.1 The death penalty

The imposition of the death penalty for children who commit offences whilst under the age of 18 years is prohibited under Article 6(5) of the ICCPR and Article 37(a) of CRC.<sup>32</sup> The prohibition of the juvenile death penalty is so universally practiced and accepted, it has reached the level of a norm of *jus cogens*.<sup>33</sup> Notwithstanding this prohibition and ‘a conspicuous global evolution’ towards the general abolition of the death penalty (even for adult offenders), the United States was the only nation as of October 2003, to have reportedly executed juvenile offenders.<sup>34</sup> The legality of the

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<sup>32</sup>Beijing Rules, Rule 17(2) also provides that: “Capital punishment shall not be imposed for any crime committed by juveniles.”

<sup>33</sup>According to Article 53 of the Vienna Convention on the Law of Treaties (1969), such a norm constitutes a general international law accepted by a large majority of States as a whole and is immune from derogation by states and is modifiable only by a norm of the same status. For the view that the prohibition of juvenile death penalty is *jus cogens*, see Schabbas, W “Reservations to the UN Convention on the Rights of the Child” (1996) 18 *Human Rights Quarterly* 472, Human Rights Advocates (2005) “The Death Penalty and Life Imprisonment Without the Possibility of Release for Youth Offenders Who Were Under the Age of 18 at the Time of the Offence” (Unpublished Submission to the 61<sup>st</sup> session of the UN Commission on Human Rights, 2005 held in New York, USA) 2 citing The Inter-American Commission on Human Rights (in charge of enforcing the Organization of American States’ American Convention on Human Rights) views to the effect that the ban on executing juveniles has become a *jus cogens* norm, Inter-American Commission Report No. 62/02, Case No. 12.285 *Michael Domingues v United States*, October 22, 2002 and Report No. 101/03, Case No. 12.412 *Napoleon Beazley v United States*, December 29, 2003. Van Bueren (n 7 above) 189 also cites the views of the American Commission in the case of *James Terry Roach and Jay Pinkerton v United States* Case No. 9647. OAE/SER.L/V/11.69, 27 March 1987, in similar vein.

<sup>34</sup>James, A and Cecil, J “Out of Step: Juvenile Death Penalty in the United States” (2003) 11 *The International Journal of Children’s Rights* 291-303, 291. Amnesty International (2004) *Stop Child Executions: Ending the Death Penalty for Child Offenders* London: Amnesty International available at < <http://web.amnesty.org/library/Index/ENGACT500012004> > (last accessed 30 September 2005) records 34 executions of child offenders in the world since 1990. Over half of these (19) took place in

juvenile death penalty in the United States was given judicial recognition in *Stanford v Kentucky*.<sup>35</sup> In this case, the U.S Supreme Court held that the Eighth Amendment to the U.S Constitution did not prohibit the execution of offenders who were 16 or 17 years old at the time of their offence.<sup>36</sup> This position obtained in United States until very recently.

On 26 August 2003, in the case of *State ex. Rel. Simmons v Roper*,<sup>37</sup> the Missouri Supreme Court held that “the execution of juvenile offenders (who commit offences whilst below the age of 18 years) violates evolving standards of decency and is,

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the United States. The remainder were documented in China, the Democratic Republic of Congo, Iran, Nigeria, Pakistan, Saudi Arabia and Yemen.

<sup>35</sup>492 U.S.361; 109 S.Ct 2969 (1989) discussed in James and Cecil (as above) 292.

<sup>36</sup>James and Cecil (n 34 above) 292 citing the *ratio decidendi* of the majority judgement written by Justice Scalia as being that capital punishment of children (between 16 and 18 years old) constituted neither cruel and unusual punishment under the Eighth Amendment, nor did it violate the ‘evolving standards of decency that mark the progress of a maturing society’ (as per *Trop v Dulles* 356 U.S. 86 101 (1956)) since the Court could not establish the degree of national agreement necessary to label a punishment cruel and unusual. In this case, the Court relied on the evidence that of 37 United States’ federal States which permitted capital punishment, only 15 had resisted extending its applicability to 16 year olds while only 12 did so with regard to 17 year olds. The constitutionality of the death penalty was first decided in an earlier case by the Supreme Court, *Thompson v Oklahoma*, 475 US 815 (1988) where Justice Stevens writing for the majority had stated that there was an “evolving standard of decency” dictating the execution of offenders aged 15 and younger to be unconstitutional under the Eighth Amendment to the US Constitution. James and Cecil allude to the point that: “Nonetheless, unprecedented dissents in both these cases indicated that the juvenile death penalty should be re-examined at the earliest opportunity...” See James and Cecil (n 34 above) 292.

<sup>37</sup>112 S.W.3d 397 Mo., 2003, discussed in James and Cecil (n 34 above) 292-293 (describing this decision as ‘extra-ordinary’). The *Roper* case involved Christopher Simmons who was accused and found guilty of committing the offence of murder by tying up a woman while burglarizing her home. He then dumped her - still bound and alive - into a river. Christopher was 17 at the time of the crime.

therefore, prohibited by the US Constitution's Eighth Amendment ban on "cruel and unusual punishment".<sup>38</sup>

The State of Missouri appealed the decision of the Missouri Supreme Court to the US Supreme Court. This set the stage once more for the US Supreme Court to review the compatibility of juvenile death penalty with the Eighth Amendment. In March 2005, the United States Supreme Court affirmed the decision of the Missouri Supreme Court. In its decision in *Roper v. Simmons*<sup>39</sup> the US Supreme Court declared the juvenile death penalty unconstitutional. The Court held that:

"The age of 18 is the point where society draws the line for many purposes between childhood and adulthood...It is, we conclude, the age at which the line for death eligibility ought to rest."<sup>40</sup>



In the context of America's juvenile justice system, the decision means that:

"...the death penalty still applies to anyone aged 18 and older. But juries can no longer be asked to assess whether defendants who commit their crimes between the

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<sup>38</sup>James and Cecil (n 34 above) 292-293 (explaining that "in reaching its decision, the Missouri Court followed the approach taken by the US Supreme Court in the case *Atkins v Virginia*, 122 S.Ct. 2242 (2002), in which the US Supreme Court held, in June 2002, in a 6-3 vote, that a national consensus had evolved against the execution of those with mental retardation. Using *Atkins* as precedent, Missouri Court held that execution of persons below the age of eighteen years violated the Eighth Amendment prohibition on "cruel and unusual punishment". Similarly, in adopting this approach, the Missouri Supreme Court held that a national consensus had developed against execution of juvenile offenders").

<sup>39</sup>125 S.Ct. 1183 (2005), a decision in which the justices of the U S Supreme Court ruled 5-4.

<sup>40</sup>Justice Kennedy's judgment (for the majority) quoted in Richey, W "Juvenile Death Penalty Abolished" available at < <http://www.oijj.org/news> > (last accessed 2 March 2005) 1.



ages of 16 and 18 were mature and culpable enough at the time of the crime to warrant society's harshest punishment."<sup>41</sup>

It has been stated that the Supreme Court's decision was primarily based on the rationale that contemporary American 'evolving standards of decency' militated against retention of juvenile death penalty.<sup>42</sup> In addition, the court also relied on international law.<sup>43</sup>

Before the recent US Supreme Court's decision, Amnesty International pointed out that:

"The USA's near-total isolation on the issue of child offender executions was shown by the fact that China, Pakistan and Yemen had abolished this type of death penalty, that Democratic Republic of Congo has abolished the military court that permitted the execution of a 14-year-old in 2000, and that Iran's Parliament recently approved a law raising to 18 the minimum age for the imposition of the death penalty. Similarly, no child offenders are known to have been executed in Nigeria or Saudi Arabia in the past seven years. In March 2003 a Chinese newspaper reported the execution of an

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<sup>41</sup>Richey (as above) 1. For detailed discussions on the case, see Northover, J "The Final End of Juvenile Executions: *Roper v Simmons*" (2005) 12 *Amicus Journal* 5-7; Cooper, K "Evolving Standards of Decency: *Roper v Simmons* in Context" (2005) 12 *Amicus Journal* 21-27.

<sup>42</sup>Northover (as above) 6 points out that the majority decision noted that 30 States already prohibited the juvenile death penalty - 12 of these had rejected the death penalty altogether and 18 who although retaining the death penalty, nevertheless had already banned juvenile executions.

<sup>43</sup>According to Cooper (n 41 above) 26, 27, the "justices cited the existence of many relevant provisions in international law - in particular, noting the failure of the U.S to ratify the CRC, and pointing out that none of the countries that have ratified it have entered a reservation to the Article on the prohibition of the execution of juvenile offender. [However] the reasoning in the decision is not 'primarily' based on international law [but] rather the result of domestic legislative and public unease, which happen to coincide with international opinion".

18-year-old for an offence that occurred when the prisoner was 16 - an execution which contravened China's own laws."<sup>44</sup>

The Committee on the Rights of the Child (CROC) has raised the issue of juvenile death penalty with a number of State Parties through its Concluding Observations on State Reports. The Committee has emphasized that it is not enough that the death penalty is not applied to children.<sup>45</sup> Its prohibition must be confirmed by legislation.<sup>46</sup> The Committee has expressed concern in instances where Belgian law allowed for young persons between 16 and 18 years of age "to be tried as adults and thereby face the possibility of the imposition of a death sentence or a sentence of life imprisonment".<sup>47</sup> Further, in respect of China, where the national legislation permits the imposition of death sentences on persons aged 16 to 18, the Committee was of the opinion that such sentencing of children "constitutes cruel, inhuman or degrading treatment or punishment".<sup>48</sup> The Committee was also 'deeply concerned' about the fact that in Guatemala, the national legislation did not prohibit capital punishment.<sup>49</sup>

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<sup>44</sup>Amnesty International (n 34 above) adding that it is only these countries that permitted the imposition of the death penalty on juveniles after 1990.

<sup>45</sup>UNICEF, Hodgkin and Newell (n 24 above) 548.

<sup>46</sup>UNICEF, Hodgkin and Newell (n 24 above) 548.

<sup>47</sup>CROC, *Concluding Observations: Belgium*, CRC/C/15/Add.38, 20 June 1995 Para 11.

<sup>48</sup>CROC, *Concluding Observations: China*, CRC/C/15/Add.56, 07 June 1996 Para 21.

<sup>49</sup>CROC, *Concluding Observations: Guatemala*, CRC/C/15/Add.58, 07 June 1996 Para 15.

### 7.2.2.2 Life imprisonment without the possibility of parole

Article 37 (a) of the CRC prohibits the imposition of life imprisonment without the possibility of parole or release.<sup>50</sup> This prohibition accords with the principle limiting detention to the shortest period of time.<sup>51</sup> The Beijing Rules recommend that confinement shall be imposed only after careful consideration and for the shortest period possible.<sup>52</sup> The principle of detention as a last resort and for the shortest period of time would be violated if a prison sentence does not allow for the possibility of release or parole as it would be indefinite.

It has been argued that the prohibition upon sentencing children to life in prison without parole has reached the level of a norm of customary international law.<sup>53</sup> For a norm to be considered customary international law, the following elements must be satisfied: a) the norm must be concordantly adhered to by a number of states, b) it must be continuous over a considerable period of time, c) a conception must exist that the norm is required by international law, and d) there must exist general

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<sup>50</sup>CRC, Article 37 (a) provides that: “Neither capital punishment nor life imprisonment without the possibility of release shall be imposed for offences committed by persons below eighteen years of age.” The CRC is the only international human rights instrument which includes this provision, see Kurki (n 2 above) 356.

<sup>51</sup>CRC, Article 37(b) emphasizes that no child shall be deprived of his liberty arbitrarily and that imprisonment shall be a measure of last resort and for the shortest period possible.

<sup>52</sup>Beijing Rules, Rule 17.1(b). The Commentary to this rule considers custodial sentences punitive and indicates that “punitive approaches are not appropriate for juveniles and that the well-being and the future of the offender *always* outweigh retributive sanctions”, Beijing Rules Commentary to Rule 17.1(b).

<sup>53</sup>Human Rights Advocates (n 33 above) 7.

acquiescence in the norm by other states.<sup>54</sup> According to a recent study<sup>55</sup> the prohibition upon juvenile life imprisonment without parole fulfils these requirements on the grounds that:

“First....very few countries actually sentence juvenile offenders to life in prison without the possibility of release.<sup>56</sup> Further, of these countries, only one, the United States, does so on a massive scale.<sup>57</sup> Second, there is little evidence that this practice has been implemented in the past anywhere. In fact, in the United States, where more juvenile offenders are serving life sentences than anywhere else, the practice only began on a large scale in the 1990’s.<sup>58</sup> Third, the CRC prohibits life without parole as a sentence for juveniles. Since almost all nations are party to the CRC, it is clear that countries are acting out of a sense of obligation to the treaty. In addition, numerous other international instruments prohibit sentencing juveniles to prison forever and espouse the principle that incarceration for juveniles should be a measure of last

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<sup>54</sup>Human Rights Advocates (n 33 above) 7. See Brownlie, I (1990) *Principles of Public International Law* (4<sup>th</sup> edition) Oxford: Clarendon Press 4-11.

<sup>55</sup>Human Rights Advocates (n 33 above) 12.

<sup>56</sup>The study cites Israel, South Africa and the United States as the only examples where certain categories of children have actually been sentenced to prison without the possibility of parole. Reference to South Africa is only valid to the extent that children may be sentenced to life imprisonment. Generally, all South African prisoners sentenced to life imprisonment (including children) are however eligible for parole, see discussion in section 7.3.1 below. The study by Human Rights Advocates adds that “in several countries, the (theoretical) possibility of life imprisonment without parole for juvenile offenders exists, although apparently it is rarely imposed.”

<sup>57</sup>The study, points out at that “...It is estimated at least 2,000 juveniles are serving life sentences in the United States” and explains that “forty-one of the fifty three states in the United States, allow life sentences without the possibility of parole to be imposed on juveniles. Even first time (adult) offenders are often eligible for such sentences, as are juveniles who commit offences other than homicide...”, see Human Rights Advocates (n 33 above) 9-10 citing LaBelle, D (2004) *et al.*, “Second Chances: Juveniles Serving Life Without Parole in Michigan Prisons,” (unpublished paper) at 3.

<sup>58</sup>The study, notes that: “...The rise in numbers can be attributed to a legislative trend (between 1992 and 1995) creating procedures whereby juveniles can be tried as adults...” See Human Rights Advocates (n 33 above) 10.

resort and for the shortest period possible.<sup>59</sup> Fourth, based on the fact they very few countries incarcerate juveniles for life, it seems worldwide acquiescence in the ban exists...”<sup>60</sup>

The CROC has in its Concluding Observations on State Reports submitted to it, urged the repeal of domestic laws which authorise the imposition of the life imprisonment so as to ensure compliance with the CRC.<sup>61</sup> Further, in one of its recommendations of a general nature, the Committee:

“...urge[d] States Parties to repeal, as a matter of urgency, any legislation that allows the imposition of unacceptable sentences (death or life imprisonment) for offences committed before the age of 18, contrary to Article 37(a) of the Convention.”<sup>62</sup>



### 7.2.2.3 Judicial corporal punishment

The prohibition of corporal punishment as a sentence in juvenile justice system draws from the right of the child to be protected from torture or other cruel, inhuman or

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<sup>59</sup>Citing the Beijing Rules, Rule 17 (1) (b) in (n above); the Riyadh Guidelines to the effect that: “The institutionalization of young persons should be a measure of last resort and for the minimum necessary period, and the best interests of the young person should be of paramount importance.” Riyadh Guidelines, G.A. Resolution 45/112, 1990, at Para. 46; and the recommendation on the prohibition of life imprisonment issued by the UN Commission on Human Rights in 2004, see United Nations Commission on Human Rights Resolution 2004/43, “Human Rights in the Administration of Justice, in Particular Juvenile Justice,” E/CN.4/2004/43 at Para. 11.

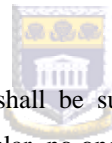
<sup>60</sup>Human Rights Advocates (n 33 above) 7-8.

<sup>61</sup>CROC, *Concluding Observations: Zimbabwe*, CRC/Add.55, 07 June 1996 Para 21 and China (n 48 above) Para 21.

<sup>62</sup>CROC, “Recommendations adopted during the Day of General Discussion on ‘Violence Against Children’”, in *Report on the twenty-fifth session*, September/October 2000, CRC/C/100, 130 cited in UNICEF, Hodgkin and Newell (n 24 above) 548.

degrading treatment or punishment. This right is provided for in Article 37(a) of the CRC and a host of other international human rights instruments.<sup>63</sup> In addition, Article 19 of the CRC provides for the right of the child to be protected against child abuse and neglect while in the care of parent(s), legal guardian(s) or other persons who have the care of the child.<sup>64</sup> The Beijing Rules are more direct, providing expressly that “juveniles shall not be subject to corporal punishment”.<sup>65</sup>

The Human Rights Committee in charge of monitoring the ICCPR has noted that the acts prohibited by Article 7 of the ICCPR (prohibiting torture, other cruel, inhuman and degrading treatment) are not defined in the ICCPR.<sup>66</sup> Moreover, the Committee did not consider it necessary “to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment”.<sup>67</sup> It was rather




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<sup>63</sup>ICCPR, Article 7 provides that: “No one shall be subjected to torture or to cruel, inhuman and degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.” Detrick (n 10 above) 622 explains that: “the CRC’s *travaux préparatoires* show that as Article 37(a) of the CRC is based on Article 7 of the ICCPR”. Regional general conventions on human rights also include this right; in particular, Article 17 of the African Charter on the Rights and Welfare of the Child; Article 5 of the African Charter on Human and Peoples’ Rights; Article 5(2) of the American Convention on Human Rights; and Article 3 of the European Convention on Human Rights. In addition, by its resolution of 39/46 of 10 December 1984, the UN General Assembly adopted the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, which entered into force on 26 June 1987.

<sup>64</sup>It is submitted that this brings into the reckoning juvenile justice authorities such as those in charge of custodial facilities. CRC, Article 28(2) imposes an obligation on States Parties to ensure that school discipline is administered in a manner consistent with the child’s human dignity and in conformity with the CRC.

<sup>65</sup>Beijing Rules, Rule 17(3); Rule 67 of the UN JDL Rules is also expressly prohibitive of corporal punishment.

<sup>66</sup>Human Rights Committee, *General Comment No. 20 Concerning Prohibition of Torture and Cruel Treatment or Punishment* (Forty-fourth session, 1992), reproduced in: UN Doc. HRI/GEN/1, 29-32, 30, Para 4 (discussed in Detrick (n 10 above) 622-625).

<sup>67</sup>Human Rights Committee (as above) Para 4.

of the view that the distinctions depend on the nature, purpose and severity of the treatment applied”.<sup>68</sup> The Committee has included corporal punishment (whether of adult or child offenders) within the ambit of the prohibited acts and identified children as a particular group of persons who are specifically protected by virtue of the prohibition. In the Committee’s words:

“[T]he prohibition must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure. It is appropriate to emphasize in this regard that Article 7 protects, in particular, children, pupils and patients in teaching and medical institutions.”<sup>69</sup>

Some debate ensues whether, in light of the above view of the Human Rights Committee (HRC), the prohibition on torture, or other cruel treatment or punishment under the ICCPR refers to chastisement of a child in a home or school, to corporal punishment *per se* or only to excessive chastisement in these settings.<sup>70</sup> Detrick points out that pending further clarification by the HRC, it is probably safe to assume the latter (the prohibition of excessive chastisement).<sup>71</sup> It is submitted however that such

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<sup>68</sup>Human Rights Committee (as above) Paras 4-5 adding that the prohibition relates not only to acts that cause physical pain but also to those that cause mental suffering to the victim.

<sup>69</sup>Human Rights Committee (as above) Para 5. The Committee against Torture which oversees the UN Convention against Torture (CAT) has noted that corporal punishment “could in itself constitute a violation of the Convention”, (see Report of the Committee against Torture, General Assembly Official Records, fiftieth session, Supplement No. 44, (A/50/44), Paras 169 and 177, cited in UNICEF, Hodgkin and Newell (n 24 above) 547).

<sup>70</sup>Detrick (n 10 above) 623 citing McGoldrick, D (1994) *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* Oxford: Clarendon Press 365. See also Joseph, S., Schulz, J., and Castan, M., (2004) *The International Covenant on Civil & Political Rights: Cases, Materials & Commentary* (2<sup>nd</sup> edn) Oxford/New York: Oxford University Press 148.

<sup>71</sup>Detrick (n 10 above) 623 citing McGoldrick (n 70 above) 365. In a recent analysis of the HRC’s work however, the HRC has expressed the view that corporal punishment (of any kind and nature) is

an assumption does not apply in relation to the corollary provision in the CRC. This is supported by the views of the Committee on the Rights of the Child (CROC).

Hodgkin and Newell explain that:

“The CROC has gone beyond condemnation of ‘excessive’ chastisement, and noted in its Concluding Observations on States’ Parties reports and in other comments that any corporal punishment of children, however light, is incompatible with the CRC.”<sup>72</sup>

As a result of the CROC’s interpretation it has been stated that under the CRC, “children’s physical integrity is absolute: any corporal punishment as a means of discipline, whether used in schools or the homes and whether considered mild, moderate, or severe, is prohibited”.<sup>73</sup> There is thus no doubt that the Human Rights Committee’s jurisprudence affirms a total prohibition on judicially-imposed corporal punishment.<sup>74</sup>



In the case of *Tyrer v United Kingdom*,<sup>75</sup> the European Court on Human Rights held that judicial corporal punishment in itself (regardless of its severity or forms of administration) is inherently degrading.<sup>76</sup> By the time this case came before the Court

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prohibited by the ICCPR, see Joseph, Schulz and Castan (n 70 above) 170 (citing the HRC *Concluding Observations: Cyprus* (1998) UN Doc CCPR/C/79/Add.88 Para 16).

<sup>72</sup>UNICEF, Hodgkin and Newell (n 24 above) 546 [underlining added].

<sup>73</sup>Kurki (n 2 above) 339-340.

<sup>74</sup>This draws from the fact that debate on the ambit of the ICCPR’s protection from cruel, inhuman and degrading punishment is exclusive to the gravity and nature of corporal punishment in the private settings of family and schools.

<sup>75</sup>Judgment of 25 April 1978, Series A, No. 26.

<sup>76</sup>In respect of corporal punishment in the home, the Court’s decision in the case of *A v UK* Application Number 25599/94, Judgment of 23 September 1998 is relevant. In this case, a young English boy, ‘A’ made an application to the European human rights machinery in Strasbourg (the European Commission



judicial corporal punishment was already abolished in Western Europe and the case therefore originated from the Isle of Man, an independent part of the United Kingdom with its own administrative government, judiciary and legislature.<sup>77</sup>

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and Court of Human Rights – amalgamated since 1995 into a single institution, the European Court of Human Rights). The boy had been beaten repeatedly by his stepfather with a garden cane. The stepfather was prosecuted in an English court, but used the common law defence of ‘reasonable chastisement’ (allowing for corporal punishment considered as reasonable disciplinary measure) and was found not guilty by the jury. The boy made an application to the European Court. Referring to the CRC, the Court found a violation of Article 3 which requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment. In the Court’s view, the ambit of Article 3 included ill-treatment administered by private individuals. Thus, “children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity”. The Court ordered the UK government to pay the child a specified amount of monetary damages as a result of the failure to provide him with ‘adequate protection’ in violation of Article 3. The Court’s decision was made easier by the UK’s government’s admission of responsibility and acknowledgement that English national law failed to protect children adequately. It is submitted that this decision implies an obligation on all States Parties to the European Convention to take legislative, administrative and other measures to outlaw the use of corporal punishment in the home. This contrasts with the Court’s earlier decisions in cases involving corporal punishment at State or private schools where the Court has held that in order to amount to cruel, inhuman degrading or humiliating treatment or punishment, corporal punishment must meet the ‘minimal level of severity’. See Kurki (n 2 above) 353 citing *Campbell and Cosans v United Kingdom*, Judgment of 25 February 1982, Series A, No. 48. Similarly the European Commission on Human Rights in *Warwick v United Kingdom* [1986], 60 DR 5 was of this view. In *Costello-Roberts v United Kingdom*, Judgment of 25 March 1993, Series A, No. 247-C, the Court did not find a violation of the Convention when the headmaster of a private boarding school whacked a 7 year-old boy three times through his shorts with a rubber-soled gym shoe. “Although there were some concerns about the automatic nature of the punishment and the three-day wait before its imposition, the Court held that the requirement of minimum level of severity was not met in this case”, see Kurki (n 2 above) 241. Most western European countries had by the time of these decisions abolished the use of corporal punishment in public schools. The United Kingdom, in respect of which these cases were brought, prohibited corporal punishment in public schools in 1986. The Committee on the Rights of the Child considers the ban on corporal punishment (whether in the home, justice system or school) absolute. Hence there should be no justifications or excuses since the CROC’s view does not envisage cases where corporal punishment could be declared as reasonable, see UNICEF, Hodgkin and Newell (n 24 above) 546.

<sup>77</sup>Van Bueren (n 7 above) 186 observes that judicial corporal punishment was abolished in England, Wales and Scotland in 1948 and in Northern Ireland in 1968.

The *Tyrer* case concerned a 15-year old boy sentenced to corporal punishment for assaulting his schoolmate. The sentence was administered in a police station where the boy was held by two policemen while a third gave him three strokes of birch on bare buttocks. After the birching, his skin was sore but not cut by the strokes. While the European Court held that the severity of punishment did not amount to torture or inhuman punishment, it issued a strong decision against any form of judicial corporal punishment due to the humiliation and degradation ‘inherent’ in this form of punishment. The Court was emphatic that judicial corporal punishment is institutionalized violence exercised by the state. As such, corporal punishment “treats a person as an object in the power of state authorities” and is thereby in violation of Article 3 of the European Convention which provides for a person’s right to dignity and physical integrity.<sup>78</sup>



### **7.3 Sentencing law and practice prior to the law reforms in the countries under study**

#### **7.3.1 Legal provisions on the imposition of custodial sentences for children prior to recent law reforms**

In Ghana, the Criminal Procedure Act 30 of 1960 (applicable to juvenile sentencing until the recent enactment of the Juvenile Justice Act, 2003 discussed in this thesis), provided that the sentence of imprisonment (including life imprisonment) should not be imposed on a person under 15 years or, in the case of a district or local court, 17

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<sup>78</sup>Kurki (n 2 above) 352.

years of age.<sup>79</sup> This law provided for the imposition of custodial sentences to be served in the industrial school or borstal institution for a maximum period of three years.<sup>80</sup> Imprisonment was, however, a competent sentence for 17-18 year old children.

The repealed Kenyan law authorized the committal of a child to an approved school (if the child was younger than fifteen years in age) or to a borstal institution (if the child was at least fifteen years old).<sup>81</sup> This law also provided for the committal of a child convicted of an offence to an adult prison (if the child was at least fifteen years old but under the age of eighteen years). By virtue of this provision, the imposition of imprisonment in general and life imprisonment, in particular, in respect of child offenders, remained a possibility under this repealed law.



Uganda's law prior to the Children's Statute of 1996 (discussed in this thesis) provided for the options of imprisonment of children convicted of crimes committed whilst they were under the age of 18 years. Under this law children found guilty of committing crimes could be sent to approved schools in Uganda if they were aged between 12 and 16 years old, and to the reformatory school, if they were aged between 17 and 21 years old. This was in addition to the possibility of imprisonment.<sup>82</sup>

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<sup>79</sup>Criminal Procedure Act 30 of 1960, section 314.

<sup>80</sup>Criminal Procedure Act 30 of 1960, sections 370-393.

<sup>81</sup>Children and Young Persons Act (repealed) section 17 (now repealed by the Children's Act, 2001 discussed in this thesis).

<sup>82</sup>CROC, *Uganda's Initial State Report to the CROC*, CRC/C/3/Add. 40, 17 June 1996 Paras 249 and 250. (Hereinafter, 'Uganda Initial Report').

No limitations are provided for in both the Namibian and South African Criminal Procedure Acts regarding the use of imprisonment, including life imprisonment as a sentence for children who commit offences whilst below the age of 18 years.<sup>83</sup> Indeed in relation to Namibia, some time in 1993, the High Court of Namibia considered the question of whether life imprisonment (for both child and adult offenders) is constitutional.<sup>84</sup> After a detailed analysis described “as taking into account international practices”, the Namibian court ruled that life imprisonment is not a violation of the Constitution.<sup>85</sup> Furthermore, the court took judicial notice of the fact that public and parliamentary debate would seem to indicate that the people of Namibia are in favour of allowing imprisonment for life in crimes of extreme gravity, particularly in the absence of the death penalty.<sup>86</sup> However, it should also be noted that under Namibian law, a sentence of life imprisonment is not mandatory but discretionary. Furthermore, all prisoners - including those sentenced to life imprisonment - are eligible for early release.<sup>87</sup> Although the possibility of such release puts life imprisonment out of scope of the prohibition in customary international law of life imprisonment without the possibility of parole,<sup>88</sup> it is submitted that the use of life imprisonment for children would still be contrary to the spirit of international children’s rights law.

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<sup>83</sup>South African Criminal Procedure Act 51 of 1977, section; CROC, *Namibia’s Initial State Report to the CROC*, CRC/C/3/Add.12, 22 January 1993 Para 122 (hereinafter ‘Namibia Initial Report’).

<sup>84</sup>Discussed in Namibia Initial State Report to CROC (as above) Para 122. The State Report does not provide the citation of this case.

<sup>85</sup> Namibia Initial Report (n 83 above) Para 122.

<sup>86</sup>Discussed in section 7.4.1, below.

<sup>87</sup>Namibia Initial Report (n 83 above), Para 122.

<sup>88</sup> Discussed in section 7.2.2.2, above.

The Criminal Procedure Act of 1977 (applicable in Namibia and South Africa) also provides for the referral of children to a reform school as a sentence in terms of section 290. A reform school sentence is generally imposed for a period of two years.<sup>89</sup> However, the Minister in charge of reform schools may extend the duration of such orders under section 291(2) of the Act, for periods not exceeding two years at a time, until the child reaches the age of 18 years. Further powers are conferred on the Minister to extend a child's stay in a reform school until the age of 21 years.<sup>90</sup> In relation to this power of the Minister, one author has correctly explained that:

“The exercise of this power can conceivably give rise to sentences which are in effect grossly disproportionate to the nature of the offence and to the blameworthiness of the offender...Although it has been argued that the possibility of effecting such extensions was placed on the statute book in order to ensure that the convicted child could complete his or her education (possibly a legitimate objective), the fact remains that children whose orders were or are so extended are regarded under international law as being deprived of their liberty, and the principle of proportionality therefore applies.”<sup>91</sup>

The current statutory child law of Lesotho pending the enactment of the Children's Bill (discussed in this thesis) is the most far reaching of the laws before the recent juvenile justice law reforms in the six countries under study. This law prohibits the

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<sup>89</sup> Criminal Procedure Act 51 of 1977, section 290(1).

<sup>90</sup> Criminal Procedure Act 51 of 1977, section 291(3).

<sup>91</sup> Sloth-Nielsen, J (2001) “The Role of International Law in Juvenile Justice Reform in South Africa” (Unpublished LL.D Thesis submitted to the University of the Western Cape) 381 (adding that a report, Inter-Ministerial Committee on Youth at Risk (1996) *In Whose Best Interests? A Report on Places of Safety, Schools of Industry and Reform Schools* “highlighted the frequent extension of orders by ministerial decree in the general child and youth care system [in South Africa]”).

imprisonment of children who commit offences whilst under the age of 18 years.<sup>92</sup> This prohibition of imprisonment in respect of children was confirmed by the decision of the Lesotho High Court in the 1995 case of *R v. Nozabalese 'Moso'*.<sup>93</sup> The accused in this case, a 15 year old girl, was charged and found guilty of the murder of her infant baby by the trial court. The Court imposed a sentence of imprisonment.<sup>94</sup>

On an appeal to the Lesotho High Court, counsel for the accused correctly argued that the girl could not be imprisoned as she was below the age of 18 years and as such was a child as defined by section 2 of the Children's Protection Act No. 6 of 1980. The High Court overturned the decision on sentencing by the court *a quo*. It held that the sentence of imprisonment was contrary to section 26 (1) of the Children's Protection Act which prohibited imprisonment as a sentence for child offenders. However, the appellate judge did not consider the social inquiry report tabled by counsel for the defence which recommended the sentence of community service to be imposed on the appellant.<sup>95</sup> The appellate judge then sentenced the accused to 'an indefinite period of detention' in the Juvenile Training Centre.<sup>96</sup>

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<sup>92</sup>The Children's Protection Act No. 6 of 1980 (as amended), section 26(1); section 2 provides for a definition of children as persons under the age of eighteen years.

<sup>93</sup>CRI/T/46/94, delivered by Justice G.N. Mofolo on 14 August 1995, Discussed in Committee on the Rights of the Child: *Lesotho's Initial State Report to the CROC*, CRC/C/11/Add.20, 20 July 1998, Annex. (Hereinafter, 'Lesotho Initial Report').

<sup>94</sup>The duration of the term of imprisonment is not clear from a discussion of the case in Lesotho Initial Report.

<sup>95</sup>Lesotho Initial Report (n 93 above) Annex.

<sup>96</sup>The government of Lesotho applauded this decision for upholding the prohibition in Lesotho's law of any form of imprisonment as a competent sentence for children, see Lesotho Initial Report (n 93 above) Para 228. It has also criticised this decision for its failure to give effect provisions in international and Lesotho's domestic law on deprivation of liberty as a last resort and for the shortest period of time. For the Lesotho Government's criticism, see Lesotho Initial Report (n 93 above) Para 228 thus: "The sentence in its nature has constituted a great departure from the Children's Protection Act and the CRC

### 7.3.2 Provision for a wide range of alternative sentences in the former laws

In addition to the options for custodial sentences discussed in the section above and corporal punishment (discussed in section 7.4, below), the laws of the countries under study were characterised (before the recent law reforms) by a wide variety of alternative sentences.

Special alternatives for the punishment of children convicted of committing offences whilst under the age of 18 were included in the juvenile justice laws of these countries prior to the recent law reforms. The laws of the countries under study prior to the recent law reforms were characterised by a wide range and variety of alternative sentences in line with the obligation in Article 40(4) of the CRC which calls for of a variety of alternatives to institutional care.<sup>97</sup>



Pending the enactment of the Child Justice Bill discussed in this thesis, the sentencing options applicable to child offenders in South Africa are contained in the Criminal Procedure Act.<sup>98</sup> The Act provides for a range of sentencing options (which are equally available for adults). These include such punishments as the imposition of a fine, a caution and reprimand, correctional supervision, and the postponement or suspension of sentence upon one or more conditions set out in the Act.<sup>99</sup> Conditions

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which prohibit the imposing of an indefinite period of detention on a minor in custody”. The imposition of an ‘indefinite’ period of detention also violates Lesotho’s Prisons Proclamation Act of 1957, section 9(2) of which provides that: “A person sentenced to detention in a juvenile training centre shall be detained for such period, not extending beyond three years after the date of his sentence.”

<sup>97</sup>See section 7.2.1, above.

<sup>98</sup>Criminal Procedure Act 51 of 1977, section 297.

<sup>99</sup>Criminal Procedure Act 51 of 1977, section 297(1) (a) or 297(1) (b).

of postponement or suspension of sentence may include the performance of community service, attendance at a programme, restitution, submission to supervision, and submission to instruction or treatment.

The above sentencing options and alternatives apply in the Namibian criminal justice system by virtue of the premise that the same Act, the Criminal Procedure Act (1977) applies in Namibia (with a few amendments to the Act in 1991).<sup>100</sup> These sentencing options will apply until the enactment of the Namibian Child Justice Bill.

Prior to the enactment of the Kenyan Act (2001), the law provided for a variety of correctional measures, including alternatives to institutional care.<sup>101</sup> The juvenile court was authorized to dispose of a case by ordering: release or repatriation to a parent or guardian, committal to the care of a fit person or an approved voluntary institution, placement under the supervision of an approved officer or a children's officer, committal to an approved school, and payment of a fine or compensation.<sup>102</sup> In addition, the options of probation and community service were and are still available for both child and adult offenders.<sup>103</sup>

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<sup>100</sup>Namibia Initial Report (n 83 above) Paras 437 and 438 (Lists the alternative sentences revealing a similar list to the options provided under the South African Criminal Procedure Act).

<sup>101</sup>The Children and Young Persons Act, Chapter 141 Laws of Kenya (now repealed by the Children's Act of 2001 discussed in this thesis).

<sup>102</sup>The Children and Young Persons Act (as above) section 17.

<sup>103</sup>Under the Probation of Offenders Act, (1962, revised 1982) Chapter 64 Laws of Kenya and The Community Services Orders Act No. 10 (1998). Both of these laws were not repealed by the Children's Act and are therefore still applicable.



The law of Ghana prior to the Juvenile Justice Act (2003) was similarly characterised by a range of alternative sanctions within the juvenile justice system.<sup>104</sup>

In the Lesotho, pending the enactment of the Lesotho Bill discussed in this thesis, alternatives to custodial sentences for children are authorized under the Children's Protection Act (1980) and the Criminal Procedure and Evidence Act (1981).<sup>105</sup> The range of options provided for include suspended sentences, the discharge or release of a child on his or her or parents' recognisance, probation orders and fines.<sup>106</sup>

It is submitted in relation to the foregoing examples that there seemed to have been far more compliance with international law precepts on the need for a wide range of dispositions for children convicted of crimes than was the case with other juvenile justice issues.<sup>107</sup>



### **7.3.3 Sentencing and alternative sentencing practices in the countries under study prior to juvenile justice reforms**

In limited instances, courts in these countries have invoked the scope accorded by the alternative sentences provided for in the laws which predate recent juvenile justice

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<sup>104</sup>Defence for Children International (2003) *Kids Behind Bars: A Study on Children in Conflict with the Law - Towards Investing in Prevention, Stopping Incarceration and Meeting International Standards* Geneva: Defence for Children International 34 (listing these as having included, orders for compensation to victims, ordering the parents to guarantee the juvenile's good behaviour and entering into recognisance).

<sup>105</sup> Lesotho Initial Report (n 93 above) Para 228.

<sup>106</sup> Lesotho Initial Report (n 93 above) Para 228.

<sup>107</sup>Such as diversion and separate juvenile justice systems (which were not characterised by comprehensive legal provisions and practice) as was discussed in Chapters 5 and 6 respectively.

law reforms. In respect of South Africa, it has been pointed out that the referral of convicted children to diversion programmes as a condition for the postponement or suspension of custodial sentences has become a valuable alternative sentence in recent years.<sup>108</sup> This is especially in light of the abolition of the sentence of corporal punishment which was the most widely used sentence for children before its abolition in 1995.<sup>109</sup>

In Uganda, the government's Initial State Report to the CROC records that research conducted in early 1990s in relation to juvenile sentencing revealed that:

“The courts, with the advice of Probation and Welfare Officers, are increasingly using non-custodial dispositions. Research established that of the 129 children who were found guilty of crimes [in Kampala's juvenile court] and sentenced, 30 per cent were placed on probation, 25.6 per cent were cautioned, 15.5 per cent were caned, 14 per cent were sent into custody and 12.4 per cent fined. Community options were used in 86 per cent of the cases...”<sup>110</sup>

In Lesotho, record is made of the increased use of probation as a sentence for children from early to mid-1990s.<sup>111</sup> It has therefore been pointed out that Lesotho's Probation Unit, which administers probation orders, “in its effort to promote the use of non-

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<sup>108</sup>South African Law Reform Commission (2000) *Report on Juvenile Justice* Para 10.14 (adding that this has been concomitant with the development of diversion programmes since 1992). The practice of diversion in South Africa was discussed in Chapter 5, section 5.6.2.

<sup>109</sup>Discussed in section 7.4.2, below.

<sup>110</sup>Uganda Initial Report (n 82 above) Para 243.

<sup>111</sup>Lesotho Initial Report (n 93 above) Para 229 (pointing out that “the Probation Unit which has been administering supervision orders has reported a rise in the use of such orders. In 1992 the Unit handled 25 cases, in 1993, 210 cases and in the first half of 1994, 84 cases.”).

custodial forms of sentencing, in line with the Beijing Rules, has been greatly encouraged that magistrates are increasingly using non-custodial forms of sentence for juvenile offenders”. The vast majority of the cases were for minor offences.<sup>112</sup>

In respect of Kenya, one study conducted in 1998 on sentencing trends in Nairobi’s juvenile court records that among the ‘most common disposal methods in criminal cases involving children were: repatriation of the child to his or her home; discharging the child or withdrawing the case; placing the child in the care of relatives or guardians; sentencing the child to corporal punishment and the imposition of fines.<sup>113</sup> The continued limited use of these alternative sentences has been confirmed by a more recent study conducted in 2004.<sup>114</sup>

However, the overall trends in these countries show that the use of the wide range of alternative sentences provided for was not maximized. Courts in these countries have also tended to rely on custodial sentences involving institutionalisation of children in prison or in residential facilities.<sup>115</sup>

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<sup>112</sup>Lesotho Initial Report (n 93 above) Para 229.

<sup>113</sup>African Network for the Prevention and Protection against Child Abuse and Neglect (ANPPCAN)-Kenya (1998) *Children in the Dock: A Situational Analysis of the Juvenile Justice System in Kenya*, Nairobi: ANPPCAN 26 (hereinafter ANNPCAN Situational Analysis). According to the study the most used disposal method was orders for the repatriation of children to their homes. This disposal method was used in up to 40% of the 920 cases for which court records were available. That it was the most used method for resolving cases highlights the fact that majority of the cases were child protection and care cases rather than cases of child offending.

<sup>114</sup>CRADLE, Undugu Society and the Consortium for Street Children (2004) *Street Children and Juvenile Justice in Kenya* London: The Consortium for Street Children 26.

<sup>115</sup>Despite the existence of a range of alternative sentences as discussed in section 7.3.2, above.

The past practice in Ghana was that children would be sentenced to serve any custodial sentences at child-specific residential facilities where it was expected that they would undertake rehabilitation and education programmes.<sup>116</sup> However, the negative aspect of these sentences was that, often, they were not proportional to the gravity and circumstances of the offence in respect of which they were imposed. Ghana's Initial Report to the Committee on the Rights of the Child observed in this regard that:

“The juvenile in conflict with the law may also be committed to a borstal institution or industrial school where facilities are available for education, counselling and reformation. In this case, the juvenile is detained for three years. Release in less than three years is by executive review. In terms of justice, this may mean that a juvenile receives a longer sentence than he would if he were an adult. This has led to some juveniles claiming to be adults (so as to avoid sentences to borstals and industrial schools)...”<sup>117</sup>

In Namibia, resort by courts to imprisonment as a first option is frequent. This has been attributed to the shortage of probation officers in Namibia which has had the consequence that pre-sentence reports (detailing the circumstances of the child) “are often not as thorough or as strongly motivated as they might be, leaving the courts without clear guidance in many cases”.<sup>118</sup> In one analysis of a random selection of

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<sup>116</sup>CROC, *Ghana's Initial State Report to the CROC*, CRC/C/3/Add.39 19 November 1995 Para 130 (hereinafter ‘Ghana Initial Report’).

<sup>117</sup>Ghana Initial Report (as above) Para 130.

<sup>118</sup>Namibia Initial Report (n above) Para 444. Schulz and Hamutenya (2004) “Juvenile Justice in Namibia: Law Reform Towards Reconciliation and Restorative Justice? (Unpublished paper on file) 18 (adds that this is also due to ‘the fact that the presiding officers, prosecutors, and, if the child is legally represented, the defence lawyer are not trained, and have no pedagogic background’).

cases, which were dealt with at the Windhoek Magistrate's Court from 1995-1997 it was brought to light that in many instances "there was no correlation between offence committed and the [custodial] sentence imposed".<sup>119</sup> The limited use of alternative sentences has also been explained in the fact that before the abolition of corporal punishment by the Supreme Court of Namibia (as discussed in section 7.4.2, below), judicially imposed whipping was the predominant sentence in respect of most juveniles.<sup>120</sup> Since the abolition in 1991, the problem has been that:

"...Appropriate alternatives to imprisonment for juveniles (such as community-service programmes and special youth facilities) have not yet been sufficiently developed."<sup>121</sup>

Further, whenever courts resort to custodial sentences, these are most likely to be served in prisons due to the fact that child-specific residential facilities were (and are) almost non-existent in Namibia.<sup>122</sup>

In regard to the sentencing practice in Kenya, a 1995 report issued by ANNPCAN, a child rights NGO in Kenya, has stated that:

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<sup>119</sup>Schulz and Hamutenya (as above) 18 (quoting Super, G (1999) *Juvenile Justice in Namibia - A Discussion Document* Windhoek: Inter-Ministerial Committee on Juvenile Justice 58).

<sup>120</sup>Namibia Initial Report (n 83 above) Para 439.

<sup>121</sup>Namibia Initial Report n 83 above) 439.

<sup>122</sup>Namibia Initial Report (n 83 above) Para 442 (documenting the lack of child specific facilities in the following words: "There are no reform schools in Namibia, and only one 'school of industry' to which juvenile offenders can be assigned for training and supervision (the Otjizondo School of Industries for boys). The Report adds that prior to independence (in 1990), South African criminal facilities were utilized for juvenile offenders from Namibia and the development of similar facilities in Namibia was neglected.").

“Whereas [Kenyan] law provides for a whole range of penalties for children convicted of offences, the magistrates tend to overuse the penalty of institutionalization by sending the [child] offenders to approved schools and borstal institutions. These schools are few in number and offer conditions that are not always conducive to the rehabilitation of children. The schools were set up with the aim of rehabilitating the children back to normal social life, but they are to be run on principles that have little room for the welfare of the child and as a result they have failed to rehabilitate a large number of children admitted there. Indeed, some of the children are said to have run away from those schools and back to the streets where they feel safer.”<sup>123</sup>

The observation on the overuse of institutionalization as a sentence for children was documented by the Kenyan government in its Initial Report to the CROC and was most recently confirmed by a study conducted by three NGOs in 2004.<sup>124</sup> The government’s Initial Report to the CROC attributes this to “many factors which include the inadequacy of pre-sentencing reports by social workers”.<sup>125</sup> The study by NGOs further notes the effect of the over-reliance by courts on institutionalisation as follows:

“The end result is that the vast majority of children in conflict with the law are sentenced to periods of custody within these institutions (remand homes, approved schools and borstal institutions), giving the impression that Kenya has a significant

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<sup>123</sup> ANNPCAN-Kenya (1995) *Hearing on Street Children in Kenya* Nairobi: ANNPCAN-Kenya 34.

<sup>124</sup> CROC Kenya’s *Initial State Report to the CROC*, CRC/C/3/Add.62, 16 February 2001, Para 492. (Hereinafter, ‘Kenya Initial Report’), CRADLE, Undugu Society and the Consortium for Street Children (n 114 above) 28.

<sup>125</sup> Kenya Initial Report (n 124 above) Para 492.

problem of juvenile crime, when in fact court convictions specify as few as 15% of children as actually having committed a criminal offence.”<sup>126</sup>

Further, the child-specific residential facilities for children in conflict with the law in Kenya are still few. This has inevitably led to the incarceration of children together with adults in prison.<sup>127</sup> The Kenyan government admitted in its Initial Report to the CROC that this practice “violates the spirit of the CRC and calls for the use of non-institutional community options...”<sup>128</sup>

Although Lesotho’s current statutory child law includes a total prohibition upon imprisonment,<sup>129</sup> instances have been recorded where trial magistrates or presiding officers sentence juvenile offenders to imprisonment.<sup>130</sup> In addition, as a result of the prohibition on imprisonment, custodial sentences imposed on children entail referrals to the only child-specific residential facility in Lesotho, the Juvenile Training Centre in Maseru.<sup>131</sup> By the government’s own admission, the practice in this facility reveals that:

“...Juvenile offenders are treated like prisoners, in that they are not offered rehabilitation programmes. The Juvenile Training Centre in which they are detained does not operate as a training and rehabilitation centre, but mainly as a prison or detention centre.”<sup>132</sup>

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<sup>126</sup> CRADLE, Undugu Society and the Consortium for Street Children (n 114 above) 28.

<sup>127</sup> Kenya Initial Report (n 124 above) Para 499.

<sup>128</sup> Kenya Initial Report (n 124 above) Paras 492, 499.

<sup>129</sup> Discussed in section 7.3.1, above.

<sup>130</sup> Lesotho Initial Report (n 93 above) Para 228.

<sup>131</sup> Lesotho Initial Report (n 93 above) Para 112.

<sup>132</sup> Lesotho Initial Report (n 93 above) Para 108.

The Juvenile Training Centre is only dedicated to male children, with the effect that any female children on whom a custodial sentence is imposed would serve such a sentence in a female prison. The female prison does not have separate facilities for juveniles. Intermingling of juvenile offenders with the adult female inmates is therefore inevitable.<sup>133</sup>

In Uganda, children have often been sentenced in the past to a term of imprisonment in adult prisons. They were also often detained in prisons for petty offences. The resort to imprisonment was partly blamed on a lack of knowledge (training) on the part of trial magistrates. A further reason was a dearth of residential facilities specifically designated for children. The government's Initial State Report documented that although child-specific residential facilities should be favoured rather than prison in respect of children, there were only three facilities in the whole country.<sup>134</sup>



The number of referrals of children to reform schools in South Africa has been on the wane in the latter part of 1990s to date, partly on account of the publicity of research which has exposed poor conditions and the lack of treatment programmes in these institutions.<sup>135</sup> The sentence of a referral of child to a reform school has also been

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<sup>133</sup>Lesotho Initial Report (n 93 above) Para 112.

<sup>134</sup>Uganda Initial Report (n 82 above) Paras 249 and 250 (noting that under the former law, children found guilty of committing crimes could be sent to the two approved schools in Uganda if they were aged between 12 and 16 years old and, to the only one reformatory school available at the time, if they were aged between 17 and 21 years old).

<sup>135</sup>Relevant in this regard is the study conducted in 1996 by the Inter-Ministerial Committee on Young People at Risk (n 91 above) generally documenting these constraints and the failure of child specific residential facilities - reform schools, places of safety and schools of industry - to comply with both South African domestic standards and international standards on the treatment of children deprived of



characterised as a “drastic measure which leads to the detention of the child for a substantial period of time and exposure of the child to other child offenders who may exhibit even worse anti-social behaviour than the child himself or herself”.<sup>136</sup>

As at 2000, some of the nine reform schools in South Africa were reported to have closed. Others were undergoing the process of transformation to “become educational rather than correctional institutions”.<sup>137</sup> Further there has been a dearth and geographical disparity in the situation of reform schools.<sup>138</sup> In one South African case, the court overturned the sentence of two girls who had been referred to a reform school.<sup>139</sup> The court’s decision was motivated by the fact that no such facility existed for girls in the province in which the two children lived. Upon sentencing they had consequently been held in prison for almost two years awaiting the designation of an appropriate facility since the other provinces had refused them admission to provincially administered facilities. It is submitted that this decision is of comparative relevance for the five other countries reviewed in this thesis. This is due to the similarity on the inadequacy of child-specific facilities in the other countries as was discussed in this earlier in this section.

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their liberty. The increased use of diversion (discussed in Chapter 5, section 5.6.2) is yet another reason that can be cited for the decreased use of reform schools.

<sup>136</sup>South African Law Commission (2000) *Report on Juvenile Justice* (n 108 above) Para 10.8 (citing judicial precedent for this view in *S v M* 1998 (1) SACR 384 (C)).

<sup>137</sup>“The Reform of Schools: An Interview with Minister Helen Zille” (2000) 2 (1) *Article 40* 4.

<sup>138</sup>Six of the nine reform schools are located in one of South Africa’s nine provinces.

<sup>139</sup>*S v Mtshali and Mokgopadi* Case A 863/99 WLD (Unreported), discussed in *Article 40* (1999) 1(3) 1-2.

On the other hand, there has been a clear trend towards an over-reliance on imprisonment as a sentence for children by South African criminal courts even for non-violent and economic crimes.<sup>140</sup>

As at 1997, South African statistics showed that there was a daily average of almost 1 400 children under the age of 18 serving sentences of imprisonment. This average had increased from approximately 600 in 1994.<sup>141</sup> At the time, figures from the South African Department of Correctional Services (in charge of prisons) reflecting the number of children in prison on a single day, showed a 51,9% increase in the number of children sentenced to terms of imprisonment from 896 in July 1996 to 1361 in September 1997. Almost half (48%) were serving sentences for economic offences.<sup>142</sup>

Although the number of children in prison declined from 1997 to 1998, it increased again rapidly from 1998 to 1999 and by September 1999 there were 34.3% more sentenced children in prison than in October of the previous year. Subsequent statistics showed an increase of 26.3% from October 1997 to September 2000.<sup>143</sup>

Between the years 2000-2003, there was a rapid rise in the number of South African children in prison.<sup>144</sup> Writing in 2005, Muntingh records that “from 1995 until the end

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<sup>140</sup>Community Law Centre (1998) *Children in Prison in South Africa: A Situational Analysis* Bellville: Community Law Centre 5, 73 and 74.

<sup>141</sup>South African Law Commission (1997 *Discussion Paper No 79 on Juvenile Justice* Para 11.12 (citing information from the South African Department of Correctional Services).

<sup>142</sup> South African Law Commission *Discussion Paper on Juvenile Justice* (n 141 above) Para 11.12.

<sup>143</sup>Sloth-Nielsen, J and Muntingh, L “Juvenile Justice Review 1999-2000” (2001) *South African Journal of Criminal Justice* 384-403, 394-396.

<sup>144</sup>See Muntingh, L.M “Statistics: Children Sentenced to Imprisonment” (2000) 2 *Article 40* 6.

of 2003, it looked as if the growth in the number of children in South African prisons, both sentenced and unsentenced, was unstoppable”.<sup>145</sup>

The discussion in this section leads to the conclusion that although the past laws of the countries under study contained a wide variety of alternative sentences in line with the precepts of international law, the practice in these countries reveals an over-reliance on custodial sentences. With the exception of South Africa (where sentencing practices show a disinclination to use reform schools) and Namibia (where such facilities are almost non-existent), the five other countries demonstrate the over-use of residential facilities which also remain inadequate. Such has been this over-reliance that even in the case of Lesotho where the current statutory child law totally prohibits imprisonment, children (and girl children in particular) are still referred to serve custodial sentences in prisons. It is submitted that discussions of the practice in the countries under study in this section therefore highlight the non-compliance with the restriction on deprivation of liberty (to be a last resort) under international children's rights law. This is despite the vast array of alternative sentences in the laws prior to recent juvenile justice law reforms.

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<sup>145</sup>Muntingh, L, “Children in Prison: Some Good News, Some Bad News and Some Questions” (2005) 7(2) *Article 40* 8 pointing out that from 2004 up and until February 2005 (in respect of which the latest figures were available), the trend shows gradual decline in the numbers of children sent to prison (to await trial or to serve custodial sentences. This may partly attributed to the steady growth of the use of diversion in South Africa, as was discussed in Chapter 5, section 5.6.2.

### 7.3.4 The lack of a sentencing policy for the imposition of custodial sentences in the countries under study

In all the six countries under study there was no distinct approach (a different policy from the sentencing of adults) to child sentencing in relation to custodial sentences.<sup>146</sup>

Therefore, no limits were placed on the power of sentencing officers to impose custodial sentences in these countries. The fact of youth was only used as a mitigating factor in custodial sentencing. For South Africa, it was specifically pointed out in this regard that until the recent juvenile justice law reform process (leading to the Child Justice Bill), “there has been no distinctive approach to child sentencing”.<sup>147</sup>

However, as a general principle, children are sentenced more leniently than adults are.<sup>148</sup> Similarly, under Namibian common law, youth is considered a mitigating




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<sup>146</sup>Ghana Initial Report (n 116 above) Para 130, Lesotho Initial Report (n 93 above) Para 228, Namibia Initial Report (n 83 above) Para 437, Kenya Initial Report (n 124 above) Paras 223-229, South African Law Commission *Discussion Paper on Juvenile Justice* (n 141 above) Para 11.10, Uganda Initial Report (n 82 above) Para 250. This is the situation even in Lesotho’s where imprisonment is currently prohibited for children. Custodial sentences to be served in the country’s ‘Juvenile Training Centre’ involve deprivation of liberty (some times for indefinite periods) and in practice some judicial officers nevertheless sentenced children to prison. The same extends to the past law and practice in Ghana which shows that custodial sentences were permissible and could be served in residential facilities (for children below the age of 17 years) and prison (for 17-18 year olds).

<sup>147</sup>South African Law Commission *Discussion Paper on Juvenile Justice* (n 141 above) Para 11.10. Similarly in Uganda, it has been pointed out that, “the pre-1996 cases (before enactment of Children Statute) indicate that the weight given to the age of an accused person is similar to that given to other factors either personal to the accused or surrounding the commission of the crime. Factors which courts take as relevant in mitigation in cases where the offenders are adults are the same factors which seem to guide court officials in arriving at decisions where the offenders are children”, Ekirikubinza, L.T, “Juvenile Justice and the Law in Uganda: Operationalisation of the Children Statute” in Bainhaim, A and Rwezaura, B (eds) (2005) *The International Survey of Family Law 2005 Edition* Bristol: Jordan Publishing 520.

<sup>148</sup>South African Law Commission *Discussion Paper on Juvenile Justice* (n 141 above) Para 11.10 (citing Geldenhuys, T and Joubert, G (1994) *Criminal Procedure Handbook* Cape Town: Juta 1994).

factor when a court considers the question of sentencing following a criminal conviction.<sup>149</sup>

It is submitted that the absence of a distinctive approach to child sentencing in the laws of these countries implied a failure on the part of the countries under study to comply with obligations under the CRC in relation to sentencing. These obligations relate to the aims of juvenile justice and the principles that should underpin sentencing, as discussed in the first section of this Chapter.<sup>150</sup>

In South Africa, the lack of a sentencing policy in respect of children has been ameliorated to a considerable extent by the inclusion of a children's rights clause derived from the provisions of the CRC in the South African Constitution of 1996.<sup>151</sup>

Relevant to the subject of sentencing is the inclusion in the children's rights clause of the best interests of the child principle, and the principles that detention must be used as a last resort and for the shortest period of time only.<sup>152</sup> In addition, the children's rights clause refers to the relevance to children of other provisions of the Bill of Rights, including the right to be protected from cruel, inhuman and degrading

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<sup>149</sup>Namibia Initial Report (n 83 above) Para 437.

<sup>150</sup>Section 7.2.1, above.

<sup>151</sup>The inclusion of a children's rights clause (section 28 of the Constitution) and the content of this provision was discussed in Chapter 3, section 3.5.3.2. Although the Constitutions of Ghana (1992), Namibia (1990) and Uganda (1995) contain child rights clauses (see Chapter 3, sections 3.3), these do not include principles restricting the use of detention (as a last resort and for the shortest period of time). The current Lesotho Constitution (1993 as amended) and Kenyan Constitutions (1969 as amended) do not include children's rights clauses. The proposed Draft Kenyan Constitution (2005) however contains an elaborate children's rights clause in its section 40 (set out in Chapter 3 section 3.5.2.6) which includes the best interests of the child principle and the provision restricting the use of detention as a last resort and for the shortest period of time.

<sup>152</sup>South African Constitution (1996), section 28(1) (g) and (2). These provisions are similar to the CRC provisions in Articles 3 and 37(b), discussed in section 7.2.1, above.

treatment or punishment.<sup>153</sup> The relevance of the South African Constitution is discussed further in the next sub-section.

### **7.3.5 South African judicial responses to the lack of a child sentencing policy in the aftermath of the 1996 Constitution**

The subsequent interpretation of constitutional rights and principles by South African courts has had far-reaching effect on the policy that should guide courts in the sentencing of children. The right not to be treated or punished in a cruel, inhuman and degrading way provided a basis for the South African Constitutional Court's decision which abolished judicial corporal punishment for children convicted of crimes.<sup>154</sup>

The provisions which constitutionalise the principles of the best interests of the child and include the restrictions on detention have influenced court decisions regarding the use of imprisonment for children who commit offences whilst below the age of 18 years. The South African High Court's decision in *S v Kwalase*<sup>155</sup> is a case in point.

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<sup>153</sup>South African Constitution, section 28(1) (g) referring in part to section 12(1) on the right not to be treated or punished in a cruel, inhuman or degrading way.

<sup>154</sup>Discussed in section 7.4.2, below.

<sup>155</sup>2000 (2) SACR 135 (C). An earlier case was the case of *S v Z* 1999 (1) SACR 427 (ECD), although this case did not directly refer to international or constitutional law principles relevant for juvenile sentencing. It has nevertheless been characterised as important to juvenile sentencing policy in South Africa since it complies with the principles of CRC and international juvenile justice instruments. See Madotyeni, Z "Setting Sentencing Standards" (1999) 2 *Article 40* 1-2. Madotyeni further points that this case emphasizes "the principle that imprisonment for youthful offenders should be avoided altogether where possible. Further, the younger the accused, the less appropriate will imprisonment be; imprisonment is inappropriate for first [child] offenders and short term imprisonment is rarely appropriate. Where direct imprisonment would not be appropriate, nor would a suspended sentence of imprisonment be appropriate. Thus, the correct approach is first to determine a suitable sentence, and then only to consider the possibility of suspension".

This case involved a review of a sentence of imprisonment imposed on a juvenile for an offence committed when he was 15 years of age. The Court made reference to the necessity of bearing in mind the “post-constitutional and international legal dispensation in South Africa...in the determination of appropriate sentences for youthful offenders”. The judgment specifically alluded not only to Article 37(b) of CRC (providing for the use of detention as a last resort) but also Article 40(1) of CRC which emphasizes the aims of juvenile justice policy,<sup>156</sup> and other international juvenile justice instruments.<sup>157</sup> The court held that:

“...The judicial approach towards the sentencing of juvenile offenders must therefore be re-appraised and developed in order to promote an individualised response which is not only in proportion to the nature and gravity of the offence and the needs of society, but which is also appropriate to the needs and interests of the juvenile offender. If at all possible, the judicial officer must structure the punishment in such a way as to promote the reintegration of the juvenile concerned into his or her family and community”.<sup>158</sup>

The court was further clear that custodial sentences should only be used as a last resort. Further mention was made by the court to the effect that pre-sentence reports should be mandatory before the imposition of such sentences.<sup>159</sup> The court ultimately

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<sup>156</sup>Discussed in section 7.2.1, above.

<sup>157</sup>At Para 138 (g)-139 (b) referring to the Beijing Rules, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty and the UN Riyadh Guidelines.

<sup>158</sup>*S v Kwalase* (n 155 above) 139(e) - (i).

<sup>159</sup>The court referred to the Beijing Rules, Rule 16 which requires reliance on pre-sentence reports in all criminal cases involving children (except minor cases). This has been reiterated in recent South African law, including, *S v D* 1999 (1) SACR 122 (NC), discussed in (1999) 1 *Article 40* 7 and *S v J and Others* 2000 (2) SACR 384 (C) and more recent case law discussed further in section 7.5.5, below.

ordered the replacement of the sentence that had been imposed in respect of the child with a shorter term sentence which could be converted into correctional supervision, which is a community-based sentence.

The influence of international children's law standards limiting the use of imprisonment as a sentence for children in South Africa has also been demonstrated through the exclusion of children from the full application of minimum sentence legislation.<sup>160</sup> The original proposal of this legislation included all offenders under the age of 18 years within its scope. It is only after submissions during the public hearings on this original proposal that the legislation's ambit was defined to totally exclude children under the age of 16 years and include a heightened test in order to justify the application of mandatory minimum sentence in respect of children aged 16 and 17 years.<sup>161</sup> In relation to adults (persons over 18 years of age), this legislation places the burden of proving that the prescribed minimum sentences should not apply on the accused person (to show that substantial and compelling reasons exists to justify deviation from the minimum sentence). In contrast, in respect of children to whom the legislation applies (16 and 17 year olds), the burden of proof rests on the State

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<sup>160</sup>The Criminal Law Amendment Act 105 of 1997, which first came into operation from 1 May 1998 (and whose continued operation has been through two subsequent Parliamentary approvals). It was introduced as a reaction to the public concern towards rising crime rates especially in respect of serious violent crimes in South Africa. This legislation has recently been comprehensively discussed in Isaacs, A (2004) "The Challenges Posed by Minimum Sentence Legislation in South Africa and Recommendations for Improved Implementation" (Unpublished LL.M Dissertation submitted to the University of the Western Cape). See also Terblanche (n 28 above) 194-220. The judicial decisions interpreting the application of this legislation to children are discussed in the discussions that follow in this sub-section.

<sup>161</sup>Skelton, A "Juvenile Justice Reform: Children's Rights and Responsibilities versus Crime Control" in Davel, C.J (1999) *Children's Rights in a Transitional Society* Pretoria: Protea Book House 102.



(prosecution) which must provide evidence to show why prescribed sentences should not be applied.<sup>162</sup>

The recent South African case of *Brandt v S*<sup>163</sup> involved the imposition of a sentence of life imprisonment (in terms of the minimum sentence legislation) on a 17-year old child who had been tried and found guilty of committing murdering a defenceless elderly neighbour.<sup>164</sup>

Following precedent in two earlier cases,<sup>165</sup> the Supreme Court held that the fact that an accused person was below 18 years of age but over 16 years of age at the time of the offence “automatically confers discretion on the sentencing court which is then free to depart from the prescribed minimum (in this case life imprisonment) and to impose sentence in accordance with ordinary sentencing criteria”.<sup>166</sup> The Court referred to the provisions of section 28 of the Constitution, the CRC, the African Charter on the Rights and Welfare of the Child and international juvenile justice instruments to conclude that the rules and guidelines set out in these instruments laid the foundation for juvenile justice to be (newly) approached from a children’s rights perspective.<sup>167</sup> The Court specifically cited the relevance to juvenile sentencing of the

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<sup>162</sup>The Criminal Law Amendment Act 105 of 1997, section 51(3) (a).

<sup>163</sup>[2005] 2 ALL SA 1 (SCA), discussed in “Do Minimum Sentences Apply to Juveniles? The Supreme Court of Appeal Rules ‘No’ ” (2005) 1 *Article 40* 1-2.

<sup>164</sup>In terms of section 51(3) (a) of the minimum sentence legislation (cited in n 160 above), the Court found that no substantial and compelling circumstances existed to justify the imposition of a lesser sentence.

<sup>165</sup>*S v Nkosi* (2002) (1) SACR 135 (W)) and *S v Blaauw* (2001) (2) SACR 255 (C).

<sup>166</sup>Per Ponnar, AJA in *S v Brandt* (n 163 above) Para 24.

<sup>167</sup>Per Ponnar, AJA, in *Brandt v S* (n 163 above) Paras 16-20. The judge set the stage for this conclusion by the dictum to the effect that: “the traditional aims of punishment have to be reappraised and developed to give effect to the spirit and purport of the Constitution, [and as a result to include]

principles of proportionality; the best interests of the child; detention as a last resort and for the shortest period of time; and the need to promote the reintegration of the child in case detention is resorted to. On the facts of the case, the sentence of life imprisonment was substituted with a sentence of 18 years imprisonment.

The *Brandt* decision has been applauded for its ‘lucid and careful reasoning’ in support of the finding that the South African minimum sentencing legislation does not require the imposition of prescribed minimum sentences on offenders aged below 18 years. The dicta in the decision about the nature and objectives of sentencing where child offenders are concerned have also been welcomed for strengthening the relevance of principles in international law and the South African Constitution as earlier confirmed by the *Kwalase* judgment<sup>168</sup> discussed in this section.<sup>169</sup>



Through these decisions, it is clear that the post-constitutional era in South Africa has ushered in a new sentencing policy in relation to the use of the custodial sentence of imprisonment, prior to the enactment and coming into force of the proposed Child Justice Bill. This is in contrast to the other countries under study in relation to the use of imprisonment in the sentencing practices of courts. The exception is Lesotho, where any form of imprisonment in respect of children has been prohibited.

It is submitted that the decisions of the South African courts should therefore be of comparative relevance to the juvenile justice systems of the other countries under

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reintegration, resocialisation and re-education as additional penal objectives relevant to juvenile sentencing”, Para 15.

<sup>168</sup>*S v Kwalase* cited in (n 155 above).

<sup>169</sup>Sloth-Nielsen, J “Do Minimum Sentences Apply to Juveniles? The Supreme Court of Appeal Rules ‘No’ ” (2005) 1 *Article 40* 2.

study. This is in light of the domestication of international law standards relating to sentencing in the new juvenile justice laws of these countries. The new or proposed child sentencing regimes in all the countries under study will be considered in the last section of this Chapter.<sup>170</sup>

#### **7.4 The position regarding juvenile death penalty and corporal punishment prior to juvenile justice law reform in the countries under study**

This section considers the position in the countries under study in relation to the use of the juvenile death penalty and corporal punishment as sentences.

##### **7.4.1 Juvenile death penalty**



The Ghanaian Criminal Procedure Act of 1960 expressly prohibited the imposition of the death penalty on children convicted of offences committed whilst they were aged 18 years and below.

The current Constitution of Lesotho (1993, amended 2001) generally permits the imposition of the death penalty.<sup>171</sup> However, in terms of section 297(b) of the Criminal Procedure and Evidence Act of 1981, the death penalty cannot be carried out in respect of a person below 18 years of age.

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<sup>170</sup>Sections 7.5.1 and 7.5.2, below.

<sup>171</sup>Constitution of the Republic of Lesotho (Revised Draft 1993), section 5(2) (d) provides in part that: “....A person shall not be regarded as having been deprived of his life in contravention of this section if he dies...in execution of the sentence of death imposed by a court in respect of a criminal offence under the law of Lesotho of which he has been convicted”.

In Namibia, the current (1990) Constitution expressly included a provision specifically prohibiting the death penalty for both child and adult offenders.<sup>172</sup>

In South Africa, the death penalty was a competent sentence for children who committed offences whilst under the age of 18 in the 1980s. However, ‘youth’ or ‘childhood’ was then considered as an extenuating circumstance in respect of which a court had discretion to impose a sentence of imprisonment *in lieu* of the death penalty.<sup>173</sup>

A 1990 amendment to section 277 of the Criminal Procedure Act<sup>174</sup> eventually prohibited the imposition of the death penalty as a sentence on children aged below 18 years at the time of commission of an offence.<sup>175</sup> In the same year, a moratorium on the execution of capital sentences was announced as part of pre-conditions for the commencement of political negotiations between the government and anti-apartheid organisations to end apartheid rule in South Africa.<sup>176</sup> The South African Interim Constitution was adopted in 1994 and on the basis of its provisions, the Constitutional Court decided in *S v Makwanyane*<sup>177</sup> that the death penalty was unconstitutional since it violated the right to human dignity and the right to be protected from cruel,

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<sup>172</sup>Constitution of the Republic of Namibia (1990), Article 6 provides: “The right to life shall be respected and protected. No law may prescribe death as a competent sentence. No Court or Tribunal shall have the power to impose a sentence of death upon any person. No executions shall take place in Namibia.”

<sup>173</sup>Keightley, R “Capacity to be Held Accountable for Wrongdoing” in Van Heerden, B, Cockrell, A and Keightley, R (1999) *Boberg’s Law of Persons and the Family* Cape Town: Juta and Co. 871.

<sup>174</sup>Criminal Procedure Act No. 51 of 1977.

<sup>175</sup>Criminal Law Amendment Act 107 of 1990.

<sup>176</sup>Sloth-Nielsen, J “Juvenile Justice Law Reform Process in South Africa: Can a Children’s Rights Approach Carry the Day? (1999) 18(3) *Quinnipiac Law Review* 469.

<sup>177</sup>1995 (3) SA 391 (CC).

inhuman and degrading treatment, guaranteed in sections 9 and 11(2) of the (1993) Interim Constitution.

In Uganda, the sentence of juvenile death penalty was prohibited for persons who committed offences whilst under the age of 18 years by virtue of Executive Decree No. 26 of 1971.<sup>178</sup>

The death penalty is still generally provided for under the Kenyan Constitution and the Penal Code.<sup>179</sup> However juvenile death penalty has been prohibited since the enactment of the Kenyan Penal Code in 1963. Section 25 (2) of this Code (which remains applicable despite the enactment of the Children's Act) provides that the death sentence shall not be passed on a person who is under the age of 18 years at the time of committing a capital offence.




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<sup>178</sup>Uganda Initial Report (n 82 above) Para 255. The Constitution of the Republic of Uganda (1995) allows for the imposition of the death penalty for capital offences in the case of adult offenders. Section 22(1) provides: “No person shall be deprived of life intentionally except in execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of a criminal offence under the laws of Uganda and the conviction and sentence have been confirmed by the highest appellate court”.

<sup>179</sup>Section 71(1) of the current Kenyan Constitution (Act 5 of 1969 as amended) provides that: “No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under the law of Kenya of which he has been convicted”. In practice, no executions have been carried out by Kenya since 1985, leading to the classification of Kenya as a *de facto abolitionist* State in relation to the death penalty. See Asiema, J and Ongoya, E (2004) “The Application of the Death Penalty in Kenya: A Case of Torturous De facto Abstinence” (Paper submitted to the Death Penalty Project of the British Centre for International and Comparative Law) 12 available at <<http://www.biicl.org/index.asp?contentid=555>> 12 (last accessed 1 September 2005). The proposed Draft Constitution of Kenya, 2005 (that awaits finalisation at a referendum) retains the possibility of the death penalty for adult offenders at section 35(1), which makes provision to the effect that: “Every person has the right to life except as may be prescribed in an Act of Parliament”.

It is submitted that the prohibition of juvenile death penalty long before the recent juvenile justice law reforms in all the six countries under study in this thesis complied with the prohibition of juvenile death penalty in international law (considered a *jus cogens* norm).

#### 7.4.2 Juvenile corporal punishment

The Ghanaian Criminal Code, 1960 (applicable before the enactment of the recent Juvenile Justice Act, 2003) allowed for the imposition of judicial corporal punishment.<sup>180</sup> Judicially imposed whipping was abolished with the adoption of the 1992 Constitution of the Republic of Ghana.<sup>181</sup> Section 28(3) of this Constitution enacted a right of the child not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment.



In Kenya, judicial corporal punishment was sanctioned by the Penal Code and the repealed children's legislation in relation to a number of offences committed by male child offenders.<sup>182</sup> It was prohibited by law for girls.<sup>183</sup> The provision in the current Kenyan Constitution which prohibits torture, cruel, inhuman and degrading treatment provided an exception to the effect that "punishment inflicted according to the law shall not be considered to contravene this section".<sup>184</sup> By virtue of this exception,

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<sup>180</sup>Ghana Initial Report (n 116 above) Para 61 (Citing sections 31, 32 and 34 of the Criminal Procedure Code of 1960 which provided for judicial corporal punishment while including provisions designed "to protect a child from the use of unjustifiable force for his correction" ).

<sup>181</sup>Ghana Initial Report (n 116 above) Para 61.

<sup>182</sup>Children and Young Persons Act (repealed) (n 81 above) section 17 and the Penal Code, Chapter 63 Laws of Kenya, section 27.

<sup>183</sup>ANPPCAN-K (n 113 above) 26.

<sup>184</sup>Constitution of the Republic of Kenya, Act 5 of 1969 (as amended) (n 179 above) section 74(1).

judicial corporal punishment was accorded constitutional validity. Corporal punishment was prohibited for the first time in Kenya by the Children's Act of 2001 (discussed in this thesis).<sup>185</sup> Further, the Criminal Law (Amendment) Act 5 of 2003 of Kenya<sup>186</sup> amends a number of provisions in the Penal Code and *inter alia* abolishes corporal punishment as a sentence for all offenders (children or adults).

In both Namibia and South Africa, judicially imposed corporal punishment was abolished by virtue of court decisions. In 1991, the Supreme Court of Namibia in the case *Ex Parte Attorney General, Namibia: In Re Corporal Punishment by Organs of State*<sup>187</sup> decided that the constitutional guarantee of human dignity precludes the use of corporal punishment for both adult and juvenile offenders, as well as the use of corporal punishment in schools.<sup>188</sup> This decision upheld the interpretation that corporal punishment was inherently degrading to human dignity and that, depending on the degree of corporal punishment, it could constitute a violation of a person's right not to be subjected to torture or to cruel and inhuman treatment or punishment in Article 8(2) of the Namibian Constitution.<sup>189</sup> There have been no subsequent legislative amendments or repeals and provisions remain for corporal punishment

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<sup>185</sup>Kenyan Children's Act, section 191(2) explicitly prohibits the imposition of corporal punishment on child offenders. Section 18(1) on the prohibition of torture, cruel and inhuman treatment is also relevant for the prohibition of corporal punishment. The liberal interpretation of this provision with the effect that it applies to the legality or otherwise of corporal punishment (in the home) was recently confirmed by the Kenya High Court in the case *Isaac Wachira v Republic High Court of Kenya (Nakuru) Criminal Application No. 185 of 2004 (Unreported)*, discussed in Odongo, G "Kenyan Law on Corporal Punishment by Parents" (2005) 1(1) *Article 19* 6-7 (the case considers the issue of excessive corporal punishment by a parent on a child in light of this provision).

<sup>186</sup>Entered into force 25 July 2003.

<sup>187</sup>1991 (3) SA 76 (NmS).

<sup>188</sup>Namibia Initial Report (n 83 above) Para 121.

<sup>189</sup>The Constitution of the Republic of Namibia (1990), Article 8(2) provides: "No person shall be subject to torture, cruel, inhuman or degrading treatment or punishment".

under the Criminal Procedure Act (1977 amended 1991).<sup>190</sup> However, the Supreme Court's decision makes it clear that corporal punishment is unlawful as a sentence for crime and as a disciplinary measure.<sup>191</sup>

In South Africa, prior to the constitutional court's decision, the sentence of whipping was the most resorted to in relation to child offenders.<sup>192</sup> The decision of the South African Constitutional Court in *S v Williams and Others*<sup>193</sup> concerned the imposition of corporal punishment as a sentence. The case arose from a referral to a higher court by a magistrate who had imposed the sentence of judicial whipping in seven cases. While imposing these sentences, the magistrate had questioned the constitutional validity of the sentence of corporal punishment in light of the Bill of Rights in the 1993 South African Interim Constitution. On a referral to it, the Constitutional Court considered arguments for and against the constitutional validity of corporal punishment. In its decision, the Court held that judicial corporal punishment was unconstitutional on the basis that it violated the right not to be subjected to cruel, inhuman and degrading treatment or punishment.<sup>194</sup> The Court based its decision on

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<sup>190</sup>Global Coalition Initiative to end Corporal Punishment of Children (2005) *Ending Legalized Violence Against Children: A Report for East and Southern Africa Regional Consultation-the UN Secretary General Study on Violence Against Children* Johannesburg: Global Coalition Initiative to end Corporal Punishment of Children 27.

<sup>191</sup>Global Coalition Initiative to end Corporal Punishment of Children (as above) 27.

<sup>192</sup>South African Law Commission *Discussion Paper on Juvenile Justice* (n 141 above) Para 11.8 (quoting statistics to the effect that before 1995, the sentence was imposed on up to 35, 000 children annually).

<sup>193</sup>1995 (7) BCLR 861 (CC).

<sup>194</sup>Protected in the South African Interim Constitution (1994), sections 10 and 11(2). The leading Judge stated "...it is my view that at this time, so close to the dawn of the 21<sup>st</sup> century, juvenile whipping is cruel, it is inhuman and it is degrading. It cannot, moreover, be justified in terms of section 33(1) of the Interim Constitution", at 632. Section 33(1) of the Interim Constitution, now section 36 of the Final



the premise that any punishment provided for by the criminal law must respect human dignity. It rejected arguments to the effect that juvenile corporal punishment should be justified as a criminal sanction on account of lack of alternative sentencing options and that its abolition would lead to an increase in the imposition of imprisonment as a sentence for children. In response, the Court was emphatic that the “the present penalties under the Criminal Procedure Act<sup>195</sup> permitted of a more flexible but effective approach in dealing with child offenders”.<sup>196</sup>

In its decision the South African Court referred to international law and decisions of foreign courts including the decision of the Namibian Supreme Court in the *Ex Parte Attorney General* case cited above,<sup>197</sup> the decision of the European Court in the *Tyrer* case discussed earlier in this Chapter,<sup>198</sup> and decisions by the courts of Zimbabwe which abolished corporal punishments in this jurisdiction.<sup>199</sup>




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Constitution, deals with limitation of fundamental rights and freedoms protected in the South African Bill of Rights.

<sup>195</sup>Discussed in section 7.3.2, above.

<sup>196</sup>*S v Williams and Others* (n 193 above) 883. The Court’s decision was motivated by several reasons. The first was that judicial corporal punishment was aimed at the ‘deliberate’ infliction of pain and terror. Second, it is institutional in nature, that is, instigated by the State and carried out by strangers. See Skelton, A “Children, Young Persons and the Criminal Procedure” in Robinson, J (ed) (1997) *The Law of Children and Young Persons in South Africa* Durban: Butterworths 173, Van Zyl Smit, D “Sentencing and Punishment” in Chaskalson, M *et al* (eds) (1996) *Constitutional Law of South Africa* Cape Town: Juta 28-16-28.17, Steytler, N (1998) *Constitutional Criminal Procedure* Durban: Butterworths 425.

<sup>197</sup>1991 (3) SA 76 (NmS).

<sup>198</sup>*Tyrer v United Kingdom* 25 April 1978 Series A 26, discussed in section 7.2.2.3, above.

<sup>199</sup>*S v A Juvenile* 1990 (1) SA 151 (ZS); *S v Ncube*; *S v Tshuma*; *S v Ndlovu* 1988 (2) SA 702 (ZS).

Following the Constitutional Court's decision, the Abolition of Corporal Punishment Act 33 of 1997 removed whipping as a sentence from South African statutory law.<sup>200</sup>

In Uganda, the sentence for corporal punishment was legally permissible for male children (under the age of 16) up and until the enactment of the Children's Statute (discussed in this thesis) in 1996.<sup>201</sup> The government's opinion before the prohibition was, however, that "corporal punishment was offensive, infringed the rights of the child and did not promote the child's sense of dignity".<sup>202</sup>

Corporal punishment remains a lawful sentence for child offenders in Lesotho. Articles 307 and 308 of the Criminal Procedure and Evidence Act (1981) permit the sentence of "moderate correction of whipping" for "males under the age of 21". Section 309 of the same Act prohibits the punishment of females by whipping. The prohibition against torture and inhuman or degrading punishment in Article 8 of the Lesotho Constitution is qualified by a proviso which specifically allows for the continued use of judicial corporal punishment.<sup>203</sup> The Lesotho government has, however, expressly admitted in the past that the continued use of corporal punishment constitutes torture, inhuman and degrading treatment arguing that:

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<sup>200</sup>The Act came into effect on 5 September 1997 and repealed all South African statutory laws that authorised the imposition of corporal punishment.

<sup>201</sup>Uganda Initial Report (n 82 above) Para 251. Ugandan Children's Statute, section 95(9) provides that: "No child shall be subject to corporal punishment".

<sup>202</sup>Uganda Initial Report (n 82 above) Para 251. This Report was submitted (in June 1996) shortly after the Children's Statute (in April 1996) was gazetted and entered into force.

<sup>203</sup>Constitution of Lesotho (1993) (n 171 above). Article 8 provides for the right to protection against torture, cruel, inhuman and degrading treatment and adds that, "nothing contained in or done under the authority of any law shall be held to be inconsistent with or contravention of this section to the extent that the law in question authorizes the infliction of any description of punishment that was lawful in Lesotho immediately before the coming into operation of this Constitution."

“...It inflicts long-term or permanent physical, emotional and psychological harm on the child. This punishment also degrades the child and makes the child lose self-esteem and dignity as a human person.”<sup>204</sup>

The Lesotho Bill (2003) therefore proposes a specific prohibition on the use of corporal punishment by courts.<sup>205</sup>

It is submitted that the prohibition of corporal punishment as a sentence for child offenders well before the recent juvenile justice law reforms (in Ghana, Namibia and South Africa) and in Kenya, Lesotho and Uganda (with the enactment or proposals for new children’s laws) is in accordance with international children’s rights law.

## **7.5 Provisions and proposals in relation to sentencing in the new laws of the countries under study**



The new laws of six laws of the countries under study demonstrate attempts aimed at compliance with international children’s rights law relating to sentencing in a number of respects. These are considered in this section. It is to be emphasized that the provisions of the Lesotho, Namibian and South African Bills are all yet to be passed into law and may be ultimately change when the laws are finally enacted.

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<sup>204</sup>Lesotho Initial Report (n 93 above) Para 110.

<sup>205</sup>Lesotho Bill, section 166(2) which provides that: “No sentence of corporal punishment or any form of punishment that is cruel, inhumane and degrading may be imposed on a child”.

### 7.5.1 The aims and purposes of sentencing

The Namibian and South African Bills are unique in comparison to the Lesotho Bill and to the new laws of Ghana, Kenya and Uganda as they include a range of principles which are intended to govern courts in relation to the sentencing of child offenders. Both Bills provide that the purposes of sentencing are to (a) encourage the child to understand the implications of and be accountable for the harm caused; (b) promote an individualised response which is appropriate to the child's circumstances and proportionate to the circumstances surrounding the harm caused by the offence; (c) promote the reintegration of the child into the family and community; and (d) ensure that any necessary supervision, guidance, treatment or services which form part of the sentence can assist the child in the process of reintegration.<sup>206</sup>



It is submitted that the express inclusion of these broadly framed principles implies that they should be of guidance to the sentencing process. The South African Law Commission's Report expressly acknowledges that these principles were, by and large, drawn from the phrasing of Article 40(1) of CRC and the requirements of other international instruments in relation to the objectives and aims of juvenile justice.<sup>207</sup> These principles affirm the primacy of the interests of a convicted child offender and the likelihood of his or her reintegration over and above other sentencing objectives in

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<sup>206</sup>Namibian Bill, section 105 and South African Bill, section 63.

<sup>207</sup>South African Law Commission *Report* (n 108 above) Para 10.1 (Noting that three factors influenced the Commission's approach to sentencing proposals contained in the South African Bill. First, was the objective of promoting the development of restorative justice. Second, there was the need to give effect to international law and to constitutional imperatives in relation to the restriction of detention. Third, was the present range of alternative sentences available in South African Criminal Procedural law, see section 7.3.2, above).

general penal law – such as deterrence and punishment.<sup>208</sup> In this regard, it is implied that any sentencing officer must impose a sentence which is compatible with the principles contained in these proposed laws.

It is submitted that a sentence which primarily emphasizes a punitive trend would not be in compliance with the above principles. One scholar sums up the significance of the inclusion of these guiding principles in the following words:

“It is, perhaps of interest that the Bill does not refer to the protection of the public as a purpose of sentencing...It has been noted, in relation to the USA, that a feature of the punitive trend has been [demonstrated through] the amendment of ‘purposes clauses’ of juvenile justice statutes to elevate the importance of public safety..”<sup>209</sup>



In addition to the above principles directly applicable to sentencing, the principle of the best interests of the child is included in these two proposed Bills.<sup>210</sup> This is also the case with the Lesotho Bill and new laws of Ghana, Kenya, and Uganda, all of which provide for the primacy of this principle in ‘all matters’ affecting the child and which applies hence, in relation to sentencing.<sup>211</sup>

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<sup>208</sup>This premise is implicit in the exclusion of traditional objectives of sentencing in criminal law such as the deterrence of would-be-offenders.

<sup>209</sup>Sloth-Nielsen (n 91 above) 398-399.

<sup>210</sup>Namibian Bill, section 4 (referring to the objective of promoting the rights of the child in the Namibian Constitution and international law) and the South African Bill, section 2 (referring to the Constitution which protects right to the best interests of the child at section 28(1)(g)).

<sup>211</sup>Ghanaian Act, section 2; Lesotho Bill, section 4(2); Kenyan Act, section 4(2); Ugandan Statute, section 4 and Schedule 1 to the Act. The *Brandt* decision by the South African Supreme Court cited in (n 163 above), confirms the link between the principle of the best interests of the child and sentencing, per Ponnann, AJA Paras 16-20.

## 7.5.2 Prohibition of and restriction of certain sentences in the new laws

The new laws contain express provisions prohibiting and limiting the use of certain sentences so as to give effect to the prohibition at international children's rights law.

### 7.5.2.1 Juvenile death penalty

Section 7.4.1 above, showed that the imposition of the juvenile death penalty was already prohibited in all the countries under study well before the recent child and juvenile justice law reforms discussed in this thesis. The new Ugandan legislation and the proposed laws of Namibia and South Africa do not expressly provide for this prohibition. However, the new legislation of Ghana and Kenya and the proposed Lesotho Bill all expressly confirm the prohibition of the death penalty for all children who commit crimes whilst under the age of 18 years.<sup>212</sup>

The retention of the death penalty for adult offenders in Ghana, Kenya, Lesotho and Uganda<sup>213</sup> has meant that capital offences remain in the Statute books of these countries with the effect that children may be charged with these offences. Uganda's new law provides that where a capital offence "has been proved or admitted against a child... the Family and Children Court shall have the power to order the detention of the child, in the case of an offence punishable by death, for a maximum of three years in respect of any child".<sup>214</sup> Although it is not explained by the Ugandan Child Law

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<sup>212</sup>Ghanaian Act, section 32(2); Kenyan Act, section 18(2); Lesotho Bill, section 166(1).

<sup>213</sup> See section 7.4.1, above.

<sup>214</sup>Section 95(g). It is of note that the Ugandan Statute vests jurisdiction to try capital offences in the High Court (rather than the specialised Family and Children Court) but empowers the specialised

Review Committee ( who were tasked with developing this law) how it arrived at a maximum of three years detention for children convicted of capital offences, it is clear that the principle of detention for the shortest period of time (a principle firmly grounded in international law) weighed in disfavour of long periods of detention for any child regardless of whether the offence would, if it were not for the fact of childhood, be punishable by death.

In relation to Kenya, the applicable position is that obtaining in the Kenyan Penal Code (where the relevant provision in this regard was not repealed by the new law of 2001).<sup>215</sup> This provision provides that where a capital charge is proved against an accused child, the sentencing court (the High Court) is empowered and obliged to order the detention of the child at the President's pleasure.<sup>216</sup> Ghana's new Juvenile Justice Act (discussed in this thesis) also makes a similar provision in the following words:



“Where in any case affecting a juvenile offender a death sentence is required, the court shall make an order that the juvenile offender is to be detained during the pleasure of the President instead of pronouncing a death sentence or recording a death sentence against the juvenile.”<sup>217</sup>

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Family and Children Court with the exclusive power to order the sentencing of any child offender after trial by the High Court, section 101 on remission of cases). Section 95(6) of the Act provides that ‘no child may be detained in an adult prison’ implying that only detention in child-specific facilities or prison would comply with this provision.

<sup>215</sup> Penal Code, Chapter 63 Laws of Kenya, section 25.

<sup>216</sup>The section provides that a child who is proved to have committed a capital offence may be detained at the President's pleasure in a place and under conditions the President may direct.

<sup>217</sup>Ghanaian Act, section 32(3).

It is submitted that the Kenyan and Ghanaian positions which allow for the detention of any child convicted of a capital offence may lead to long periods of imprisonment and even life imprisonment for such children. This would be in violation of the restrictions that international children's rights law places on imprisonment.<sup>218</sup> This is especially so as regards the requirements on the proportionality of any sentence to the child (and his or her circumstances) and to the offence committed; the prohibition on life imprisonment (or detention) without the possibility of parole; and the requirement that detention should be for the shortest appropriate period of time.<sup>219</sup> Although the CROC did not give its view regarding the compatibility of a President's prerogative in relation to a child found guilty of a capital offence (when examining the Reports of both Kenya and Ghana),<sup>220</sup> it has had this to say on a similar provision in Nigerian child law:




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<sup>218</sup>Discussed in sections 7.2.1 and 7.2.2, above.

<sup>219</sup>In the two cases (*T v UK* Application no. 24724/94 and *V v UK* Application no. 24888/94, Judgements of 16 December 1999) arising from the infamous English Bulger case (discussed in Chapter 4, section 4.2.2.1), the European Court of Human Rights considered this issue. After the conclusion in 1994 of the two child applicants' trial, the English trial court sentenced them to be detained 'at Her Majesty's pleasure' but up to a maximum of fifteen years. On an appeal by the UK government to the English House of Lords in 1997, the trial court's decision to impose a maximum limit to the detention was quashed. The House of Lords did not set any new tariff for the period of detention. The applicants applied to the European Court, one of the grounds being that the potential for their indefinite detention was in violation of their rights under the European Convention (Articles 5 and 6 on the right to liberty and fair trial). By the time of the European Court's judgment in 1999, the applicants had served six years in detention. The European Court considered that detention at 'Her Majesty's Pleasure' was discretionary under English Criminal Law and hence not a violation of Articles 5 and 6 of the Convention per se. However, the Court held that all decisions on the duration of a custodial sentence must be exercised by an independent court. Hence the absence of judicial determination of the period of the applicants' detention and the deprivation by virtue thereof of their right to a periodic review of the indefinite detention by a judicial body constituted violations of Articles 5 and 6 of the Convention. For a detailed discussion, see Kurki (n 2 above) 357.

<sup>220</sup>As of the time of writing, both these countries have submitted only the Initial Reports which were examined in 1997 in Ghana's case and 2001 in Kenya's case.



“...The Committee is concerned that the provisions of national legislation by which a child may be detained at [the President’s pleasure] may permit the indiscriminate sentencing of children for indeterminate periods. The Committee wishes to emphasize that the Convention requires that detention be a measure of last resort and for shortest period of time. The institutionalization and detention of children must be avoided as much as possible and alternatives to such practices must be developed and implemented...”<sup>221</sup>

Further, it is submitted that by referring to the ‘President’s pleasure’, the provisions in the Kenyan Penal Code and the Ghanaian Juvenile Justice Act exclude the child’s right to appeal to a higher court or independent authority for a review of any terms of imprisonment pursuant to the exercise of the President’s discretion.<sup>222</sup> This is contrary to the provisions of Article 40(2) (b) (v) of the CRC.<sup>223</sup>



The plight of children convicted of a capital offence in Lesotho is subjected to considerable restrictions and limitations in relation to detention (custodial sentences).

These are considered in section 7.5.3.2, below.

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<sup>221</sup>Nigeria Initial Report (n 25 above) Paras 21 and 40.

<sup>222</sup>These concerns have also been expressed in Kenya Law Reform Commission (1993) *A New Law on Children* Para 5.27 stating that: “From the language of this provision it appears that a child may, in cases of homicide, be detained even in places that could compromise the chances of rehabilitation. We do not consider such a situation to provide the best conditions for the protection of the rights and welfare of the child, and we recommend that an appropriate amendment be made, to provide for a more objective basis for determining the place and conditions of confinement for children. In particular, provision should be made for a full exercise of discretion by the court”. It is to be noted that this recommendation was not acted upon in the drafting of the new Children’s Act discussed in this thesis. Records or studies on the number and situation of children who would have been sentenced to death but are now serving prison terms by virtue of this provision are not available.

<sup>223</sup> By virtue of this provision, the CRC guarantees the right of the child to appeal to a higher competent independent and impartial authority or judicial body according to law upon conviction for a crime and in relation to any measure imposed in consequence thereof.

### 7.5.2.2 Life imprisonment

The imposition of a sentence of life imprisonment on child offenders in the former laws of the countries under study remained a possibility due to the absence of a sentencing policy except for judicial intervention through case law in South Africa.<sup>224</sup>

With the predominant use of institutionalization in the past sentencing practice of these countries,<sup>225</sup> there is<sup>226</sup> (was) a risk that detention would be used as a ‘first’ (instead of ‘last resort’). This also invited the possibility of life imprisonment for offences committed by children.<sup>227</sup> This theoretical possibility has now been abolished by the new and proposed laws of the countries under study.

The laws of Kenya, Lesotho, Namibia and South Africa expressly prohibit the imposition of a sentence of life imprisonment on a child offender.<sup>228</sup> On the other hand, the new legislation of Ghana and Uganda indirectly prohibits the imposition of life imprisonment or any custodial sentence involving long and disproportionate durations by expressly including provisions setting out the maximum duration of any custodial sentence.<sup>229</sup>

It is submitted that the total prohibition of life imprisonment for children in the new or proposed juvenile justice laws of the countries under study is a significant attempt to

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<sup>224</sup>Section 7.3.5, above.

<sup>225</sup>Discussed in section 7.3.3, above.

<sup>226</sup>In relation to Lesotho, Namibia and South Africa where the proposed laws have not been enacted.

<sup>227</sup>Sections 7.3.3 and 7.3.4, above.

<sup>228</sup>Kenyan Act, section 18(2); Namibian Bill, section 113 (1); South African Bill, section 72(1).

<sup>229</sup>Ghanaian Act, section 46 (1); Ugandan Act, section 95(g), setting out the maximum period of detention in respect of offences and children of certain age. These provisions are discussed in section 7.5.3, that follows below.

comply with international law standards. In addition, this total prohibition on life imprisonment for child offenders sets a higher standard than that in international law, which is limited to a prohibition of life imprisonment without the possibility of release (rather than life imprisonment per se).<sup>230</sup>

### **7.5.2.3 Judicial corporal punishment**

In section 7.4.2 above, it was discussed that the use of corporal punishment as a competent for child offenders was prohibited before the start of the juvenile justice law reform processes in Ghana (through the 1992 Constitution), Namibia and South Africa (by virtue of court decisions rendered in 1990 and 1995 respectively). On the other hand it was pointed out that the new laws of Kenya (2001) and Uganda (1996) were the first laws to prohibit the use of corporal punishment for child offenders in these countries. In the same vein, the proposed Lesotho Bill (2003) prohibits the use of corporal punishment, currently a competent sentence for child offenders in Lesotho. It is submitted that these developments are in accordance with the requirements of international law in this regard.

### **7.5.3 The prohibition and restrictions on the use of imprisonment and other custodial sentences**

The principle at international law that detention should be used as a last resort and for the shortest period of time played a considerable role in shaping the proposals of the

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<sup>230</sup>Discussed in section 7.2.2.2, above.

new laws in relation to the use of custodial sentences. Two diverse approaches characterise the new laws in this regard.

On the one hand, provisions in the laws of Ghana, Kenya and Uganda totally prohibit the use of imprisonment as a sentence for child offenders. At the same time, these three laws introduce a number of constraints on the use of custodial sentences even where they are to be served in child-specific facilities. On the other hand, the proposed Lesotho, Namibian and South African Bills permit the use of custodial sentences (whether the term is served in prisons or child-specific facilities) to a limited extent. However, the three Bills considerably limit the remit of judicial discretion in imposing custodial sentences in general and the sentence of imprisonment in particular.



These two diverse approaches by the countries under study are considered in the next sub-sections that follow below.

### **7.5.3.1 The Ghanaian, Kenyan and Ugandan laws**

The three new laws of Ghana, Kenya and Uganda prohibit the use of adult prisons as a sentence for child offenders.<sup>231</sup> It is thus submitted that with the exception of child offenders charged with capital offenders, in respect of whom Ghanaian and Kenyan law provides for detention at the President's pleasure,<sup>232</sup> the laws totally outlaw the

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<sup>231</sup> Ghanaian Act, section 46(6) and Ugandan Statute, section 95(6) provide: "No juvenile or young offender shall be detained in an adult prison"; Kenyan Act, section 190(1) provides: "No child shall be ordered to imprisonment or to be placed in a detention camp".

<sup>232</sup> Discussed in section 7.5.2.1, above.

use of adult prisons for children on whom a custodial sentence may otherwise have been imposed. It is further submitted that this is in line with the preference at international law in relation to ‘open’ over ‘closed’ institutions, as well as the need to avoid prisons as a more harmful form of incarceration.<sup>233</sup>

In furtherance of the principle of detention as a last resort, the three laws place considerable restrictions on the use of sentences to be served even in child-specific facilities.<sup>234</sup> In the Kenyan Act, this restriction is age-based. Thus where a child offender is above ten years and under fifteen years of age, the court, in the event of a custodial sentence, must order the child to be sent to a rehabilitation school.<sup>235</sup> Where the child is aged sixteen and above, such a sentence must instead be served in borstal institutions.



Further custodial options include the possibility for the court to give an order for the child’s placement in ‘a probation hostel’, educational institutions or a vocational training programme. The choice of the age thresholds (of ten and sixteen) is not clear from the Kenyan Law Reform Commission’s Report whose recommendations led to the enactment of the Kenyan Act.<sup>236</sup> It is, however, submitted that the use of these child- specific institutions (subject to their compliance with standards in relation to

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<sup>233</sup>Beijing Rules, Rule 17(c) recommends that a child should not be held in prison unless found guilty of a ‘serious crime involving personal injury or violence’.

<sup>234</sup>This is in line with the inclusion of ‘diversion’ in all the new and proposed laws, as discussed in Chapter 5. Further, the Ugandan Statute provides in section 95(4) that “Detention shall be a matter of last resort and shall only be made after careful consideration and after all other reasonable alternatives have been tried and where the gravity of the offence warrants the order”.

<sup>235</sup>The Act renames ‘reform schools’ under the previous legal order and calls them ‘rehabilitation schools’.

<sup>236</sup>Chapter 3, section 3.5.2.

children deprived of their liberty)<sup>237</sup> is in accordance with the preference in international law instruments for these facilities over and above prisons.<sup>238</sup> On the other hand, the Kenyan Children's Act fails to repeal the former legal framework applicable for the treatment of children in child-specific facilities. It is submitted that this may result in downgrading the provisions of the new Act (and consequently, international law standards). This is especially in relation to the possibility for disproportionate sentences which may involve transfer of children from borstals to prison.<sup>239</sup>

The Ghanaian and Ugandan Acts contain considerable limits both in relation to the age of children sent to custody and the duration of sentences that these children may serve in a detention centre (in the case of Uganda) and juvenile correction centre (in case of Ghana). In both these laws, such custodial sentences must not exceed three




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<sup>237</sup>As contained in the UN JDL Rules.

<sup>238</sup>Discussed in Chapter 6, section 6.2.1.

<sup>239</sup>The most relevant legislation in this regard is the Borstal Institutions Act, Chapter 92 Laws of Kenya (1963) whose provisions predate the CRC and notions of children's rights. The Act allows for the transfer of children, on an application by the Commissioner of Prisons to the Court, from a borstal to prison as a disciplinary punishment where the 'character' of the child 'expediently demands' (section 42). The Act extends the Kenyan Prisons' Department's mandate to borstals, hence implying that the ethos in these institutions may not be too dissimilar to prison policy and which would subject release of a child to the policy that apply to adult prisoners. In addition, the overall framework of this Act reflects a lack of children's rights as evident in the considerable discretion accorded to the Minister in charge in relation to the management of the institutions and the general treatment of children. The powers of the Minister (in charge of Borstals) to order the extension or discharge of children from the institutions (sections 28 and 29 of the Act) may lead to abuse and to disproportionately long periods of detention. This would be in violation of international standards restricting periods of detention besides excluding the child's right, in Article 40 of CRC, to an appeal or review in respect of such decisions. Further, the Act which was passed into law in 1963 obviously predated the recognition of children's rights in binding international law. For example, it permits corporal punishment as a disciplinary measure (section 36).

months for a child below sixteen years of age.<sup>240</sup> The maximum term of detention for a child between the ages of sixteen and eighteen years is six months and twelve months, respectively, in the Ghanaian and Ugandan Acts.<sup>241</sup> These provisions will be especially relevant to the sentencing law and practice in Ghana where the custodial sentences to residential facilities were previously for an automatic three years subject to executive review. This had the effect that in most instances, custodial sentences in these institutions were more disproportionate to the offences committed by children and longer than the duration a child would have spent in prison.<sup>242</sup>

### **7.5.3.2 The proposed laws of Lesotho, Namibia and South Africa**

The proposed laws of Lesotho, Namibia and South Africa also place considerable limitations on the discretion of judicial officers to impose sentences of imprisonment as opposed to past sentencing law and practice in these countries.<sup>243</sup> In contrast to the approach of Ghanaian, Kenyan and Ugandan laws, the proposed laws of these countries require in the first instance that no sentence involving deprivation of liberty<sup>244</sup> should be imposed unless the sentencing officer is satisfied that such a sentence is justified by “the seriousness of the offence, the protection of the

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<sup>240</sup> Ghanaian Act, section 46(1) (a); Ugandan Statute, section 95(g).

<sup>241</sup> Ghanaian Act, section 46(1) (b); Ugandan Statute, section 95(g).

<sup>242</sup> Ghana Initial Report (n 116 above) Para 130.

<sup>243</sup> The lack of a sentencing policy and the free rein of judicial discretion are discussed in section 7.3.4, above.

<sup>244</sup> All three Bills refer to the sentences as “sentences involving a residential element”. The South African Law Commission *Report* (n 108 above) Paras 10.7-10.8 includes prison sentences, referrals to institutions managed by Welfare or Education Departments under the rubric of ‘residential sentences’ in line with the wide definition of the term ‘deprivation of liberty’ under Rule 11(b) of the UN JDL Rules, discussed in Chapter 6 (on Separate Procedures and Institutions).

community and the severity of the impact of the offence upon the victim”.<sup>245</sup> The same provisions nevertheless envisage the imposition of residential sentences where the child has “failed to respond previously to non-residential alternatives”.<sup>246</sup>

The three Bills provide for a further set of limitations in relation to the use of imprisonment as a sentence with the aim of giving effect to the principle of detention as a last resort.<sup>247</sup> Sentences of imprisonment may not be imposed, unless a child was 14 years (16 in the case of Lesotho Bill) or older<sup>248</sup> at the time of commission of the offence. Second, the court must be satisfied as to the existence of ‘substantial and compelling reasons’ for imposing a sentence of imprisonment. Such reasons may include a conviction for a serious offence or a previous failure to respond to alternative sentences, including sentences with a residential element. Thirdly, no sentence of imprisonment may be imposed on a child in respect of Schedule 1 offences.<sup>249</sup> Fourth and last, imprisonment cannot be imposed as an alternative sentence.<sup>250</sup>

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<sup>245</sup>Lesotho Bill, section 162; Namibian Bill, section 108; South African Bill, section 67.

<sup>246</sup>Lesotho Bill, section 162; Namibian Bill, section 108; South African Bill, section 67.

<sup>247</sup>The South Law African Commission *Discussion Paper on Juvenile Justice* (n 141 above) Para 11.71 motivates this on the basis that “prison represents the most restrictive form of deprivation of liberty”.

<sup>248</sup>The choice of the age of 14 years in the Namibian and South African Bills was motivated by the upper threshold of the *doli incapax* rule (14 years) over and above which a child would be presumed to have criminal capacity to commit a crime, see Chapter 4 (on Age and Criminal Capacity). This rule applies in Lesotho and hence it is not clear why Lesotho departed from the choice of 14 (to 16), although the higher age can be argued to be in more compliance with the restriction on deprivation of liberty at international law.

<sup>249</sup>Schedules 1 of the proposed Bills are similar and include offences such as; “assault where grievous bodily harm has not been inflicted, malicious injury to property, any offence relating to the illicit possession or dependence producing drugs of a certain quantity, theft where value of property does not exceed a fixed value, any statutory offence where the maximum penalty determined by that statute is imprisonment for three months or an equivalent fine and any conspiracy, incitement or attempt to commit any offence referred to in Schedule 1”.



In addition to the above conditions, Lesotho's Bill further provides that "no sentence of imprisonment may be imposed on a child under the provisions in the [Act] for a period exceeding 15 years on any charge".<sup>251</sup> An identical provision was proposed by the South African Law Commission in its Discussion Paper. The Commission's Report records that the aim of this proposal was to give practical effect to the principle that deprivation of liberty should only be imposed for the shortest period of time.<sup>252</sup> However, this proposal was eventually excluded from the proposed South African Bill in light of widespread opposition to a provision to this effect.<sup>253</sup> It is submitted that the inclusion of such a provision in Lesotho's Bill is therefore a clear attempt at giving effect to children's rights against the background of competing pressures such as harsh public attitudes towards child offending.

The use of child-specific facilities (reform schools in Namibia and South Africa and the Juvenile Training Centre and approved schools in Lesotho's case) as options for residential sentences has been retained by the three proposed laws. However, the Bills provide that as a minimum, such sentences should be for a period of six months but

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<sup>250</sup>Lesotho Bill section 164 (6) and (7); Namibian Bill, section 110(1)-(3); South African Bill, section 69(1) and (2).

<sup>251</sup>Lesotho Bill, section 164 (9) (adding that "where a child is sentenced to periods of imprisonment on more than one charge and the sentences cumulatively amount to more than 15 years the sentences must be served concurrently").

<sup>252</sup> South African Law Reform Commission *Report* (n 108 above) Para 10.33.

<sup>253</sup>South African Law Reform Commission *Report* (n 108 above) Para 10.33 (Commenting on the potential for lack of political support for this provision against a perceived public backlash). In the proposed Namibian and South African Bills, the theoretical potential for long terms of imprisonment (short of life imprisonment which is prohibited by the new proposed laws) will therefore remain. This is also in contrast to Ghanaian and Ugandan legislation discussed in section 7.5.3.1, above.

must not exceed a period of two years in the maximum.<sup>254</sup> In a break with past sentencing law,<sup>255</sup> three proposed laws abolish the administrative power to extend the detention period through executive decree.<sup>256</sup> It is submitted that both these provisions are aimed at ensuring the realization of the principle that detention should be used for the shortest period of time.

#### **7.5.4 Alternative sentences**

All the six new or proposed laws include a considerable range of alternatives in accordance with the obligation in Article 40(4) of the CRC which requires a variety of dispositions to be made available at the sentencing stage.

##### **7.5.4.1 The Lesotho, Namibian and South African Bills**



The proposed Lesotho, Namibian and South African laws make explicit provision in relation to a variety of alternative sentences under the classifications; ‘community-based sentences’ and ‘restorative justice sentences’.<sup>257</sup>

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<sup>254</sup>Lesotho Bill, section 164 (1), (2); Namibian Bill, section 109; South African Bill, section 68 (all adding that only where a child is below 14 years (16 years in Lesotho’s case) and such child would have, due to the seriousness of the offence, been sentenced to prison would such a child be subject to a residential sentence that lasts until the age of 18 years, as an alternative to imprisonment (which is prohibited for this category of children in the respective proposed Bills).

<sup>255</sup>Discussed in section 7.3.1, above. This is in contrast to the new Kenyan Act which allows for the application of the old legal order and hence the Minister’s power to extend or review periods of detention in child-specific facilities, see section 7.5.3.1, above.

<sup>256</sup>Lesotho Bill, section 164 (5); Namibian Bill, section 109; South African Bill, section 68.

<sup>257</sup>Namibian Bill, Chapter 10; South Africa Bill, Chapter 8 (Sentencing). Lesotho Bill, Part XVII (Sentencing) (uses the term ‘sentences not involving a residential element’ instead of ‘community based sentences’).

Community-based sentences in these three Bills are characterised as those which allow the child to remain in the community. The Bills provide for a range of such sentences including:<sup>258</sup> the imposition of supervision and guidance orders for a period of up to 3 years; ‘referral to counselling or therapy’ in conjunction with any other community-based sentences; orders for compulsory school attendance for children above the age for compulsory school attendance and performance of community service without remuneration for the benefit of the community under the supervision of an organisation or institution.<sup>259</sup> In addition to the community-based sentences listed in the Namibian and South African Bills, sentencing officers in these countries are empowered to develop “any other sentence which is appropriate to the circumstances of the child and in keeping with the principles in the Act(s)”.<sup>260</sup>

The three Bills also make explicit provisions for ‘restorative justice sentences’.<sup>261</sup> By virtue of these provisions, a sentencing officer would be empowered to refer a matter

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<sup>258</sup>Lesotho Bill, section 158; Namibian Bill, section 106; South African Bill, section 64.

<sup>259</sup>The provisions put limits on the use of community service including a maximum period of 12 months and 250 hours of such work. Where a child under the age of 14 is subjected to community work, “due consideration must be paid to the child’s age and development”. It is submitted that the limitations in relation to the use of community service are designed to place this form of sentence outside the ambits of the prohibition of child labour in international law. This is evident in the restriction in relation to the type of work and the limitations of the working hours-250 hours and a maximum of 12 months. That these options may be used in conjunction with other sentencing options such as counselling or compulsory school attendance also supports this premise in that the sentence may be imposed in addition to other sentences such as an order requiring the child to attend school. This applies to the Lesotho Bill which includes community service as a sentence. The Lesotho Bill, section 158 (l) prohibits the imposition of community service on a child under the age of thirteen years. In addition the Lesotho includes options such as the imposition of novel orders such ‘peer association orders’ and ‘family time orders’ as community-based sentences, section 158.

<sup>260</sup>Namibian Bill, section 106 (f); South African Bill, section 64(f) (adding that the period stipulated in any of these sentences may not exceed 12 months in duration).

<sup>261</sup>Lesotho Bill, section 160; Namibian Bill, section 107; South African Bill, section 65.

to a family group conference, victim offender mediation or ‘other restorative justice processes’ after a conviction. It is submitted that these provisions show the influence of restorative justice theory (which is compatible with children’s rights)<sup>262</sup> on the subject of sentencing, as was the case with diversion.<sup>263</sup>

The South African Bill provides for correctional supervision as a separate sentencing option.<sup>264</sup> The use of this sentence is limited to children above the age of 14 years in light of the proposed prohibition of imprisonment for children under this age. The Lesotho and Namibian Bills do not provide for correctional supervision as a separate option.<sup>265</sup> However, by virtue of the provision in the Namibian Bill which empowers sentencing officers to develop “any other sentences appropriate to a child’s circumstances and in keeping with the principles under the Act,”<sup>266</sup> sentencing officers would have the discretion to use this type of sentence in Namibia. The failure




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<sup>262</sup>Chapter 2, section 2.9.1.


<sup>263</sup>Discussed in Chapter 5, section 5.7.3.2 and 5.7.3.3 which considered that the possibility of post-trial diversion was provided through a range of alternative sentences including ‘restorative justice-oriented’ sentences.

<sup>264</sup>The sentence is currently provided for under the South African Criminal Procedure Act No. 51 of 1977, sections 276(1) (h) and (i). It has been described as comprising of a combination of different aspects, which entail alternative sentences under the supervision of correctional officials. In South Africa, the use of correctional supervision includes aspects such as community service, house arrest and regular supervision by a correctional official and may eventually include electronic monitoring, see Sloth-Nielsen (n 91 above) 402, Muntingh, L “Alternative Sentencing” in Sloth-Nielsen, J and Gallinetti, J (eds) (2004) *Child Justice in Africa: A Guide to Good Practice* Bellville: Community Law Centre 93, Muntingh, L “Alternative Sentences in South Africa: An Update” in Maepa, T (ed) (2005) *Beyond Retribution: Prospects for Restorative Justice in South Africa Monograph No. 111* Pretoria: Institute for Security Studies 105-119, Steytler (n 196 above) 426.

<sup>265</sup>This is despite the similarity of the Namibian and South African Criminal Procedure Acts in these countries and the identical provisions of the new Bills. It is submitted that this exclusion may be due to the fact that correctional supervision has been practiced for some years in South Africa, whilst it has not got off the ground in Namibia.

<sup>266</sup>Namibian Bill, section 106 (f).

to explicitly include correctional supervision in the Lesotho Bill, which is also identical in other respects to the South African Bill, may be explained by the inclusion of probation as a separate sentencing option. In this respect, the Bill makes extensive provision.<sup>267</sup>

All three Bills include provisions to the effect that any sentence imposed on a child may be suspended or postponed with or without conditions for a period not exceeding three years.<sup>268</sup> The conditions for the postponement of sentences may include orders that the child pays compensation, restitution or symbolic restitution, that the child renders an apology, the child's acceptance of an obligation not to commit an offence, regular school attendance and that the child submits to a family group conference or victim offender mediation.<sup>269</sup> These provisions are also in further compliance with the requirement in Article 40(4) of CRC  on the need for a variety of non-institutional dispositions.

#### **7.5.4.2 The new laws of Ghana, Kenya and Uganda**

These three laws also provide for a range of sentences to serve as alternatives to custodial sentences.

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<sup>267</sup>Lesotho Bill, sections 167-172 (on the details regarding the imposition of probation, limitations on the period of probation, the supervision, discharge or variation of probation orders) in contrast to both the Namibian and South African Bills, sections 111 and 70 respectively, where probation is only included as a condition for suspension or postponement of a sentence).

<sup>268</sup>Lesotho Bill, section 159; Namibian Bill, section 111; South African Bill, section 70.

<sup>269</sup>Lesotho Bill, section 159; Namibian Bill, section 111; South African Bill, section 70.

Sentencing officers in these three countries are empowered to adopt one or more of a number of orders including discharge (with or without conditions); caution; binding the child to be of good behaviour; compensation, restitution or fine; and ordering the child to undergo a period of probation.<sup>270</sup> The Kenyan and Ghanaian Acts provide for the option for the child to be committed to the care of fit persons (whether relatives or other persons and institutions).<sup>271</sup> The options of community service and the placement of the child ‘under the care of qualified counsellor’ are included only in the Kenyan Act.<sup>272</sup> Further, it is submitted that the provision in the Kenyan Act which empowers the sentencing court “to deal with the child in any other lawful manner”,<sup>273</sup> may be construed as enabling the development of new alternative sentences options which are not included in the Kenyan Act.

It is submitted that, although devoid of the detail that characterises the provisions in the three proposed laws of Lesotho, Namibia and South Africa discussed above,<sup>274</sup>

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<sup>270</sup>Ghanaian Act, section 29; Kenyan Act, section 191(1); Ugandan Statute, section 95. The Ugandan Statute is unique in comparison to the two other laws in providing a 12 months maximum limit for the duration of all these orders or sentences. The Ghanaian Act also provides that probation orders shall be valid for not less than three months or more than six months (section 31(5)). In contrast to the two laws, the Ugandan Statute is also explicit that a probation order shall not require a child to reside in a remand home (section 95(f)). It is submitted that this provision aims at giving effect to the exclusion of the use of institutionalization through sentences involving probation, in line with the principle of detention as a last resort.

<sup>271</sup>Ghanaian Act, section 29 (1) (d); Kenyan Act, section 191(1) (d).

<sup>272</sup>Kenyan Act, section 191(1) (h) and (k). The option of placement with a counsellor draws directly from a similar inclusion in the provisions of Article 40(4) of CRC. The provision in relation to community service does not include the limitations on the use of community service as contained in the Lesotho, Namibian and South African Bills (see the discussion in n 259 above).

<sup>273</sup> Kenyan Act, section 191(1) (l).

<sup>274</sup>The provision of these new laws do not provide for restorative justice sentences, conditions for the suspension or postponement of sentences and a number of community-based sentences included in the Bills of the other countries.

these provisions are in line with the obligation relating to the need for alternative sentences in Article 40(4) of CRC.

In section 7.3.2 of this Chapter, it was discussed that the former laws of the countries under study were all characterised by a range of alternative sentences. It was, however, pointed out that past sentencing practice in these countries reveals that the range of alternative sentences were only used to a limited extent due to a number of reasons. These included the lack of, or inadequacy of, pre-sentencing reports and the predominance of sentences involving institutionalization.<sup>275</sup> It is submitted that the prohibition on and restrictions in relation to the use of imprisonment and custodial sentences in all the new laws<sup>276</sup> will have the effect that sentencing courts must have full recourse to the range of alternative sentences discussed in this section. Further, all six laws under study introduce explicit provisions in relation to the requirement of pre-sentencing reports so as to ensure that sentencing officers make sentencing decisions based on information on the circumstances of child offenders as contained in these reports. The provisions in this regard are highlighted in the last section of this Chapter below.

### **7.5.5 Provisions on the requirement of pre-sentencing reports**

The Ghanaian Act and the Bills of Lesotho, Namibia and South Africa all provide that the court must, upon the conviction of a child, require the preparation of pre-sentencing reports which detail the child's social background before the making of

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<sup>275</sup>Discussed in section 7.3.2, above

<sup>276</sup>Discussed in section 7.5.3, above.

any order.<sup>277</sup> In respect of South Africa, the enactment of this provision will build on judicial precedent thus far which indicates that pre-sentence reports should be prepared before the imposition of a sentence upon a juvenile offender. Dictum in the *Kwalase* decision discussed in this Chapter is an example.<sup>278</sup> Most recently, in the case *S v M and Another*,<sup>279</sup> a South African High Court set aside custodial sentences in respect of two accused children and remitted the case back to the trial court so that they may be sentenced *de novo* in light of probation officers' reports.<sup>280</sup>

The Ugandan Act obliges the preparation of written pre-sentencing reports in all cases where the court is considering making a detention or probation order.<sup>281</sup> In the Kenyan Act, the court has the discretion to resort to an oral or written social background while considering "any question with respect to a child under the Act".<sup>282</sup>



It is submitted that, besides the compliance of these provisions with the requirement of pre-sentence reports in international law (the Beijing Rules),<sup>283</sup> the provisions will,

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<sup>277</sup>Ghanaian Act, section 24; Lesotho Bill, section 155; Namibian Bill, section 104; and South African Bill, section 62.

<sup>278</sup> Section 7.3.5, above.

<sup>279</sup>2005 (1) SACR 481, discussed in (2005) 7(2) *Article 40* 5. The case involved two accused, aged 15 and 17 years respectively, who were convicted and sentenced by a South African Magistrate's Court for the offences of house-breaking with intent to steal and theft. Each was sentenced to two years imprisonment, half of which was suspended for five years on certain conditions. However, neither their parents nor guardians were present at the proceedings. Further, the magistrate finalised the matter without a probation officer's report.

<sup>280</sup>The judge, Pickering, J referred to and confirmed judicial precedent in similar vein in *S v Petersen en'n Ander* 2001 (1) SACR (SCA) and *S v Z en Vier Ander Sake* 1999 (1) SACR 427 (E).

<sup>281</sup>Ugandan Statute, section 96.

<sup>282</sup>Kenyan Act, section 78.

<sup>283</sup>Beijing Rules, Rule 16 requiring social inquiry reports detailing a juvenile's background and circumstances in 'all except minor' cases.



if adhered to in practice, ensure that sentencing officers have the information they need in order to be able to impose alternative sentences provided for in the new and proposed laws.

## 7.6 Conclusion

This Chapter considered that international children's rights law applies to juvenile sentencing in two respects. The first involves the principles which should underpin the aims of sentencing. The second relates to limitations on sentences that may be imposed on children, namely prohibitions on juvenile death penalty (now constituting a *jus cogens* norm); life imprisonment without the possibility of parole; judicial corporal punishment and a restriction on the use of deprivation of liberty.



In the discussion of the former sentencing laws of the countries under study, it was established that the provision of a wide range of alternative sentences theoretically complied with the requirements of international law. However, it was pointed out that this was not adequately implemented in past practice. Past sentencing practices in these countries have shown the over-reliance on the use of custodial sentences. It was contended that this was in violation of the restriction in international law in relation to detention as a last resort and for the shortest period of time. This Chapter attributed the failure to fully utilize the array of alternative sentences in the past sentencing laws of these countries to the lack of sentencing policy<sup>284</sup> in respect of custodial sentences.<sup>285</sup> This lacuna was qualified in respect of South Africa where the inclusion

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<sup>284</sup>Reflected through the aims of a juvenile justice system and the restriction on detention in international law.

<sup>285</sup>And partly due to other factors such as the inadequacy or lack of pre-sentencing reports.

of the restriction on detention in the children's rights clause of the South African Constitution led to judicial decisions affirming restrictions on detention (particularly imprisonment) and international law standards on the desirable aims of juvenile sentencing. It was further contended that the exclusion of children from the South African minimum sentences legislation of 1997 (and subsequently confirmed by judicial precedent) was in a large measure premised on the provisions of CRC and international juvenile justice instruments.

The Chapter discussed the new and proposed laws of the countries under study to illustrate the influence of international law in a number of respects. In relation to the lack of a sentencing policy for custodial sentences in the past practice of these countries, it was highlighted that the laws now provide for or propose fetters on judicial discretion.<sup>286</sup> This is applicable to three main areas. First, there are provisions for and inclusion of new forms<sup>287</sup> (mainly in the case of Lesotho, Namibia and South Africa) of alternative sentences. Second, there is a prohibition on the use of imprisonment (in the laws of Ghana, Kenya and Uganda) on the one hand, and on the other, explicit restrictions on its use (in the proposed laws of Lesotho, Namibia and South Africa). Third, all six new or proposed laws place restrictions on the use and duration of custodial sentences to be served in facilities other than prison.<sup>288</sup> The provisions of the new laws in relation to a range of alternative sentences suggest that

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<sup>286</sup>In addition, the Namibian and South African Bills explicitly provide for the 'purposes of sentencing'.

<sup>287</sup>In relation to new forms of 'community-based sentences' and 'restorative justice sentences'.

<sup>288</sup>The exception was stated to be the Ghanaian and Kenyan positions in respect of which children found guilty of committing capital offences may be detained in prison at the President's pleasure, see section 7.5.2.1, above. Further, the Kenyan position which still allows for the exercise of administrative discretion to extend periods of detention was faulted in this regard, see section 7.5.3.1, above.

the provisions of CRC (Article 40(4))<sup>289</sup> were influential in the drafting of these laws. In addition, the prohibitions and restrictions in relation to the use of imprisonment bear evidence of the substantial influence of the principle that detention should be used as a last resort and for the shortest period of time.

In addition, the Chapter has considered that the provisions in the new laws which require the consideration of pre-sentencing reports in the process of sentencing are aimed at making the use of alternative sentences more attainable.

This Chapter submitted that the prohibition of juvenile death penalty long before the recent juvenile justice law reforms in all the six countries under study in this thesis is in line with the prohibition of juvenile death penalty in international law (now constituting a norm of *jus cogens* character). However, it was submitted that the Kenyan and Ghanaian positions which allow for the detention, at the pleasure of the president, of any child convicted of a capital offence may lead to long periods of imprisonment and even life imprisonment for such children.

The Chapter considered that the (indirect or direct) prohibition of life imprisonment in the new laws of these countries is not only another pointer to the influence of international law, but also an instance where domestic provisions may go further than the provisions in international law.<sup>290</sup> The prohibition on the use of judicial corporal punishment in all the countries under study also bears further testimony to the

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<sup>289</sup> This provides that juvenile justice systems must provide for a variety of dispositions and alternatives to institutional care.

<sup>290</sup> CRC, Article 37 (a) prohibits the sentence of life imprisonment without the possibility of parole and not life imprisonment, per se.

influence of international law in relation to juvenile sentencing laws on the new and proposed laws.



## CHAPTER 8

### PROSPECTS AND CHALLENGES IN IMPLEMENTING THE NEW LAWS

#### 8.1 Introduction

The enactment of juvenile justice laws underpinned by children's rights is a daunting challenge. This is especially in view of competing pressures. Harsh public opinion against crime and questions on the affordability of new proposals are two major obstacles which can impede juvenile justice law and practical reforms. Indeed the delay in enacting the Namibian and South African Child Justice Bills which were drafted over two years ago, and in South Africa's case, even introduced in Parliament in 2002 is an illustration that proposals for child rights-centred juvenile justice legislation would not find ready political support.<sup>1</sup>

However, even when the difficulty of successfully enacting new juvenile justice legislation is overcome, the actual implementation of the laws is bound to remain a complex, costly and time consuming process.<sup>2</sup> Hence, the transformation of obligations derived from international law "must not be confused with a strong determination to enforce the law".<sup>3</sup> As noted by Parry-Williams, it is instructive that,

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<sup>1</sup>Considered further in section 8.2, below.

<sup>2</sup>Wadri, K "Introducing Child Rights Through Law Reform in Uganda" in Petty, C and Brown, M (eds) (1998) *Justice for Children: Challenges for Policy and Practice in Sub-Saharan Africa* London: Save the Children 37.

<sup>3</sup>Schulz, S and Hamutenya, M (2004) "Juvenile Justice in Namibia: Law Reform Towards Reconciliation and Restorative Justice?" (Unpublished Paper on file) 27.

“...the proposing and passing of laws is only the first part of the process. The second part of implementation will cost and take at least as long in its initial phase”.<sup>4</sup>

The previous Chapters of this thesis discussed the opportunities for realizing the CRC rights on juvenile justice through new juvenile justice laws. This Chapter will consider challenges to the implementation of the new juvenile justice laws with a view to identifying a general framework for the way forward.<sup>5</sup> The Chapter argues that the proposed new juvenile justice systems call for practical mechanisms in terms of resources and a commitment to turn legal provisions into practice. It will be further argued that the key prerequisite in this regard is political leadership and the ability to sustain the initiatives taken into long-lasting structures and systems.<sup>6</sup> It is only then that the proposed child rights-centred juvenile justice systems can be turned into reality.



## **8.2 Delay in enacting new legislation in Namibia and South Africa and questions on the sustainability of a children’s rights approach to juvenile justice**

The process of developing the Namibian Bill was first started in 1994 and finalized in 2002, but the Bill is yet to be introduced into Namibia’s National Assembly. Furthermore, the South African Law Reform Commission’s process which was

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<sup>4</sup>Parry-Williams, J “Legal Reform and Children’s Rights in Uganda-Some Critical Issues” (1993) (1) *International Journal of Children’s Rights* 49.

<sup>5</sup>A ‘general’ framework in the sense that the Chapter will not give specific detailed recommendations due to the limited scope of the thesis.

<sup>6</sup>Hammad, S “The CRC: ‘Words on Paper’ or a Reality for Children - A Case Study of Jordan” (1999) *The International Journal of Children’s Rights* 215-237, 216.

formally started in 1997 was completed in 2000 with the submission of a Report and a Draft Bill recommended by the Commission.<sup>7</sup> The revised version of this Bill was first introduced in the National Assembly in August 2002 (as Bill No. 49 of 2002, discussed in this thesis). This Bill went through the process of public hearings (in accordance with South Africa's law making process) by a Parliamentary Portfolio Committee in early 2003 and was subjected to further deliberations later in the same year.<sup>8</sup> At the time of writing (October 2005), it is not clear when the Committee will recommend the finalised version of the Bill for passage into law by the South African National Assembly.<sup>9</sup> In contrast to the Namibian and South African Bills, the Lesotho Bill (2004) is however much more recent, the drafting process having started two years ago (2003).

Generally, the process of developing and eventually enacting a new acceptable legislative framework to underpin juvenile justice seems to be an inordinately long one as the examples of Kenya, Ghana and Uganda show.<sup>10</sup> However, it is submitted that in the context of South Africa and Namibia where the respective Bills seek to give legal force to aspects of juvenile justice practice that are already being

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<sup>7</sup>As discussed in Chapter 3, section 3.5.3.

<sup>8</sup>Odongo, G.O "Public Hearings by the Portfolio Committee on Justice on the Child Justice Bill" (2003) 1(1) *Article 40* 1-2.

<sup>9</sup>This is in spite of earlier predictions of commentators on the Bill. Writing in 2000, Sloth-Nielsen predicted that the Bill was "likely to be tabled in Parliament in 2001". See Sloth-Nielsen, J "Child Justice and Law Reform" in Davel, C.J (ed) (2000) *Introduction to Child Law in South Africa* Cape Town: Juta 393. Almost four years later, the Bill is still awaiting parliamentary approval.

<sup>10</sup>Kenya's process lasted eight years from the inauguration of the reform process to the time the legislation was enacted. The completion of similar processes took five years in Ghana and four years in Uganda. For discussions on the law reform processes in Kenya and Uganda, see Chapter 3, sections 3.5.1 and 3.5.2

implemented in practice (such as diversion),<sup>11</sup> and where the pre-legislative phase was marked by an extensive broad-based consultative process, legitimate fears may be expressed as to whether a child rights' approach may be successfully advocated and sustained as the primary criterion for new legislation. Chapter 3, section 3.5.3, discussed the widely consultative pre-drafting process undertaken by the South African Law Reform Commission. It was considered in that Chapter that the intention of this consultative process was to ensure a high degree of legitimacy and acceptance by juvenile justice role-players, politicians and the general public regarding the content of the draft legislation which was underpinned by children's rights.<sup>12</sup> Further, the South African Bill was costed so as to allay fears regarding its feasibility.<sup>13</sup>

In light of such a comprehensive process of provisioning, the fears about a possible retreat by politicians from a children's rights approach in the proposed South African Bill draw from the powerful nature of other competing pressures, such as the 'need to be tough' on crime.<sup>14</sup> Such pressures may eventually have far-reaching effect on the final provisions of the Namibian and South African Bill on issues such as diversion and sentencing. Put in other words, in the final result the applicability of diversion may be substantially restricted and the limitations and specific prohibitions in relation

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<sup>11</sup>Considered in Chapter 5, section 5.6.1 and further highlighted in the broader context of all the law reform processes in section 8.5, below.

<sup>12</sup> See the discussion in Chapter 3, section 3.6.4.

<sup>13</sup>Chapter 3, section 3.5.3 and further considered briefly in section 8.4, below.

<sup>14</sup> For an earlier analysis of the potential for the dominance of a crime control theme in South African juvenile justice reform debates prior to the introduction of the Bill in Parliament, see Skelton, A "Juvenile justice reform: Children's rights and responsibilities versus crime control" in Davel, C.J (ed) (1999) *Children's Rights in a Transitional Society* Pretoria: Protea Books.



to imprisonment removed as a result of the dominance of a crime control theme.<sup>15</sup> At the time of writing, such fears are speculative since the final versions of the Lesotho, Namibian and South African Bills will only be made public when re-introduced for debate in the respective National Assemblies. However, the fear has already been expressed in one analysis of some of the debates during the South African Parliamentary Committee's discussion concerning diversion and the possible automatic exclusion of some categories of child offenders, irrespective of their circumstances, from diversion and alternative sentencing.<sup>16</sup> In similar vein, the decision by the Namibian government to reject the original draft proposal in the Namibian Bill for an increase in the minimum age of criminal responsibility from the age of seven years to ten was discussed in Chapter 4, section 4.8.1.

In view of the above, there is an ever-present challenge in relation to the creation of awareness on the value of a children's rights approach to the handling of children who

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<sup>15</sup>See the discussion in Chapter 7, section 7.5.3.2 on the restrictions in the Lesotho, Namibian and South African Bills on the use of imprisonment.

<sup>16</sup>See Chapter 5, section 5.7.3.1. Skelton, A "The South African Child Justice Bill: Transition as an Opportunity" in Jensen, E and Jepsen, J (2004) *Comparative Juvenile Justice* Copenhagen: Danish Institute of Human Rights (forthcoming) also comments on this point. Following an extensive analysis of the debates during the Committee's hearings on the Bill, Skelton concludes thus: "... In South Africa the sense of new-found freedom amongst the public was soon eclipsed by a sense of fear – a fear of crime, a fear that young people were out of control. And thus politicians began to feel some pressure from the electorate to articulate the fears of voters and to show that they are tough on crime. As an antidote, it has been necessary to keep the history of South Africa's children to the fore, to stress that those who will benefit most from the new provisions are the poorest and most marginalized children, such as street children. This has helped to keep many of the provisions intact..." Also see, generally, Sloth-Nielsen, J and Van Heerden, B "Politics, Processes and Pressures of Legislating for Children in South Africa" in Dewar, J and Parker, S (eds) (2003) *Family Law: Politics, Processes and Pressures* London: Hart Publishing; Sloth-Nielsen, J "The Business of Child Justice" in Burchell, J and Erasmus E (eds) (2003) *Criminal Justice in a New Society* Cape Town: Juta 175-193. Influencing public opinion as a key challenge to the implementation of the new laws under study in this thesis is further considered in section 8.3.2, below.

commit crimes. Such awareness will however have to contend with public perceptions on increasing rates of child offending. The next section of this Chapter turns to this discussion.

### **8.3 Creating public awareness on the value of a children's rights approach**

Chapter 3 discussed the importance of creating public awareness on children's rights in the process of developing juvenile justice laws underpinned by children's rights.<sup>17</sup> It is to be emphasized that this process is vital and must be continuous so as to ensure that a lack of community awareness on any new law does not hinder the process of implementation.<sup>18</sup> In relation to juvenile justice, the importance of creating awareness on children's rights is relevant in two respects. The first is the need to challenge paternalistic perceptions and interpretation of children's rights against the socio-economic and political backgrounds that obtain in the African context. The second is the need to create awareness so as to counter harsh public opinions about juvenile crime.

#### **8.3.1 The need for social mobilisation regarding the child's right to individual autonomy**

Provisions in the new and proposed juvenile justice laws discussed in previous Chapters are premised on the child's individual autonomy as recognised in children's

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<sup>17</sup>Chapter 3, section 3.6.4

<sup>18</sup>CRC, Article 42 provides: "States Parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike."

rights.<sup>19</sup> Thus, for diversion to take place, a child's consent (to the commission of a crime) is mandatory.<sup>20</sup> Therefore, it is only with the acceptance of the child's right to make such an independent decision that diversion may work as intended.

There are wide ranging disagreements by States and different cultures regarding the content of children's autonomy or 'self-determination rights'.<sup>21</sup> Despite the lack of consensus, the concept of children's rights requires that when a child has the capacity to act in its own best interests (taking into consideration the age of the child), then the child must have the right to decide for itself.<sup>22</sup>




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<sup>19</sup>This is the essence of the CRC, Article 12. However, the right of child to participate is qualified to the extent that 'due weight' must be given in accordance with the child's age and maturity and in a manner consistent with the child's evolving capacities. For a comprehensive discussion, see Lucker-Babel, M.F "The Right of Children to Express their Views and to be Heard: An Attempt to Interpret Article 12 of the UN Convention on the Rights of the Child" (1995) 3 *The International Journal on Children's Rights* 398.

<sup>20</sup>Chapter 5, section 5.3 considered that the initiation of a process of diversion is contingent on the child's free admission of criminal responsibility.

<sup>21</sup>As embodied in the child's right to participation and expression. Despite the universal nature of CRC's ratification, States have achieved no consensus as to what constitutes children's rights as evident in different interpretations of a number of key children's rights and issues, see An-Na'im, A "Cultural Transformation and Normative Consensus on the Best Interests of the Child" in Alston, P (ed) (1994) *The Best Interests of the Child: Reconciling Culture and Human Rights* Clarendon Press: Oxford 63. For a more recent analysis, see Harris-Short, S "International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention on the Rights of the Child" (2003) 25 *Human Rights Quarterly* 130-181.

<sup>22</sup> Smith, L "Human Rights for Children" in Bergsmo, M (ed) (2003) *Human Rights and Criminal Justice for the Downtrodden* Leiden/Boston: Martinus Nijhoff 746 adding that "children reach autonomy in different areas at different stages in their life."

Veerman strongly argues that this right of children to ‘self-determination’ largely depend upon the prevailing image of childhood in a given community.<sup>23</sup> Rwezaura, in his examination of the approach to children’s rights in a number of sub-Saharan African societies, argues that the best interests of the child in Africa remain closely tied to those of adults.<sup>24</sup> As a result, the concept of children’s rights is still not widely accepted in most of these societies and a paternalistic interpretation is still dominant in defining and giving effect to the rights of children.<sup>25</sup> It is submitted therefore that the creation of public awareness on the child’s right to decide on a range of issues such as giving consent to referrals to diversion processes and participating in their legal representation will play an important role in the effective working of the new systems.

### 8.3.2 Making use of children’s protection rights to counter harsh public opinion about crime



The need to emphasize the child’s right to individual autonomy does not preclude taking into account the fact of vulnerability of children as a special category of people from the definition of children’s rights. It has correctly been argued that many provisions of the CRC affirm the view that children are different (from adults) and are

<sup>23</sup>Veerman, P (1992) *The Rights of the Child and the Changing Image of Childhood* Dordrecht: Martinus Nijhoff Publishers 398

<sup>24</sup>Rwezaura, B “The Concept of the Child’s Best Interests in the Changing Economic and Social Context of Sub-Saharan Africa” in Alston, P (ed) (n 20 above) 82-115, 115 concluding that: “[t]his paper has shown that the concept of the best interests of the child is best appreciated by locating it in the wider social and economic matrix of any community.”

<sup>25</sup>Rwezaura (as above) 115 pointing out that one manifestation is the dominance of the idea of children as a source of wealth and that this contributes to increasing rates of child labour. See also Chirwa, D.M “The Merits and Demerits of the African Charter on the Rights and Welfare of the Child” (2002) 10 *The International Journal of Children’s Rights* 157, 169 and discussion in Chapter 3, section 3.6.4.

in a stage of development.<sup>26</sup> Illustrating this view are previous discussions in this thesis in relation to the CRC provisions on the setting of a minimum age below which children may not be held capable of committing a crime at all, and an ‘upper age’ of eighteen years in respect of which a juvenile justice system should apply to all children accused of crime.<sup>27</sup> Further, recognition of diversion and the need for separate juvenile justice systems<sup>28</sup> both proceed from the rationale that the formal criminal justice system is not appropriate for children due to their age and status of development.<sup>29</sup>

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<sup>26</sup>Freeman, M “Taking Children’s Rights More Seriously” (1992) 6 *International Journal of Law and the Family* 52, 66 (defines this affirmation as being in line with ‘children’s developmental trajectory’). Eekelaar also argues in support of the theory that calls for children’s ‘developmental interests’ and which emphasizes that “children’s potential should be developed so that they enter adulthood as far as possible without disadvantage”, Eekelaar, L.J “The Importance of Thinking that Children Have Rights” (1992) *International Journal of Law and the Family* 221, 231. It has been pointed out that due to children’s vulnerability, the CRC leans strongly in favor of ‘protection and provision’ rights as compared to ‘participation rights’, see LeBlanc, L (1995) *The Convention on the Rights of the Child-United Nations Lawmaking on Human Rights* Nebraska: University of Nebraska Press 123. Other scholars have also strongly warned of the danger that the child’s right to participation may conflict with children’s protection and developmental interests. Hence, the need to be aware of this danger and recognize both aspects of children’s rights. See Hafen, B and Hafen, J “Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child” (1996) 37 (2) *Harvard International Law Journal* 449-491 cited in Pare, M “Why Have Street Children Disappeared? - The Role of International Human Rights Law in Protecting Vulnerable Groups” (2003) 11(1) *The International Journal of Children’s Rights* 1-32, 14.

<sup>27</sup>Discussed in Chapter 4. These provisions are examples of recognition in international law that while children are bearers of rights, they are still developing and have not reached full maturity.

<sup>28</sup>Discussed in Chapters 5 and 6.

<sup>29</sup>Researchers in criminology and psychology have put forward arguments that motivate the treatment of child (young) offenders differently from adults. These include the points that young people are regarded as being less responsible for their actions than adults, although they are expected to become more responsible as they grow older; early prevention, through appropriate corrective action and guidance, could prevent a life of continued crime; children are more amenable to behavioural change than adults; prison and detention damage young people’s physical and emotional well-being and development; institutionalisation and formal proceedings stigmatise the offender and this could promote further offending because the young person would be labelled a criminal; prison and detention

It is therefore important that the appreciation and understanding of children's rights should be two-pronged. It should entail recognizing both obligations in relation to children's autonomy on the one hand, and their vulnerability on the other. The argument concerning the vulnerability of children is especially important in the process of marshalling public support for change to the administration of juvenile justice.<sup>30</sup> Worldwide, lack of public support for the implementation of CRC's juvenile justice provisions has posed a fundamental problem for States.<sup>31</sup> Public opinion in both western and developing countries "is generally opposed to anything that can be seen as liberalization or 'softening' of the juvenile justice system".<sup>32</sup> However, available research appears to indicate that public opinion is largely 'uninformed opinion'.<sup>33</sup> Thus, there is a general lack of public knowledge about crime trends,

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facilities are often seen as 'schools of crime' where further offending could be learnt from fellow inmates. For these arguments, see Open Society Foundation for South Africa (2005) *Review of South African Innovations in Diversion and Reintegration of Youth at Risk* Cape Town: Open Society Foundation 11.

<sup>30</sup>See Covell, K and Currie, F "Juvenile Justice and Juvenile Decision Making: A Comparison of Young Offenders with their Non-Offending Peers" (1998) 6(2) *The International Journal of Children's Rights* 125-136, 125 pointing out that "underlying the public demands [for more punitive measures for children who commit crimes] is an assumption that [children] and adolescents have the same decision making capacities as do adults, and that offences committed by adolescents reflect reasoned action."

<sup>31</sup>See Hamilton, C and Harvey, R "The Role of Public Opinion in the Implementation of International Juvenile Justice Standards" (2003) 11 (4) *The International Journal of Children's Rights* 369, Hemmens, C *et al* "The Rhetoric of Juvenile Justice Reform" (1999) 18 *Quinnipiac Law Review* 661, Covell, K and Howe, B "Public Attitudes and Juvenile Justice in Canada" (1996) 4(4) *The International Journal of Children's Rights* 345-355. For an analysis in the South African context see Skelton (n 14 above) and the references in n 15 above, generally.

<sup>32</sup>Hamilton and Harvey (as above) 380 adding that although there is sparse data on public opinion relating to juvenile justice in developing countries, "there is no reason to believe that it would be conspicuously [in favour of juvenile justice reform]." Also, "it is a truism that no government is likely to sacrifice its popularity and its electability by implementing deeply unpopular juvenile justice reforms."

<sup>33</sup>See Covell and Currie (n 30 above) 125 asserting that "public demands for more punitive measures appear to be based on misconceptions of the incidence of youth crime and causes of crime."

prevalence of violent juvenile crimes, recidivism rates, specific criminal laws, legal reforms, the alternatives to imprisonment, the high costs of incarceration, and the impact of rehabilitation and restorative justice.<sup>34</sup>

In relation to the prevalence of violent child offending which is often cited to justify harsher reactions to dealing with child crime, the little anecdotal evidence in the context of the countries under study shows that majority of offences committed by children in the region comprise of minor economic crimes.<sup>35</sup> If this fact was given publicity and disseminated by governments and the media, perhaps calls for a culture of crime control would not be the norm in relation to child offending, at least in the case of the countries under study.

It has been correctly argued that:



“Where a State is willing to implement the juvenile justice provisions of the CRC, they may have to overcome, or ignore, public resistance to reform...Public opinion should not be an excuse for the violations of children’s rights.”<sup>36</sup>

In this regard, a better informed public has been said to be less punitive.<sup>37</sup> The political will to take the provisions of the child rights-oriented juvenile justice systems

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<sup>34</sup>Hamilton and Harvey (n 31 above) 380 citing Cullen *et al* “Public Opinion about Punishment and Corrections” in *Crime and Justice 2000* Volume 27 Chicago: University of Chicago 1.

<sup>35</sup> See section 8.7, below.

<sup>36</sup>Hamilton and Harvey (n 31 above) 386.

<sup>37</sup>Covell and Howe (n 31 above) 347 citing a study in this regard, Doob, A.N and Roberts, J.V “Social Psychology, Social Attitudes and Attitudes Toward Sentencing” (1984) 16 *Canadian Journal of Behavioural Science* 269-280.

seriously will undoubtedly be affected by public pressures.<sup>38</sup> Hence, governments of the countries under study in co-operation with other non-government actors such as the civil society and the media must make concerted, multi-pronged coherent and coordinated efforts to influence public opinion in order to counter popular sentiment premised on an attitude of crime control.<sup>39</sup> Although this process was started at the pre-legislative stage in some of the countries under study,<sup>40</sup> it must be a continuous one so as to mitigate against harsh public attitudes about crime, which is frequently based on misinformation.

The need to create awareness on the viability and value of the children's rights' approach to juvenile justice is one of many challenges. The next sections of this Chapter consider some of the other relevant issues in relation to the implementation of the new laws.



#### **8.4 Emphasizing the financial feasibility of new juvenile justice laws**

In African settings, the matter of resources inevitably assumes a prominent role in debates about law reform generally and juvenile justice law reform in particular.<sup>41</sup>

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<sup>38</sup>Covell and Howe (n 31 above) 347 adding in the Canadian context that: "As long as the public misperceives the causes, seriousness and frequency of juvenile crime, we can expect youth in trouble will continue to be denied their rights."

<sup>39</sup> UNICEF (1998) *Innocenti Digest No 3 on Juvenile Justice* Florence: UNICEF 17.

<sup>40</sup> See Chapter 3, section 3.6.4. It was discussed that the processes of drafting the new juvenile justice laws involved multidisciplinary reform committees representing different groups and were highly consultative with the aim of widely influencing understandings regarding the viability of a children's rights approach to law reform.

<sup>41</sup>'Resources' is comprehensively used here to refer to financial and human resources at a government's disposal, both domestic and external (as a result of international co-operation and foreign aid), see CROC *General Comment No. 5 General Measures of Implementation for the Convention on*



This is in view of the scarcity of resources that characterise the socio-political and economic contexts of developing countries.<sup>42</sup> The challenge has therefore been expressed by one author in the following words:

“Whilst law makers should be free to dream up completely innovative solutions to the problems facing children, they should make sure that they dream with their feet firmly planted on the earth. Empty promises echoing provisions of the UN Convention will not protect children or further the promotion of their rights. Law-makers must commit themselves to what can realistically be achieved in the country they are working in, and make sure that the laws have the best possible chance of being properly implemented.”<sup>43</sup>

As was discussed in Chapter 3,<sup>44</sup> the provisions in the South African Child Justice Bill were subjected to a costing process. This entailed a preparation of brief estimates of the costs of implementing the legal provisions in the Bill.<sup>45</sup> The law reform process in Uganda was also marked by preparatory work on the affordability of the proposals

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*the Rights of the Child*. (CRC/GC/2003/5 (Adopted at the 34<sup>th</sup> session on 27 November 2003)) Paras 5-7.

<sup>42</sup>See generally, Ngokwey, N “Children’s Rights in the Central Africa Sub-Region: Poverty, Conflicts and HIV/AIDS as Context” (2004) 12 (3) *The International Journal of Children’s Rights* 183-216.

<sup>43</sup>Skelton, A “The Child Justice Bill: Implementing the UN Convention Through the Process of Law-Making” (Unpublished Paper delivered at the International Society for the Prevention of Child Abuse and Neglect (ISPCAN) Conference on “Implementing the UN Convention on the Rights of the Child: Myth or Reality?” Durban, September 2000) (On file).

<sup>44</sup>Chapter 3, section 3.5.3.6.

<sup>45</sup>Barberton, C and Stuart, J (1999) *Costing the Implementation of the Child Justice Bill: A Scenario Analysis* Research Monograph No. 14 Cape Town: Applied Fiscal Research Centre (AFReC), Barberton, C “Costing Child Justice” (2000) 2(1) *Article 40* 4, “Re-allocating Expenditure to Implement the Draft Child Justice Bill” (2000) 2(2) *Article 40* 4. This was the first such process in any law reforms developed by the South African Law Reform Commission.

in the 1996 Statute.<sup>46</sup> The intention of both processes was to provide a platform to lobby for the respective laws by illustrating their affordability. One of the findings of the South African costing process was that substantial savings would result from implementation of the Bill, principally through the increased use of diversion and procedural reforms expected to result in greater operational efficiency, manageable court rolls, less demand for lengthy trials, and less recourse to detention in the pre-trial and trial stages.<sup>47</sup>

None of the four other law reform processes discussed in this thesis was subjected to a process of costing similar to the South African example or a situational analysis similar to the case of Uganda. However, the pragmatic consideration for the availability of resources was very much part of the Ghanaian and Kenyan legislation and the proposed Lesotho and Namibian Bills.<sup>48</sup> The existence of provisions which tap into existing personnel and resources, such as the emphasis on specialization of the court system, rather than creation of new and physically separate court structures, are examples of a more pragmatic approach in all the new and proposed systems.<sup>49</sup>

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<sup>46</sup>Entailing an analytical research and situational analysis by the Child Law Review Committee to ascertain the capacity of the system before the enactment of the Children's Statute, see Chapter 3 section 3.5.1.4.

<sup>47</sup>See Barberton in (2000) 2(1) *Article 40* (n 45 above) 4.

<sup>48</sup>In relation to Lesotho and Namibian Bills whose juvenile justice provisions were influenced by the content of the South African Bill (as demonstrated in Chapters 4-7), the arguments on the affordability of the proposed South African system can be assumed to have held sway.

<sup>49</sup>Chapter 6, section 6.6. This point also influenced the decision to empower local committee courts in the Ugandan Statute rather than 'the remote and unresponsive' district and High Court Structure in relation to diversion, see Chapter 5, section 5.7.2. Parry-Williams J (1993) "A Case Study of Segal Reform in Uganda as Part of a Strategy for Promoting Community-based Care" (Unpublished Paper on file) 34. Parry-Williams further explains in this regard that, "Uganda is a poor country and will be in all probability for the next decade. It cannot therefore afford an expensive and sophisticated court infrastructure requiring more magistrates, court buildings, remand homes, transport facilities and all the

Through the recognition of diversion in all six new and proposed juvenile justice systems<sup>50</sup> there is an expected decrease on the use of detention and the involvement of formal criminal justice officials. Provisions aimed at procedural reforms and time limits for the determination of cases involving children are motivated by an expectation that the proposed juvenile justice systems will be more efficient.<sup>51</sup> It is therefore clear that cost saving on time and finances otherwise incurred through the involvement of the formal criminal justice systems is envisaged.<sup>52</sup>

It is thus submitted that the approach that underpins all the law reform processes is that the new (and proposed) juvenile justice systems are not only modelled on the framework derived from the CRC and desirable from this principled point of view, but are also informed by financial feasibility.<sup>53</sup>




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back up services.” In relation to proposals for the new Preliminary Inquiry (P.I) pre-trial procedure in Lesotho, Namibian and South African Bills (see Chapter 6, section 6.5.1), the expectation is that the P.I procedure will involve existing judicial officers to serve as inquiry magistrates and hence necessitating the less-expensive avenue of training these officials in order to inculcate a child rights-centred attitude and encourage innovation, rather than the creation of new institutions and structures.

<sup>50</sup>Discussed in Chapter 5.

<sup>51</sup>Chapter 6, section 6.4 discusses the provisions in this regard. This is in light of the delays that characterise the adjudication of children’s cases as was discussed in Chapter 6, section 6.3.

<sup>52</sup>Sloth-Nielsen, J and Gallinetti, J (eds) (2004) *Child Justice in Africa: A Guide to Good Practice* Bellville: Community Law Centre 53 point out that: “Many gains for children’s rights can be made simply by speeding up decision-making processes. One of the key common characteristics of child justice systems throughout Africa is the length of time it takes to process trials. This means that children spend lengthy periods in welfare facilities and prisons, awaiting the conclusion of their cases.” See the discussion in this regard in Chapter 6, section 6.3.

<sup>53</sup>For a detailed discussion of how the South African Law Reform Commission’s process on costing was used to motivate the final recommendations for the South African Bill, see, Sloth-Nielsen (n 16 above) generally. However, it has been correctly pointed out in respect of the South African Bill in Stout, B and Wood, C “Child Justice and Diversion: Will Children’s Rights Outlast the Transition” in Dixon, E and Van der Spuy, E (2004) *Justice Gained? Crime and Crime Control in South Africa’s Transition* Cape Town, UCT Press 123 that: “the relative affordability of diversion must be seen as

## 8.5 The place of juvenile justice ‘good practice’ within existing legal frameworks<sup>54</sup>

It may not always be possible, and it is never sufficient, simply to reform the law. In some circumstances, a more effective way of improving children’s lives may in fact be to work within the framework of existing law. Even where good laws exist on the statute book, juvenile justice systems often fail to implement them in practice.<sup>55</sup> It has therefore been correctly argued that “within existing systems and without vast injection of fiscal resources, much can be done to implement child justice reform, provided that there are individuals and organisations willing to make a difference”.<sup>56</sup>

Examples of good juvenile justice practices which predate the enactment of new laws in a number of African countries and are characterised by government and non-government partnerships have been profiled in other works.<sup>57</sup> The South African experience in relation to diversion programmes is illustrative. Although the current South African law does not provide for diversion,<sup>58</sup> it is now widely practiced in

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complementing rather than displacing arguments about the benefits of diversion for children and the obligation to institute diversion.”

<sup>54</sup> The phrase ‘good practice’ is used here to refer to more humane responses to the handling of children in the juvenile justice systems in these countries prior to the recent juvenile justice reforms. The phrase is preferred to ‘best practice’ in order to avoid questions regarding what amounts to ‘best practice’ and who decides so and in what context?

<sup>55</sup> Petty and Brown “The Formal Justice System: Influencing Practice” in Petty and Brown (eds) (n 2 above) 43.

<sup>56</sup> Sloth-Nielsen and Gallinetti (n 52 above) 47.

<sup>57</sup> See Petty and Brown (n 2 above) generally. A recently published research in relation to the countries under study and other examples from Africa is Sloth-Nielsen and Gallinetti (eds) (n 52 above) generally. The intention here is to describe some of these examples as illustrative, without exhaustively listing and discussing all good practice. It was noted that that there is a rich source of literature documenting these examples in South Africa in contrast to the other countries under study.

<sup>58</sup> Chapter 5, section 5.6.

South Africa.<sup>59</sup> Further, the South African practice of pre-trial assessment of arrested children by a social worker or probation officer (so as to properly inform the decisions at the pre-trial level on diversion and during sentencing) was first started without a legal framework within which to situate the whole procedure.<sup>60</sup> The Namibian

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<sup>59</sup>This was discussed in Chapter 5, section 5.6. However, a short recap is necessary. Diversions in South Africa were first pioneered by an NGO, the National Institute for Crime Prevention and the Rehabilitation of Offenders (NICRO) in the early 1990s. NICRO introduced diversion as an alternative to the incarceration of child offenders especially those who had committed petty offences. Since then the National Directorate of Public Prosecutions has published a Policy Directive on Diversion setting out circumstances in which diversion may take place. In the late 1990s the Department of Social Services also started to offer diversion in some parts of South Africa through interventions by probation and assistant probation officers. At the same time, other non-governmental organizations began to experiment with a range of innovative diversion options. The provision of diversion programmes remains mainly NGO-driven. See Mbambo, B “Diversion: A central feature of the new child justice system” in Maepa, T (ed) (2005) *Beyond Retribution: Prospects for Restorative Justice in South Africa Monograph No. 111* Pretoria: Institute for Security Studies (ISS) 76-88, 76. See also Open Society Foundation for South Africa (n 29 above generally): Open Society Foundation, Wood, C (2003) *Diversion in South Africa: A Review of Policy and Practice, 1990-2003* Institute for Security Studies (ISS) Paper 79 Pretoria: ISS. Stout and Wood (n 53 above) 123 explain that “...[I]t is significant that contemporary advocates of children’s rights in South Africa have not concentrated solely on devising legislation and campaigning for its implementation, but also been closely involved in designing and implementing diversion programmes that anticipate the Child Justice Bill’s passage.”

<sup>60</sup>Sloth-Nielsen and Gallinetti (n 52 above) 42 explaining that the concept was first piloted in the Western Cape Province of South Africa in 1994 and that: “Assessment became the preferred model for ensuring that children’s parents were traced as quickly as possible, exploring the possibility of diversion, and minimising the use of pre-trial detention.” The procedure was accorded legislative recognition through amendments to the Probation Services Act of 1991, which came into effect in 2002, eight years after the procedure had been experimented with in various parts of South Africa. Pursuant to these provisions, the South African Department of Social Services has in the last three years appointed new probation and assistant probation officers in order to adequately discharge this obligation. Pre-trial assessment is included as part of the Child Justice Bill, discussed in Chapter 6, section 6.5.1. The commitment of the South African government’s Department of Social Development to the employment and (re)training of both existing and new probation and assistant probation officers was restated in a speech by the Department’s representative during the “Inaugural Conference on Strategies to Address Prison Overcrowding in South Africa” (Organised by the South African Department of Justice and Constitutional Development, the Justice College, NICRO and civil society held on 14-16 September 2005, in Pretoria, South Africa). The author attended this Conference.

diversion experience is similar in so far as it has also been practiced without underpinning legislation.<sup>61</sup>

Related to the above have been a number of efforts by the government in South Africa regarding the development and implementation of policy in relation to the detention of children. Past developments in this regard included attempts to reduce the number of children in detention and improve the conditions in detention facilities.<sup>62</sup>

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<sup>61</sup>Mukonda, R (1999) “Juvenile Justice Project in Namibia” (Unpublished Paper presented at a seminar on Juvenile Justice held in Lilongwe, Malawi, 23-25 November 1999) available at <[http://www.penalreform.org/english/vuln\\_juvenamibia.htm](http://www.penalreform.org/english/vuln_juvenamibia.htm)> (last accessed 28 September 2005). Mukonda explains the establishment of Juvenile Justice Forums (JJFs) (comprising of magistrates, prosecutors, the police and the civil society) starting from 1994 in the capital, Windhoek and by end 1999, eventually being replicated in the whole country. One of the main aims of the JJF has been the facilitation of pre-trial diversion (which pending the enactment of the Namibian Child Justice Bill (2002) is currently practiced without a legislative framework).

<sup>62</sup>See in this regard, the 1994 and 1996 legislative amendments to the Correctional Services Act of 1959, discussed and critiqued in Chapter 6, section 6.3. Developments such as the formation of an Inter-Ministerial Committee on Young People at Risk (IMC) in 1995 so as to contain the increase in the numbers of detained children in South Africa are an example. For a Report of the IMC in relation to conditions in child-specific facilities, see IMC (1996) *In Whose best interests? Report on Places of Safety, Schools of Industry and Reform Schools* Pretoria: IMC. The example of a three-year technical assistance project set up in 1999 by virtue of an agreement between the South African government and the United Nations is also illustrative. This project was intended to facilitate capacity building in anticipation of the passage of the Child Justice Bill into law. Funded, executed and jointly administered by the UN Office for Project Services and United Nations Development Programme (UNDP) (through three staff members who were all South Africans), the project is credited with assisting the South African government and the non-governmental sector in a number of areas. These included enhancing the capacity and use of programmes for diversion, establishing a monitoring process for child justice, improving the protection of children in detention and raising awareness about the aims of the Child Justice Bill. For a comprehensive discussion on this project, see Skelton, A “Intergovernmental and Non-governmental Organisations as Role-Players” in Sloth-Nielsen and Gallinetti (n 52 above) 157-159.

In Ghana, a special police unit for juvenile justice was established well before the process of law reform.<sup>63</sup> Similarly, the involvement of local communities through Child Panels (in Ghana) and local council courts (in Uganda) to mediate in disputes involving children, including petty child offending, was already in practice in Ghana and Uganda before their recognition as forums for diversion in the recent law reforms.<sup>64</sup> Similarly, the potential for the use of Lesotho's traditional structure of chieftainship in mediating disputes involving children who commit crimes has been noted in the past.<sup>65</sup> The establishment of pilot diversion projects in Kenya contemporaneously with the enactment of the Children's Act in 2001 has been recorded.<sup>66</sup> Further in Kenya, volunteer children's officers (drawn from members of public and accredited by the government) have been used to assist in tracing children's families, hence relieving pressure from the inadequately-staffed probation, social work and police departments.<sup>67</sup> In addition, in Kenya and Uganda, free legal




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<sup>63</sup>Oppong, G "The Role of Defence for Children International - Ghana in Advocacy on Juvenile Justice" (Unpublished Paper presented at the International Symposium on "The Rights Based Approach to International Co-operation: Child Rights Perspective, held in Geneva, 22-23 November 2004) 7 pointing out that well before the Juvenile Justice Act, 2003, the Ghanaian government set up a Women and Juvenile Unit of the police to handle all criminal issues involving women and children including juvenile justice issues.

<sup>64</sup>The provision in the Ugandan and Ghanaian legislation in this regard were discussed in Chapter 5, section 5.7.2.

<sup>65</sup> Thacker, R "Traditional Systems in Lesotho" in Petty and Brown (n 2 above) 90-91 pointing out that the Lesotho government's inability to expand its justice system to meet the demands of the country's population, is "due to a lack of financial and institutional capacity". This calls for the empowering of traditional chiefs in their control over community affairs and local justice. Thacker warns however that subject to reforms, the "process and sentencing systems of Lesotho's 'chieftainship' justice do not conform to the principles in the CRC."

<sup>66</sup>Odongo, G.O "The Juvenile Justice System in Kenya and Challenges to Law, Policy and Practice in Regard to Diversion" (2004) 13(2) *Chronicle* 6-11.

<sup>67</sup>The system was introduced in 1999 based on the Volunteer Probation Officer System of Japan. It is now entrenched in the work of the government's Children's Department. There are on-going efforts to train volunteers, recognize Volunteer Children Officers' organizations, and create a database of

aid has been extended to a number of children, especially through the voluntary involvement of NGOs.<sup>68</sup> Provision of legal aid in these two countries has always been observed as a mandatory obligation on the part of government in capital offence cases.<sup>69</sup>

It is therefore clear that in certain respects, implementation of the new laws will tap into practices which already existed before the enactment of the laws.

## 8.6 The need to allocate resources

In spite of the goodwill of governments and non-governmental organisations to put in place good practices and the provisioning for affordable of children's rights-centred juvenile justice systems,<sup>70</sup> the future success of new laws and proposals will depend on the actual allocation and spending of (sometimes considerable) financial resources.

In relation to Uganda, one author explains that:

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volunteers for effective referral of cases to volunteers and to seek ways of sustaining the mechanism of volunteer children officers. See Government of Kenya, Children's Department (2003) *National Standards and Manuals for Field Services* (Second Revised Version) Nairobi: Government of Kenya, Chapter 2.

<sup>68</sup>Odongo, G.O., "The Birth of a Regional Juvenile Justice Network in East Africa" (2004) 6(1) *Article 40* 10.

<sup>69</sup>Odongo (as above) 10. See also Kakama, P "Juvenile Justice in Kampala" [undated] (Unpublished Paper drafted for Presentation to the Uganda Law Society on file) available at < <http://www.anppcan.org/new/projects/clan/ugandapolicy.htm> > (last accessed 01 October 2005) (on Uganda).

<sup>70</sup>And independent of the financial savings that the implementation of a children's rights'-oriented system may lead to when compared to the system sought to be reformed, see the analysis in respect of the South African Bill, Barberton (2000) 2(1) *Article 40* (n 45 above) 4.



“Implementing the Children’s Statute requires a great deal of money, personnel and logistical support, both for initial training and for later implementation through work with children. For example, there are heavy resource implications for training local councils as courts of first instance for children...Another change is the abolition of reformatory schools for young offenders and approved schools [which the Statute] replaces with the National Rehabilitation Centre for Children which will conform to set standards and should be used [only as a last resort]. To establish and maintain these standards will have cost implications...”<sup>71</sup>

Similarly, in relation to the Namibian Child Justice Bill the point has been made that “the proposed new system is ambitious and requires structural re-adjustment of government spending... It will also require dedicated, skilled and trained professionals endowed with and backed by a corresponding infrastructure”.<sup>72</sup>




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<sup>71</sup>Wadri (n 2 above) 38 writing in 1998 and pointing out that: “To finance this work, the [Ugandan government] has drawn up a comprehensive budget that will be included as part of the government’s Development Budget. Some external assistance is also being sought.” However research conducted almost 5 years since these observations by Wadri revealed that the government was yet to set up the proposed National Rehabilitation Centre. Reformatories and Approved schools (which stood abolished in theory since the enactment of the Ugandan Statute (1996) remains operational). See Odongo, G.O (2003) *Report on the Ugandan Juvenile Justice System in Light of Best Practices and Challenges* (Unpublished Report submitted to the Community Law Centre University of the Western Cape) 6. In 2001 (five years after the enactment of the Ugandan Statute), the Ugandan Human Rights Commission recorded that a total of 173 children were still placed in adult prisons in total violation of the absolute prohibition upon imprisonment for persons under the age of 18 years in the Ugandan Statute (see Chapter 7 section 7.5.3.1). See Uganda Human Rights Commission *Annual Report 2000-2001* 48-49. It may be argued that the continued use of imprisonment may be attributable to the over-reliance on institutionalisation despite provisions on diversion and alternative sentences in the Statute, see Ekirikubinza, L.T, “Juvenile Justice and the Law in Uganda: Operationalisation of the Children Statute” in Bainhaim, A and Rwezaura, B (2005) *The International Survey of Family Law 2005 Edition* Bristol: Jordan Publishing 522-524.

<sup>72</sup>Schulz and Hamutenya (n 3 above) 27-28.

The initiation of diversion programmes and their sustenance require that governments must specifically allocate resources in their budgets even where NGOs and civil society are involved in the service delivery of these programmes.<sup>73</sup> Further resources would be needed for the establishment of child-friendly court rooms,<sup>74</sup> the recruitment of more probation and social welfare officers to undertake various roles in the juvenile justice system,<sup>75</sup> and legal representation (whenever this is at the State's expense) as envisaged by the new laws. This extends to the appointment and training of role

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<sup>73</sup>See Oppong (n 63 above) 15 in relation to Ghana. In Namibia and South Africa, civil society has taken a leading role in piloting diversion programmes since their inception over a decade ago (including the funding or partial funding of these programmes). In relation to the future of diversion in South Africa, one writer comments thus: "Diversion services are currently [mainly] provided by NICRO, an NGO funded by government subsidies and private donors. The government has committed itself to diversion as a principle of juvenile justice, but has done very little to provide such services in terms of either delivering the services or contracting them out. A far greater involvement by all the relevant government departments is required, especially in funding diversion services in areas where they are not being delivered...", see Muntingh, L "The Development of Diversion Options for Young Offenders" in Institute for Security Studies (1997) *Policing the Transformation ISS Monograph No. 12* 11.

<sup>74</sup>The new laws do not envisage the erection or building of separate children's courts as such (see Chapter 6, section 6.6.1); rather what is emphasized is specialization on the part of court officers and changes to the ambiance of regular courtrooms which may be used as specialized courts (see Chapter 6, section 6.6.2). However, real compliance with the provisions on ambiance of courts could require substantial renovation and redesigning of regular court rooms that may be used as Children's (specialized) Courts.

<sup>75</sup>The Uganda Human Rights Commission (n 71 above) 48-49 noted in respect of implementation of the Children Statute that although in the year 2000 there were probation and social welfare officers in Uganda's 45 districts, these officers were more or less redundant because they lacked operational funds and transport to conduct research for their social welfare reports. This resulted in delays in the conclusion of cases which the Statute seeks to avoid. Similarly, in relation to Kenya, one study, The Cradle, Undugu Society of Kenya and The Consortium for Street Children-UK (2004) *Street Children and Juvenile Justice in Kenya* London: Consortium for Street Children 20 observed that a number of constraints hinder the speedy submission of probation and social welfare reports. These include delays in contacting the child's family or relatives who may live in other parts of the country away from where the trial is conducted.

players (in the police, prosecution, residential facilities and judiciary) to ensure the implementation of the proposed systems.<sup>76</sup>

In practice, a juvenile justice system is not one harmonious stand-alone institution that is independent from other systems. Rather, it involves an inter-play of different governmental departments and role players, with the police, prosecution, social work and courts among others, performing their respective roles. This has two implications. Firstly, there is potential constraint that the implementation of the proposed juvenile justice systems is likely to be trapped in the general problem of insufficient allocations to fund criminal justice systems that has been observed in most African countries.<sup>77</sup> Secondly, in terms of financial budgetary allocations, the different government departments operate independently. The overall proper functioning of the proposed systems will depend on an integrated, inter-sectoral approach between government departments and non-governmental organisations which provide services and work in the juvenile justice field.<sup>78</sup> This is also in view of the fact that effective

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<sup>76</sup>The dearth of specialised child-friendly courts four and nine years, since the enactment, respectively, of the Kenyan and Ugandan Children's laws was noted in Chapter 6, section 6.6.2. Moreover, the Kenyan practice post-enactment of the Children's Act in 2001 reveals that the provisions of the Act regarding specialization in court processes are far from being observed in practice, see The Cradle and Odhiambo, M (2003) *Juvenile Justice Journal: After the Promise - A Situational Analysis of Child Rights Protection under the Children's Act* Nairobi: The Cradle 14 commenting, *inter alia* on the lack of efforts to foster specialization in the ranks of Children's Courts' Magistrates.

<sup>77</sup>For the general observation on the problem of lack of funding in relation to various aspects of criminal justice systems in Africa, see country reports on African countries in Amnesty International (2005) *Amnesty International Report 2005* London: Amnesty International.

<sup>78</sup> Skelton (n 62 above) 157.

co-ordination between different departments of government is often lacking in many countries.<sup>79</sup>

On the other hand, many provisions of the children's rights-oriented laws discussed in this thesis do not require any financial resources for their implementation. This is particularly in relation to provisions on the rules setting minimum ages of criminal capacity,<sup>80</sup> referrals to diversion programmes which may be informal and not resource intensive,<sup>81</sup> respecting a child's right to privacy during trial proceedings,<sup>82</sup> time limits in relation to the duration a trial should take,<sup>83</sup> the use, where appropriate, of the array

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<sup>79</sup>For example, Odongo, G.O (2003) "Report on the Juvenile Justice in Kenya in Light of Best Practices and Challenges" (Unpublished Report submitted to Community Law Centre, University of the Western Cape) 2 (on the example of Kenya in this regard). Sloth-Nielsen, J (2004) "Strategies for Enhancing Diversion: Lessons from Africa" (Unpublished Paper on file) 14-15 however discusses examples from South Africa on how inter-sectoral co-operation and monitoring can improve service delivery in juvenile justice. In the new laws studied in this thesis, legislative recognition of specific inter-sectoral structures are proposed in the Kenyan Act, (Part IV on the establishment of a National Council for Children's Services comprising government and non-government representatives) and proposals in the Lesotho Bill (Part XXVI on the establishment of an independent Children's Commission with powers to monitor and ensure co-ordination between respective government departments), Namibian Bill (Chapter 13 on the establishment of a Child Justice Commission with wide reaching powers which include co-ordination) and South African Bill (Chapter 11 on inter-departmental monitoring of the application of the proposed system). The Ghanaian and Ugandan Acts are however silent on the creation of such a co-ordination or monitoring role.

<sup>80</sup>Discussed in Chapter 4, section 4.8.

<sup>81</sup>Discussed in Chapter 5, section 5.7. Diversion processes which make use of existing community structures and do not involve formal programmes, for example, community service or programmes which involve the child staying within the family.

<sup>82</sup>Discussed in Chapter 6, section 6.6.2.

<sup>83</sup>Discussed in Chapter 6, section 6.4.1.

of alternative sentences<sup>84</sup> and the upholding of the prohibitions on life imprisonment, corporal punishment and imprisonment of children.<sup>85</sup>

Giving effect to the above provisions will require dedicated and informed individuals with a commitment to upholding the law, rather than additional budgets or funds.

### **8.7 The problem of allocation of resources in the context of socio-economic reform**

The realization of children's rights as a whole requires substantial financial investments by governments in basic health care, nutrition, free and compulsory basic education and other 'child-developmental' needs.<sup>86</sup> When viewed against governments' obligations to invest in these 'child developmental rights' and other




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<sup>84</sup>Discussed in Chapter 7, section 7.5.

<sup>85</sup>Discussed in Chapter 7, section 7.5.3 regarding the prohibition on imprisonment of children in the Ghanaian, Kenyan and Ugandan laws on the one hand and on the other, proposed restrictions to the use of imprisonment in the Lesotho, Namibian and South African Bills.

<sup>86</sup>Ngokwey (n 42 above) 211 argues in the general context of Africa that while 'some progress' has been made in addressing problems affecting children, there is 'stagnation' or in some cases, 'a reversal in trends' in the realization of the rights of children to life, survival, and development. This is characterized by "the litany of shameful indicators [including] very high and/or worsening child mortality rates, worsening nutritional status of children, lagging net primary school enrolments, declining primary school completion rates, high HIV prevalence rates, low public spending in education and health, increasing numbers of working children and children affected by conflicts." In respect of a specific substantive analysis of one of the laws studied in this thesis see, Wabwile, M.N "Rights Brought Home? Human Rights in Kenya's Children Act 2001" in Bainhaim and Rwezaura (eds) (n 71 above) 393-415, 413 arguing that "so far, the most formidable challenge facing the realization of economic and social rights of children in Kenya, which threatens their basic survival and development, is poverty..."

areas of social welfare, the direct allocation of resources for the administration of juvenile justice system may be considered something of a lesser priority.<sup>87</sup>

It is, however, submitted that such a view would be a misconception. This contention is based primarily on the interrelatedness of the application of children's rights. As Hammad correctly puts it, "achieving children's rights in the full sense of the word often necessitates a number of parallel strategies".<sup>88</sup>

Placed as they are within a children's rights approach,<sup>89</sup> the overall aim of the proposed juvenile justice systems reviewed in this thesis will be to ensure successful reintegration and rehabilitation of children in conflict with the law back into the community. In concrete terms, it will be important to measure this through decreasing rates of recidivism. It has thus been stated in relation to Namibia that the manifest objective of the upcoming juvenile justice system is "a sustainable reduction of juvenile delinquency".<sup>90</sup> This applies to all the other new and proposed juvenile

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<sup>87</sup>The 'unpopularity' of the subject of juvenile justice, in comparison to say, children's education and basic health may also explain reluctance to fund juvenile justice reforms. In the words of Abramson, "when it comes to youngsters accused or convicted of criminal activity, there is neither the public nor political support to ensure the necessary allocation of money", see Abramson, B "An Analysis on Juvenile Justice Issues in the Concluding Observations of the Committee on the Rights of the Child (1993-2000)" in Defence for Children International (2001) *Juvenile Justice: the Unwanted Child of State Responsibilities* Geneva: Defence for Children International 4, 14. Abramson further criticizes the CROC's Concluding Observations for consistently failing to make specific recommendations to States on increases to budgetary allocations for the administration of juvenile justice.

<sup>88</sup>Hammad (n 6 above) 229.

<sup>89</sup>As discussed in Chapters 4-7. The children's rights approach can be contrasted with reforms adopted purely in a criminal justice context. The example of juvenile justice law reforms in a number of Western jurisdictions is illustrative. See Chapter 2, section 2.6 which discusses the pursuit of a more punitive ideal in jurisdictions such as England.

<sup>90</sup>Schulz and Hamutenya (n 3 above) 27.

systems by virtue of the premise that they all place children's rights as their central reference point. The prevention and reduction of child offending requires that attention is paid to the root causes of child offending in these countries.

Poverty alone accounts for many of the problems faced by children in Africa.<sup>91</sup> The problem of child offending is no exception.<sup>92</sup> Child offending is an illustration of a social problem that is not only interrelated with many other aspects of child rights but which is itself a complex phenomenon rooted in broader social and economic conditions.<sup>93</sup>

Although comprehensive statistics on rates of child offending in Africa are hard to come by,<sup>94</sup> research conducted in Kenya has shown that most child offenders in the




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<sup>91</sup>Rwezaura, B "Competing 'Images' of Childhood in the Social and Legal Systems of Contemporary Sub-Saharan Africa (1998) 12 *International Journal of Law, Policy and the Family* 253, 268. For a recent general analysis see, Ngokwey (n 42 above) 198-199.

<sup>92</sup>International criminological research has shown that the causes of antisocial behaviour, including child and youth offending, are complex and involve an interaction between risk factors occurring at three levels: the individual, the family and the community, see Rutter, *et al* (1998) *Antisocial Behaviour by Young People* Cambridge: Cambridge University Press cited in Open Society Foundation for South Africa (n 29 above) 7. In the analysis of the community risk factors, it is widely accepted that poverty places a significant number of children at risk of offending, see generally, Cassiem, S *et al* (2000) *Are Poor Children Being Put First? Child Poverty and the Budget* Cape Town: IDASA. Further, Petty and Brown (n 2 above) 45 record that a 1996 Conference held by the United Nations International Crime Research Institute noted that in Africa, "juvenile criminal behaviour is linked to urbanisation, hunger, poverty, malnutrition and unemployment."

<sup>93</sup>This is an analogy drawn from one author's illustration with the example of child labour, see Hammad (n 6 above) 229. For a similar but more comprehensive analysis of poverty as a root cause of child labour, see Arat, ZF "Analyzing Child Labour as a Human Rights Issue: Its Causes, Aggravating Policies, and Alternative Proposals" (2002) 24(1) *Human Rights Quarterly* 177-204.

<sup>94</sup>Petty and Brown (n 2 above) 44. This fact in itself calls for the recommendation that the respective countries should develop comprehensive systems of records, and specific research and statistics in relation to the situation of child offending in the region.

region generally tend to commit relatively petty economic crimes.<sup>95</sup> In similar vein, the majority of youth arrests in South Africa are for property offences “that are likely to be associated with poverty”.<sup>96</sup> Ugandan research points out that the majority of child offenders in that country are charged with minor offences such being idle and disorderly and petty theft which are mainly related to the socio-economic circumstances in which they live.<sup>97</sup> The Kenyan, South African and Ugandan situations ring true for the three other countries under study due to poverty being a common factor.<sup>98</sup>

Further, the reality is that most children who come into contact with criminal justice authorities in the region are not criminal offenders per se, but are children in need of care and protection, due to, among other factors, endemic poverty and the high prevalence of HIV/AIDS on the continent.<sup>99</sup> Research carried out in early 2002 suggested that Kenya and South Africa (two of the countries under study) had the

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<sup>95</sup>In relation to Kenya, see Gallinetti, J “Diversion” in Sloth-Nielsen and Gallinetti, J (n 52 above) 66 citing Save the Children Fund (UK) (2001) *Baseline Survey Report on the Situation of Children in Conflict with the Law in Kenya* Nairobi: Save the Children Fund (UK). See also Skelton, A “African Focus: Juvenile Justice in Kenya” (1999) 1(2) *Article 40* 8 pointing out at the time of writing in 1999 that, “the prevalence of serious or violent crime amongst Kenyan children is very low.”

<sup>96</sup>Open Society Foundation for South Africa (n 29 above) 10 adding that South African research reveals that poverty is a major cause of antisocial behaviour of all kinds, particularly for offences associated with survival, such as theft.

<sup>97</sup>Kakama, P (2002) “Juvenile Justice in Uganda: Past and Present Perspectives” (Unpublished Paper on file) 3.

<sup>98</sup>For a further illustration in relation to Nigeria (although not forming part of this thesis), see Gallinetti, J “Child Justice Reform in Nigeria” (2003) 5(3) *Article 40* 10 (generally noting that “only a small percentage of child offenders in Nigeria were found to have committed serious offences.”).

<sup>99</sup>For a recent analysis on the impact of the HIV/AIDS and poverty on the realization of children’s rights in the region, see Ngokwey (n 42 above) generally. In relation to Kenya, recent data indicate that 80-85% of children coming into correctional facilities are there for welfare reasons rather than for committing crimes. See The Cradle, Undugu Society of Kenya and The Consortium for Street Children-UK (n 75 above) 21.



highest number of street and homeless children in Eastern and Southern Africa with ‘conservative estimates’ putting the number at 250 000 in each of the two countries at the time.<sup>100</sup> Street children fall into the category of children in need of protection (rather than the intervention of criminal law). However, this does not detract from the reality of street childhood as a big risk factor for child offending.<sup>101</sup>

Poverty-related crimes (comprising the majority of child offending in the region) are amongst the most difficult to prevent without broad reaching socio-economic reform.<sup>102</sup> In the African context, it is clear that many families in the region are facing serious economic hardships.<sup>103</sup> This is to be viewed against the backdrop of the fundamental assumption that underlies the CRC to the effect that parents, guardians and families bear the primary responsibility to meet the basic needs of the child and




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<sup>100</sup>Undugu Society of Kenya *The Flash Magazine* (April 2002 Issue) 1. The figure is confirmed in respect of Kenya in Someda, K “The Basic Concept of the Through Care System for Children in Need of Care and Protection in Kenya Based Upon the National Standards” (Unpublished Paper presented at the Workshop on the Establishment of Effective Collaboration Between Police, Courts and the Children’s Department, organised by the Government of Kenya and United Nations Asian Far East Institute (UNAFEI), on 5-6 August 2003 in Nairobi, Kenya) 12. In regard to Kenya, this is a considerable increase, considering that in 1997, one study Human Rights Watch (1997) *Juvenile Injustice: Police Abuse and Detention of Street Children in Kenya* New York: Human Rights Watch 2 put the number of street children in Kenya at 40,000.

<sup>101</sup>Open Society Foundation for South Africa (n 29 above) 10. For a recent comprehensive comparative study on the link between street childhood and juvenile justice in various juvenile justice systems, see generally, Wernham, M (2003) *An outside Chance: Street Children and Juvenile Justice - an International Perspective* London: Consortium for Street Children. Street childhood in the African context has been attributed to numerous socio-economic factors, including, but not limited to, rapid urbanization and the breakdown of traditional family support structures and internal displacements through war and internal violence. Overall, poverty is related to these factors, see, Human Rights Watch (n 100 above) 2.

<sup>102</sup>Skelton (n 95 above) 8.

<sup>103</sup>Rwezaura (n 91 above) 268.

assure the child's survival until transition to adulthood.<sup>104</sup> Therefore, parents and families bear a considerable amount of responsibility in addressing and preventing juvenile offending. However, the CRC enjoins the State "to take appropriate measures to assist parents and others responsible for the child to implement the rights..."<sup>105</sup> Therefore, for the new laws to be successful in the prevention of child offending and reduction of recidivism rates, a range of socio-economic and political strategies must be put in place.<sup>106</sup> In this regard, the success or failure of the new laws will further hinge on a range of factors including the extent to which investments are made in children's and families' social welfare, particularly the child's right to basic

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<sup>104</sup>This obligation is contained in various provisions of the CRC, including Articles 6, 23, 24, 26 and 27. For instance, Article 27 provides, "State Parties shall recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development." In addition, Article 28 of the Convention enshrines the right to education. Domestic laws recognizing the primary parental duty of child support are relevant in this regard.

<sup>105</sup> CRC, Article 27(3).

<sup>106</sup>UNICEF correctly argues that realization of all CRC rights is the best way to approach the prevention of child offending, see UNICEF (n 39 above) 15 noting that: "The UN Riyadh Guidelines [which deals with the prevention of child offending]...echo many of the rights set out in the CRC as basic components of primary and secondary prevention of juvenile crime and perhaps to a lesser extent, at the tertiary level. Thus, adequate standard of living and access to an education system that transmits positive values to children are both rights in the CRC and elements of primary prevention in the Riyadh Guidelines. The family's primary responsibility for the welfare, protection and upbringing of the child, and the State's obligation under the CRC both to assist in this role but also to intervene when parents are nonetheless manifestly unwilling or unable to assume their responsibilities, are basic to the philosophy behind both instruments in terms of secondary prevention." Similarly, Penal Reform International *Newsletter* (2002) *Issue No. 50* available at <[http://www.penalreform.org/english/nl50\\_1.htm](http://www.penalreform.org/english/nl50_1.htm) > (last accessed 01 October 2005) notes that most of the CRC's provisions are directly relevant to juvenile justice. Respect for rights such as the right to education, to health care, to protection against abuse and exploitation and the right to appropriate information, to an adequate standard of living and appropriate guidance helps keep children from becoming involved in crime. They are essential when dealing with those who come into conflict with the law. For an introduction to the Riyadh Guidelines, see Chapter 2, section 2.8.

education<sup>107</sup> and the political and economic empowerment of economically-deprived families.<sup>108</sup>

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<sup>107</sup>In the specific context of juvenile justice, one Kenyan study ANPPCAN-Kenya (1998) *Children in the Dock: A Situational Analysis of the Juvenile Justice System in Kenya* Nairobi: ANPPCAN 55 makes the recommendation that: “Given that the majority of the children who pass through the [Kenyan] juvenile justice system are from the streets, which in essence means out of school, there is need to thoroughly review the education delivery system in Kenya, particularly primary education to make it free and compulsory”. This recommendation was also made by Human Rights Watch (n 100 above) 11. Human Rights Watch called for the establishment of a special fund to realize the right to primary education and paying special focus to women, as heads of single parent households, and others who care for children and are unable to afford the costs of primary education. Since the enactment of new Children’s legislation in Kenya (2001) and Uganda (1996), the respective governments have made efforts (with the financial assistance of external donors such as UNICEF) to make primary education free and compulsory. However the realization of free primary education in these countries is still confronted with a number of obstacles including the inadequacy of schools, facilities and personnel. For a discussion, see Wabwile (n 86 above) 400-401.

<sup>108</sup>This is a broad topic which may include a vast array of issues to be examined. It has been suggested that the starting point could be redressing the economic hardships faced by families and children in desperate situations. In this regard, the South African Law Reform Commission (1998) *First Issue Paper on the Review of the Child Care Act* Para 11.6 points out that “social and economic upliftments (of families) are ultimately developments which occur outside the usual domain of legislative drafters, *although much can be done to ensure redress, equity and support for children in most marginal situations*” [italics supplied]. This calls for comprehensive reviews of child care and protection legislation and substantive provision for child developmental policies backed by political will. All the countries under study have engaged in law reform on child care and protection (Ghana, Kenya, Namibia, South Africa and Uganda) or are still engaging in such reforms (Lesotho). See generally, Odongo, G.O (2003) “International Law and Child Law Reform in the Aftermath of the CRC: Some Examples from Africa” (Unpublished Paper on file). However, comprehensive national regimes of State-funded (income or means-tested) child-support benefits are lacking in all the countries under study (with the limited exception of the child-support grant in South Africa). In relation to Kenya, Wabwile (n 86 above) 413 explains that the absence of such a scheme means that children’s rights under the Kenyan Act “will remain paper rights and pipe dreams for the hundreds of thousands of doomed poor children who are decimated daily by hunger, malnutrition, curable diseases, and material deprivation due to the grinding poverty situation in the country.” Further, studies conducted in the sub-Saharan African context show that “although women carry a lion’s share of family responsibility, they are not accorded full participation in the crucial decisions affecting children. Hence, the low status of women in the home impacts negatively on their children.” See Rwezaura (n 91 above) 268, citing Armstrong, A (1992) *Struggling over Resources: Women and Maintenance in Southern Africa* Harare:

In conclusion, it is submitted that the problem of child offending will only be effectively addressed by putting in place broader social and economic reforms so as to enable the realization of children's 'developmental rights' such as education, health care and protection from abuse and neglect .<sup>109</sup>

## 8.8 Training and sensitisation of professionals

An important recognition in implementing the new laws is that the perceptions of those tasked with their implementation towards key concepts must be of vital interest.<sup>110</sup> In order to ensure the centrality of diversion, a primary role for social enquiry reports and a recognition by courts of these reports, the use of alternatives to arrests and detention whenever appropriate and the effective working of child friendly courts, amongst the other new proposals, juvenile justice officials and professionals must be committed to the implementation of the new laws.

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University of Zimbabwe Publications and Armstrong, A *et al* "Towards a Cultural Understanding of the Interplay Between Children's and Women's Rights: an Eastern and Southern African Perspective" (1995) 3 *The International Journal of Children's Rights* 333-368. At a general level, the challenge of developing effective crime prevention strategies has been noted as follows: "The prevention of juvenile criminal behaviour in Africa will require an enormous investment in services for all ages, from young children to adults. This investment in services is complicated in Africa, where structural adjustment programmes and budget constraints severely limit government spending. The challenge to African societies will be to develop a crime prevention strategy that draws on the limited funds available but capitalizes on the strength of communities. Strategies will need to take into account the role of all key agencies in society including the state, NGOs, churches, community associations and the media. [They will need to be specific] in understanding problems in each community and identify agencies that are best placed to offer improved opportunities for [children]." See Petty and Brown (n 2 above) 45.

<sup>109</sup>This conclusion applies to other problems affecting children in the region (such as child labour) as well. This extends the obligation of governments to comprehensively invest on children's and families' social welfare as means for the social prevention of crime.

<sup>110</sup>Ekirikubinza (n 71 above) 520.

In the context of one of its law making processes, the South African Law Reform Commission has correctly stated that “legislation alone cannot produce well trained, committed and motivated personnel”.<sup>111</sup>

This point has been demonstrated in the case of Uganda where the Children’s Statute is now almost a decade old since enactment (1996). A recent Ugandan study on court practice records the failure on the part of key role players (trial judges, prosecutors and defence counsel) to appreciate key provisions of the new law. The practice:

“... [I]ndicates very little evidence that court officers are guided by the need to keep the child out of detention and/or to rehabilitate the child offender. The factors mentioned by state prosecutors as well as defence counsel in their submissions towards what they considered appropriate ‘sentences’, were hardly different from submissions made by lawyers engaged in the trial of an adult offender. The presiding judges too seemed hardly aware of the importance of childhood and the need for rehabilitation...There is no evidence that court officials had internalised the need to ensure that trial proceedings within juvenile justice should not be adversarial in nature...The judicial system totally ignores some other concepts which are core to a juvenile justice system based on the best interests of the child. For example, there were no adequate measures to protect the identities of children who had been processed through the High Court... Further, research findings indicate that court files bear the names of child offenders (contrary to the provisions of the Statute). In cases where children are tried in other courts other the [specialised] Family and Children’s Courts (for example in joint trials with adults and in capital offence cases) the Statute provides for the remission of the child to the Family and Children Court

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<sup>111</sup>South African Law Reform Commission *First Issue Paper on the Review of the Child Care Act* (n 108 above) Para 11.6.

for an appropriate order.<sup>112</sup> As can be observed in a [number] of post-1996 cases, none of the judges of the High Court remitted the relevant children to the [specialised] court and instead went ahead to make post-trial orders [mostly entailing institutionalisation]...”<sup>113</sup>

The study on Uganda does not provide reasons for these anomalies. However it legitimately poses the question whether they are as a result of a lack of knowledge about the relatively new Ugandan Statute, or indicative of indifference in the attitude of court officers to the provisions of the new law.<sup>114</sup> An earlier Ugandan study attributed similar anomalies in the specialised Family and Children Courts to a combination of these two factors.<sup>115</sup>

The Ugandan example confirms the need for awareness-raising campaigns and training sessions to impact on prevailing attitudes and practices on a long term basis. This may prove very challenging since many professionals are accustomed to traditional or stereotypical working practices that may be resistant to change.<sup>116</sup>

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<sup>112</sup>Ugandan Statute, sections 101 (3) and 105(2) discussed in Chapter 6, section 6.6.1.

<sup>113</sup>Ekirikubinza (n 71 above) 527-528.

<sup>114</sup>See Ekirikubinza (n 71 above) 528 also suggesting that “the answer to this question partly lies in conducting interviews with the various categories of court officers and thus eliciting their level of knowledge of the relevant law as well as their attitude towards such a law.”

<sup>115</sup>See Save the Children, UK *et al* (2003) *Towards a Strengthened Juvenile Justice and the Family and Children’s Courts in Uganda* Kampala: Save the Children, UK 7, making the point that constraints facing the specialized Family and Children’s Courts include the inadequate capacity and indifference or negative attitude on the part of some of the actors in addition to ignorance of the system by some of the key actors, the parents and general members of the public. The study specifically notes that serious problems regarding funding has meant hiccups in the transporting of children awaiting trial to and from courts and has hampered the preparation of probation and social welfare reports which entail necessarily that social workers travel to the homes of the relevant children.

<sup>116</sup>Hammad (n 6 above) 229.

However, the caution must be noted that training and sensitisation may not fully guarantee a commitment to the implementation of the proposed juvenile justice systems.<sup>117</sup> In order to ensure that such a capacity-building process benefits the juvenile justice system in the long term, it is crucial that specialisation on the part of different personnel, judicial officers, probation officers, police, prosecutors, and so forth is encouraged and matched by professional job terms and incentives which aim at ensuring these personnel are retained to work in the juvenile justice system.<sup>118</sup> Capacity building may also need constant reinforcement, as existing staff leave and are replaced with new people unfamiliar with the goals and objectives of a child rights-oriented juvenile justice system and its components such as diversion.<sup>119</sup>

## 8.9 Conclusion



This Chapter considered that the successful implementation of child rights' oriented juvenile justice systems discussed in this thesis will depend on broader socio-economic, political and cultural realities of the different countries. The enactment of new legislation which emphasizes a child rights approach to dealing with juvenile justice is a daunting challenge in light of competing pressures, foremost of which are harsh public attitudes towards crime and the question of affordability of the envisaged new infrastructure. The delayed enactment of the Namibian and South African Bills is

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<sup>117</sup>In the sense that knowledge and awareness of the content of new laws may not be sufficient of themselves.

<sup>118</sup>More often than not, the various role players, for example, Children's Court magistrates would work at lower cadres with the consequence of an ever-present expectation to 'climb' to higher positions. A study on Kenya, *The Cradle and Odhiambo* (n 76 above) 14 above, points out this constraint in relation to the frequent transfers of magistrates and prosecutors working in Children's Courts in Kenya.

<sup>119</sup>Sloth-Nielsen (n 79 above) 13.

illustrative of this point. Upon the enactment of child rights oriented juvenile justice laws, it is worth noting that their durability in the statute book would also never cease to be under threat in light of these competing themes. Hence, advocacy and lobbying for a children's rights approach (preferably started at the pre-legislative stage)<sup>120</sup> must be kept alive throughout the whole law making process until enactment, and should continue in the implementation phase.

However, it is further worthy of emphasis that, upon enactment, the creation of the enabling infrastructure to ensure implementation of the new laws requires investment of (human and financial) resources which are scarce in the context of developing countries. This challenge is also exacerbated by the fact that the substantial reduction of child/juvenile delinquency, which is the overall aim of any child rights-centred juvenile justice system, requires far-reaching socio-economic reforms aimed at the empowerment of economically deprived families. This demands the allocation of resources and re-organisation of government budgets to ensure reforms in social and economic welfare in the countries under study.

In addition, this Chapter emphasized that laws, policies and resources aimed at ensuring a children rights approach for juvenile justice are meaningless if not enforced by the professionals who draw upon them in their work with and for children. Hence judicial officers, lawyers, social workers, the police, governmental and non-governmental service providers are ultimately the ones in a position to interpret and use provisions based on children's rights.<sup>121</sup> Indeed, the Chapter

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<sup>120</sup>As was considered in the law making processes of Kenya, South Africa and Uganda, discussed in Chapter 3, section 3.6.4

<sup>121</sup>See Hammad (n 6 above) 228-229.



discussed a few examples of juvenile justice practices which show the potential for developing good practices that comply with the CRC.<sup>122</sup> These examples were all developed within the prior legislative frameworks, and therefore pre-dated the recent juvenile justice law reform processes in the countries under study. Their introduction and successful practice was largely based on the will of dedicated and committed individuals and organisations in both government and civil society. The Chapter emphasized that the key towards inculcating such attitudes is the need for training sessions and awareness raising campaigns in the short term, so as to impact on prevailing attitudes and practices. This process of capacity building will have to be sustained in the long term.

The need to create awareness extends to the public domain where social mobilisation must be done to enable the gradual entrenchment of the concept of children's rights, especially against the background of paternalistic conceptions and culturally-grounded views about children as non-bearers of human (children's) rights.

Of further significance in the creation of public awareness is the need to inform public opinion with accurate (and well-researched) information through well co-ordinated and targeted campaigns on the incidence and causes of child offending. This must extend to the potential (and actual) impact of a child rights oriented juvenile justice system in the general reduction of rates of juvenile crime and recidivism, besides the potential for cost savings in comparison to the formal justice system and the use of incarceration.<sup>123</sup>

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<sup>122</sup>See Section 8.5, above.

<sup>123</sup> Regarding the issue of saving costs, the South African pre-legislative costing process in this regard, discussed in Barberton and Stuart (n 45 above) would be of comparative relevance to the countries

In sum, implementation of the new laws will involve work in four key areas; (a) sensitisation of professionals and the general public, (b) training of professionals, (c) budgeting at all levels of government (national, regional and local) and (d) procedural reform within state institutions requiring innovation and dedication of different officials in the implementation process.<sup>124</sup>

It can be in no doubt that the governments of the respective countries under study bear the primary obligation in ensuring progress in this regard.<sup>125</sup> However, examples of good juvenile practices which predate the law reform processes demonstrate the value of governmental and non-governmental partnerships which can be crucial in the implementation of the new laws. In addition, different sectors of society including the family,<sup>126</sup> communities, the media,<sup>127</sup> civil society (national and international) and the




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under study. For discussion on the predominance of pre- and post-trial incarceration of children in the countries under study, see Chapter 6, section 6.3 and Chapter 7, section 7.3.3. A recent global study on juvenile justice confirms in this regard that “to resort to alternatives to deprivation of liberty often allows for savings to be made in the juvenile justice system, a feature which should increase the attractiveness of such options for States looking to tighten fiscal spending in the justice area.” See Cappelaere, G, Grandjean, A and Naqvi, Y (2005) *Children Deprived of Liberty Rights and Realities* Amsterdam: Defence for Children International 417.

<sup>124</sup>Wadri (n 2 above) 37 further discussing these factors in relation to the Ugandan Statute.

<sup>125</sup>By virtue of the treaty obligations under the CRC.

<sup>126</sup>Section 8.7, above discussed the overall role of States, parents and families in the prevention of juvenile offending. Parents and families will be crucial in ensuring the success of birth registration regimes so that provisions based on a child’s age such as the minimum age of criminal capacity are effectively realized. They will also play a number of specific immediate roles in relation to various parts of the juvenile justice system. Examples include instances where diversion programmes and alternative sentences will require their cooperation and supervision. Similarly, they will play a role in the collation of information for social workers’ and probation reports and putting up bonds for the release of children (following arrest and or detention) on caution or bail.

<sup>127</sup>For a recent comprehensive discussion on the role of the media in creating awareness on implementation on the rights of the child, including violations thereof, see Tobin, J “Partners Worth

international community (such as inter and intra-governmental organisations and donor agencies) bear different levels of responsibility.<sup>128</sup>

To ensure that the above obligations are observed and that violations of children's rights are addressed, there is a need for effective monitoring structures to be put in place. This may be done through the creation of independent national monitoring bodies (with a broad mandate)<sup>129</sup> consisting of government and non-government representatives,<sup>130</sup> such as Children's Commissions,<sup>131</sup> Children's Ombudspersons<sup>132</sup>

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Courting: The Relationship Between the Media and the Convention on the Rights of the Child" (2004) 12(2) *The International Journal of Children's Rights* 139-167.

<sup>128</sup>International or foreign (governmental, intra-governmental and non-governmental) support for juvenile justice programmes has been crucial in initiating and sustaining juvenile justice law and practical reforms processes in Africa, including in the piloting and funding of projects, for example diversion programmes and some of the good practices discussed in section 8.5, above. Inter-governmental organisations such as UNICEF and International NGOs like, Penal Reform International and the International Save the Children Alliance are examples in point. For discussions in this regard, see, Skelton (n 62 above) 154-167.

<sup>129</sup>To evaluate and oversee the formulation and implementation of policy and monitor violations of all children's rights, juvenile justice rights included.

<sup>130</sup>Such as the proposed National Council for Children's Services in Kenya which comprises of both government and non-government representatives. Under the Kenyan Children's Act, section 32(1), the Council has wide ranging powers ranging from developing and formulating policy, monitoring the implementation thereof, facilitating co-ordination between government departments, seeking donor funding, creating awareness and so forth. The Council does not have adjudicative powers which extend to the making of orders or recommendations to address violations of children's rights. To effectively fulfill their monitoring functions, the Council's mandate should be extended to include these powers.

<sup>131</sup>As proposed in the Lesotho Bill, Part XXVI. Under section 246 of the Bill, the proposed Commission's powers are spelt out as follows: a) investigate national and individual issues pertaining to violation of children's rights; (b) subpoena any witness during investigations; (c) make appropriate referrals following investigations; (d) monitor national compliance with international and regional obligations; (e) coordinate awareness raising activities in regards to children's rights; and (f) perform any other functions as may be prescribed by regulations made under this Act. The Independent Children's Commission shall report directly to Parliament. The Ghanaian National Commission for Children was established in 1979 well before the adoption of the CRC and recent juvenile justice law

or independent National Human rights Commissions.<sup>133</sup> The establishment of bodies specifically in charge of monitoring juvenile justice should be encouraged wherever possible.<sup>134</sup> It is however worthy of note that the degree of ‘independence’ of all monitoring bodies hinges on the body’s mandate,<sup>135</sup> the competence, impartiality and security of tenure of its members and the funding of the body’s work.<sup>136</sup>

There is therefore a need for independent monitoring structures which can authoritatively investigate problems and weaknesses in the working of the proposed

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reforms culminating in the Juvenile Justice Act (2003) discussed in this thesis. See CROC, *Ghana’s Initial State Report*, CRC/C/3/Add. 39 19 December 1995 Para 2.

<sup>132</sup>Used for many years in a number of western countries for example, Norway and Sweden. However, there are no examples in the context of African countries under study.

<sup>133</sup>On the role of National Human Rights Commissions in protecting children’s rights, see generally, CROC (2002) *General Comment No. 2* “The Role of Independent National Human Rights Institutions in the Protection and Promotion of the Rights of the Child.” CRC/GC/2002/2 (Adopted at the 32<sup>nd</sup> session on 15 November 2002). The fact that independent Human Rights Institutions usually have a broad mandate to monitor violations of all human rights (of all persons) means that there is a need to create specific structures within these institutions to focus especially on children’s rights and juvenile justice.

<sup>134</sup>The proposed Child Justice Commission under the Namibian Bill is illustrative. Under section 118 of the Bill, such a body would have powers to advise the government on issues of implementation and may (a) receive a report or complaint from any other body, institution, organisation or individual concerning the implementation of the provisions of this Act; (b) require any person or representative who is a member of the Commission to investigate, provide further information or take steps to resolve any complaint, difficulty or problem affecting the implementation of this Act; (c) receive information concerning the implementation of this Act; (d) receive from the Directorate for Child Justice recommendations concerning any review of the provisions of this Act; (e) refer any complaint, difficulty or matter that has been brought to the attention of the Commission, to the local Child Justice Committee which has jurisdiction.

<sup>135</sup>For example whether the body has power to make binding orders to various government departments.

<sup>136</sup>Funding of the monitoring body should not depend on the whims of the Executive (government). For example under the Lesotho Bill, section 251, the functioning of the proposed Lesotho Children’s Commission would be funded through (legislatively recognized) grants from government, donors and any funds independently raised by the Commission.

systems. Such bodies should have the power to resort to a range of options including the power to order remedial measures, name and shame and engage in research, advocate and lobby for practical reforms.<sup>137</sup> In addition, non-governmental organisations should play a complementary role in relation to monitoring and advocacy.<sup>138</sup>

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<sup>137</sup>None of the countries under study have independent structures with mandates to effectively discharge a monitoring role. Although the Ghanaian National Commission for Children and Kenyan National Council for Children are in place, their powers are severely limited. They are not independent in terms of having a mandate to make binding orders on implementation to government for compliance, nor are their members' tenures secured. They both exclusively rely on the respective executive governments for funding which may not be guaranteed since this depends on the whims of the Executive. In respect of South Africa, the absence of provisions on the creation of a specific independent institution for monitoring children's rights generally and juvenile justice in particular, will threaten the value of independent monitoring. Although this is ameliorated by the existence of an independent Human Rights Commission (the South African Human Rights Commission), the heavy workload on this institution as a general monitoring body may mean that monitoring juvenile justice reform is relegated to the margins. Any such involvement of the Commission in monitoring will also await the passage of the Bill into law. The Lesotho Bill's example (proposing the creation of an Independent Children's Commission with a broad mandate on all children's violations) and the Namibian Bill (recommending the establishment of a Child Justice Commission) will only come into effect if the Bills are enacted into law with these proposals intact. Monitoring in Uganda is left to the Ugandan Human Rights Commission and the concern raised with regard to South Africa (on the issue of capacity of a body with a general broad mandate to monitor violations of all human rights) applies.

<sup>138</sup> Skelton (n 62 above) 163 points out in this regard that NGOs are "often adept at revealing problems or weaknesses in a system from the perspective of the people at the receiving end: in the case of juvenile justice, the children themselves."

## CHAPTER 9

### GENERAL CONCLUSIONS AND RECOMMENDATIONS

#### 9.1 Introduction

This thesis set out to investigate juvenile justice law reform in particular African countries in light of international children's rights law. The central focus of the thesis was the extent to which the legislative reforms under study incorporate a child's rights approach to juvenile justice rather than reflecting either a justice or a welfare construct in which children are seen as non-beneficiaries of rights to individual autonomy.<sup>1</sup> The thesis has also considered the extent of the influence of latter-day contemporary developments which are not premised on welfare or justice ideology but on other considerations such as crime control.

As shown in Chapter 2, the theme from which this thesis proceeds is that the children's rights model offers an alternative theory within which juvenile justice can be located. Children's rights further provide a theoretical framework for addressing the practical constraints and deficiencies of earlier juvenile justice theories based on the welfare-justice continuum. Novel standards and ideals have emerged in international children's rights law on which all juvenile justice systems may be premised.<sup>2</sup> Overall, it was considered that these standards require (a) the establishment of separate laws, institutions and procedures applicable to children accused of or alleged to have committed crimes; (b) the setting of a minimum age of

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<sup>1</sup>Chapter 2, section 2.6.

<sup>2</sup>Chapter 2, section 2.8

criminal capacity; (c) the incorporation of the principle of detention as a last resort and for the shortest period of time; (d) the desirability of diversion as a binding obligation on State Parties; (e) the extent to which procedural guarantees under the CRC and Beijing Rules are accommodated in the juvenile justice framework and; (f) the limitation of certain sentences and the need for alternative dispositions at the sentencing stage.

Contemporary developments reflect a general trend for the dominance of a crime control theme in juvenile justice legislative reform in Western (European) countries and the US.<sup>3</sup> In contrast, this thesis has considered that while a crime control theme can be discerned in relation to a few provisions of the new juvenile justice laws (and proposed laws) of the six African countries under study, it did not provide the central motivation. Rather, the author has argued that children's rights provided the primary overarching theoretical basis upon which these legislative reforms were founded.

The general conclusions presented in this Chapter summarise the extent of the influence of international child rights law standards on the substantive provisions of the new laws and Bills. Conclusions are also drawn on the prospects and challenges regarding the implementation of the new and proposed laws.

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<sup>3</sup>Chapter 2, section 2.6.

## 9.2 Ensuring a primary role for children's rights through broad based consultative law-making processes

In all six countries under study, a dualist system of incorporating international law treaties<sup>4</sup> necessitated the adoption of specific national law to give domestic legal effect to provisions of the CRC in general and juvenile justice provisions, in particular. The political will demonstrated by governments of the countries under study to embark on legislative reform is significant in light of the general dismal record and lackadaisical stance of most African countries in relation to the enactment of domestic legislation to give effect to international human rights law treaties.<sup>5</sup>

Writing recently, Ngokwey discussed that the rapid and impressive ratification of the CRC by most African governments was motivated more by *realpolitik* than a genuine commitment to the implementation of children's rights.<sup>6</sup> Ngokwey argues that "a more utilitarian hypothesis is that the rush of African States to ratify the CRC stems

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<sup>4</sup>By which international law treaties are not considered to be part of domestic sources of law hence requiring the enactment of domestic legislation.

<sup>5</sup>For a documentation on the general failure of African countries to pass domestic legislation to give effect to international human rights law treaties (such as the main UN Human Rights treaties, including the two 1966 Covenants on Civil and Political Rights and Covenant on Economic, Social and Cultural Rights), see generally, country reports in Heyns, C (ed) (2004) *Human Rights Law in Africa* (Vol 2) The Hague: Martinus Nijhoff and An-Na'im, A (ed) (1999) *Universal Rights, Local Remedies: Implementing Human Rights in the Legal Systems of Africa* London: Interights.

<sup>6</sup>Ngokwey, N "Children's Rights in the Central Africa Sub-Region: Poverty, Conflicts and HIV/AIDS as Context" (2004) 12 (3) *The International Journal of Children's Rights* 183. Chapter 3, section 3.3 noted that of the six countries under study, Ghana, Kenya, Namibia, and Uganda, all ratified the Convention within the first year of its adoption. Lesotho ratified the CRC three years after its adoption and, in the post apartheid period, the CRC was the first international human rights treaty to be ratified by South Africa. Ngokwey (as above) 183 further notes that "of the first 20 ratifications that helped the CRC come into force, 9 were from African States."



from their assumption that funding would result from ratification or that ratification could become a condition for developmental assistance even on a non-formal basis”.<sup>7</sup> Chapter 3, section 3.6.3, also discussed that some of the reasons for the impressive political will to put in place children’s laws may be rooted in the perception that children’s rights are apolitical in nature. In this sense the concept of children’s rights is deemed not to carry any threat to politicians regarding the possible alienation of voting constituencies.<sup>8</sup>

However, this thesis has considered that in relation to juvenile justice reforms, the powerful nature of other competing pressures such as harsh public opinion about crime lead to the conclusion that political leaders may be driven by genuine commitments and a real intention to implement the provisions of the CRC on juvenile justice. Where children’s rights may entail high political costs, such as a possible public backlash on provisions seen as liberalization or softening of criminal laws, the commitment of governments is likely to waver. It is therefore submitted that there is a considerable degree of commitment by the countries under study to the implementation of children’s juvenile justice rights. This is demonstrated through the enactment or proposals for legal provisions which establish a minimum age of criminal capacity, give effect to diversion, establish separate juvenile justice systems and legislate for a wide range of alternative sentences in the new laws considered in this thesis.<sup>9</sup>

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<sup>7</sup>Ngokwey (as above) 183.

<sup>8</sup>For further discussion on this point, see Sloth-Nielsen, J “The Contribution of Children’s Rights to the Reconstruction of Society: Some Implications of the Constitutionalisation of Children’s Rights in South Africa” (1996) (4) *The International Journal on Children’s Rights* 323-344.

<sup>9</sup>Chapters 4-7.

Chapter 3 argued that the law reform-making processes in Kenya, South Africa and Uganda were unique by virtue of the fact that they were led by reform committees whose memberships were multidisciplinary.<sup>10</sup> These processes were also not only characterised by the official political will to initiate law reform but also largely influenced by the advocacy of the civil society in these countries.<sup>11</sup> The involvement of the civil society was significant in contrast to developments in Western juvenile justice (and criminal justice) legislative reforms where there is a general decline of the influence of the ‘professional elite’ (civil society) which is increasingly finding itself marginalised in policy-making (for example in the UK and the USA).<sup>12</sup> It is submitted that the inclusion of organs of the civil society in the law reform case studies considered in this thesis may therefore partly explain the difference between juvenile justice law reforms that were under study in contrast to the trend in western jurisdictions. Stout and Wood have therefore asserted in relation to South Africa’s Child Justice Bill that:



“The discourse of human rights (in this thesis, children’s rights) can provide a mutually acceptable language and framework around which both civil society and government can unite. By providing a common frame of reference, it allows real dialogue to take place. In South Africa, the success of children’s-rights activists in

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<sup>10</sup>Chapter 3, section 3.5.

<sup>11</sup>Chapter 3, section 3.6.4.

<sup>12</sup>Stout, B and Wood, C “Child Justice and Diversion: Will Children’s Rights Outlast the Transition” in Dixon, E and Van der Spuy, E (2004) *Justice Gained? Crime and Crime Control in South Africa’s Transition* Cape Town, UCT Press 122-123 citing the views of Garland, D (2001) *The Culture of Control: Crime and Social Order in Contemporary Society* New York: Oxford University Press.

promoting the Child Justice Bill can be partly explained by their willingness to call for reform from a human rights perspective.”<sup>13</sup>

The juvenile justice law reform processes considered in this thesis have been characterised by the primary relevance of a children rights approach on a range of issues such as the setting of a minimum age of criminal capacity, diversion, requirements on separate juvenile justice systems and alternative sentences. In contrast, in most western countries there is an increasing dominance of a crime control theme as defined by government officialdom rather than through broad based reform processes (which would have provided the opportunity for ‘dialogue’ and hence include the views and suggestions of organs of civil society).<sup>14</sup> For example, the decision to abolish the *doli incapax* rule<sup>15</sup> in the UK was by and large premised on the Labour party government’s determination on the ‘need to get tough’ on crime rather than the protection of young children from criminal proceedings.<sup>16</sup>

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<sup>13</sup>Stout and Wood (as above) 134. Although these writers attribute the relevance of arguments on human (children’s) rights to the fact of ongoing transition of the South African society (from apartheid to democracy), these comments are relevant for the other countries under study as illustrated by the centrality of arguments based on children’s rights in the law reform debates to be considered in section 9.3, below.

<sup>14</sup>A note of caution in this regard is that the Lesotho, Namibian and South African Bills are yet to be passed into law. Stout and Wood (as above) 123 correctly point out that “In South Africa...., the real influence of the professional elite [civil society] will not truly be known until it is clear if, when and in what form the Bill will be implemented...” For a discussion of the challenges in this regard, see Chapter 8, section 8.2.

<sup>15</sup>Discussed in Chapter 4 and examined in conclusion in section 9.3.1, below.

<sup>16</sup>See Chapter 4, section 4.7.2. For a general discussion on the contemporary trend for punitiveness in juvenile justice systems, see Chapter 2, section 2.6.

Hence, the common thread in this thesis contrasts a child rights-based approach to juvenile justice law reforms on the one hand, and, a populist and punitive strategy on the other.

The extent of the influence of international children's rights law on the new and proposed laws was considered in Chapters 4-7 and the concluding premises are presented in the next sections.

### **9.3 The role and influence of international children's rights law in the substantive provisions of the new and proposed juvenile justice laws under study**

#### **9.3.1 Provisions on the setting of minimum and upper ages of criminal capacity**



The issue of age and criminal capacity is central to a child rights-centred juvenile justice system.<sup>17</sup> There is now an emerging international consensus (supported by state practice and the views of human rights monitoring bodies) which points to the age of 18 as the acceptable upper age applicable to all juvenile justice systems in spite of different socio-cultural and legal systems worldwide.<sup>18</sup> A separate juvenile justice

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<sup>17</sup> As considered in Chapter 4.

<sup>18</sup> Chapter 4, section 4.2.1.4. Article 1 of the CRC provides: "For the purposes of the present Convention, a child means every human being below the age of eighteen years, unless under the law applicable to the child, majority is attained earlier". This provision may be construed as inferring the possibility of setting a cut-off age for the application of the juvenile justice system at a lower age than 18. However, this thesis has proceeded from the premise that the age of 18 as the minimum threshold in matters of juvenile justice law has been confirmed by domestic legal provisions, the interpretation of the CROC and Human Rights Committee (as considered in Chapter 4, section 4.2.1.4). Support for this conclusion also draws from scholarly analyses which consider that 18 must now be considered as the

system should therefore apply to children until they reach the age of 18 years. In some countries, this cut-off age has been set at lower than 18 in clear violation of the CRC.<sup>19</sup> The trend for the exclusion of juvenile courts' jurisdictions through waiver and transfer provisions by which children who are below the age of 18 years may be tried in adult or regular courts is further illustrative.<sup>20</sup>

In the past laws of the countries under study, there were different definitions of 'a child' and inconsistencies existed even within the same legal system as regards the upper age threshold. The definition of children varied depending on the issue at hand.<sup>21</sup> In view of this and state violations in relation to the upper age, the setting of an upper age was considered to be illustrative of the influence of international law in the countries under study. In this regard, it was considered significant that all the legislative reforms discussed adopted the age of 18 years (or higher)<sup>22</sup> as the upper age for the new and proposed juvenile justice systems. It was also submitted that this

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applicable age for the definition of childhood in light of the "CRC's preamble and preceding human rights instruments such as the Universal Declaration of Human Rights (1948), the 1959 Declaration on the Rights of the Child and recent proclamations of States in the UN General Assembly". For this view, see Grover, S "On Recognizing Children's Universal Rights: What Needs to Change in the Convention on the Rights of the Child" (2004) 12(3) *The International Journal of Children's Rights* 259-271, 251, 271 also calling for "the requisite revision of article 1 of the CRC to include all children under 18 *without exception*". Of further specific reference to the African countries under study, the African Children's Charter (article 2) adopts the age of 18 as the upper age for all the Charter's protected rights (including juvenile justice rights).

<sup>19</sup>See, Chapter 4, section 4.2.1.4.

<sup>20</sup>Considered in Chapter 6, section 6.2.2.1.

<sup>21</sup>Chapter 4, section 4.6.

<sup>22</sup>In the Namibian and South African Bills where the upper age is proposed at 21 in certain cases, for example where a child is alleged to have jointly committed a crime with persons of similar ages or persons aged between 18 and 21 years and where a person commits an offence while aged below 18 but attains adulthood after entry into the juvenile justice system. See Chapter 4, section 4.2.1.4.

development can solely be attributed to the influence of international law due to the increasing international consensus agreeing on 18 as the upper age.<sup>23</sup>

On the other hand, the setting of a minimum age of criminal responsibility is a much more vexing issue. This is partly due to universal differences about social interpretations of childhood and notions on children's guilt. The setting of a minimum age of criminal responsibility is therefore much less of a legal issue than one of societal and practical dilemmas. However, in a similar way to the development of consensus on the age of 18 as the upper age of criminal responsibility, it was argued that there are some general guiding international law standards which are discernible from the CROC's and Human Rights Committee's approach to this issue. It was submitted that these standards seem to distil what can be said to be an emerging 'minimum' threshold that requires the minimum age to be set at 12 years or more.<sup>24</sup> Related to this is an instructive emerging norm relating to States which apply the doctrine of *doli incapax*.<sup>25</sup> This norm can be considered to militate against the abolition of this doctrine where the result would be a low minimum age of criminal capacity (of below 12).<sup>26</sup> The foregoing emerging principles culminate in the conclusion that the choice of a minimum age of criminal capacity must not be arbitrary.<sup>27</sup>

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<sup>23</sup>Chapter 4, section 4.2.1.4.

<sup>24</sup>See Chapter 4 sections 4.2.1.1, 4.2.1.2 and 4.2.1.3.

<sup>25</sup>Discussed in Chapter 4. The doctrine presumes children between the ages of 7 and 14 as lacking in criminal capacity unless proved otherwise by the prosecution.

<sup>26</sup>See Chapter 4 section 4.2.3.

<sup>27</sup>See Van Bueren, G (1995) *The International Law on the Rights of the Child* Dordrecht/Boston/London: Martinus Nijhoff Publishers 173.

The country-specific reform examples discussed in this thesis have adopted differing approaches to the issue of minimum age of criminal capacity.<sup>28</sup> It follows that debates on the setting the minimum age were motivated by varying arguments. New children's laws in Ghana and Uganda led to an increase of the minimum age of criminal capacity from the age of 7 to a new age of 14 (in Ghana's case) and 12 (in Uganda's case). The Lesotho and South African proposed laws have recommended an increase from a minimum age of 7 (which is common to both countries) to a new minimum age of 10 years in both countries. For Ghana, South Africa and Uganda few children of tender ages were found to have come before criminal courts for trial at the time of the law reform process. Further, comparative research on different minimum ages of criminal capacity set by other states both in Africa and abroad was also instructive to these countries' law reform processes.



In regard to South Africa, most of the respondents to the South African Law Commission's Issue Paper indicated support for an increase in the minimum age. However, the decision to set the age at 10 was also influenced by deliberations at an expert seminar convened by the Commission and attended by lawyers, criminologists and child development experts. In particular, the Commission was sufficiently convinced by scientific and developmental research presented at the experts' seminar. The research, based on selected South African children, tended "to show that children develop cognitive and connative capacity more or less at the age of 10".<sup>29</sup>

Despite the different motivations for the increase of the minimum age of criminal capacity, it was argued that arguments on the obligations under the CRC were of

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<sup>28</sup>See Chapter 4, section 4.8.

<sup>29</sup> South African Law Reform Commission (2000) *Report on Juvenile Justice* Para 3.19

persuasive value to the law reformers. In Ghana, South Africa and Uganda there was specific reference to the guidelines in the Beijing Rules (Rule 4.1) and the views of the CROC.<sup>30</sup>

The decision to increase the minimum age of criminal capacity in (Ghana, Lesotho, South Africa and Uganda) substantially accords with the CROC's consistent criticisms whenever the minimum age is set very low. It was submitted that while the minimum age of 10 in Lesotho and South Africa may still be considered lower than the age of 12 which is suggested in many instances by the CROC, retention of the *doli incapax* rule with strengthened rebuttal procedures will ensure an enhanced protection for children between the ages of 10 and 14 where it cannot be proved that they had the capacity to commit crime.<sup>31</sup>



In light of the jurisprudence of the CROC and the Human Rights Committee, Chapter 4 considered that the retention of low minimum ages in Kenya (8 years) and Namibia (7 years) to be in violation of the CRC. In regard to Kenya, it was considered that the retention of the low minimum age of 8 was neither expressly nor impliedly cited to be the result of a desire to fight crime.<sup>32</sup> Rather, this decision was motivated by the Kenyan Law Reform Commission's interpretation on this issue. The Law Commission's interpretation mirrored the view expressed in the European Court's

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<sup>30</sup>Chapter 4, sections 4.8.2 and 4.8.3.

<sup>31</sup>It was also concluded that provisions which relate to the strengthening of the common law rebuttal procedure for the *doli* presumption (in Lesotho, Namibian and South African Bills) constitute an example of how legislating for improved state practice may substantially bolster provisions at international law.

<sup>32</sup>Chapter 4, section 4.8.1



decision in *V and T v UK* cases discussed in Chapter 4.<sup>33</sup> In this case, the European Court held in relation to the issue of a minimum age of criminal capacity that emphasis should be primarily on the procedures and conduct of a trial for children rather than focus on a specific rule which requires the setting of a minimum age of criminal capacity. Chapter 4 considered the Kenyan Law Commission's reasoning to have been in similar vein.<sup>34</sup> Chapter 4 discussed that such an interpretation does not accord with the interpretation of the CROC which considers the setting of a minimum age to be a fundamental part of juvenile justice rights under the CRC.<sup>35</sup>

It was discussed that the decision to propose the retention of the age of 7 in the Namibian Bill was a direct result of a unilateral decision by the Namibian government.<sup>36</sup> The proposed Namibian Child Justice Bill substantially complies with other aspects of a children's rights oriented juvenile justice system (such as diversion, separate procedures and sentencing regimes).<sup>37</sup> Hence, the failure to increase the minimum age as originally proposed in the Bill (drawing from the South African example) was considered to hint at the possible influence of the fear about a perceived escalation of crimes rather than a child rights approach.<sup>38</sup> This conclusion is lent support by Schulz and Hamutenya who have considered that the juvenile justice system which is proposed by the Namibian Child Justice Bill (2002) will, "with the

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<sup>33</sup>Discussed in Chapter 4 section 4.2.2.1.

<sup>34</sup>Chapter 4, section 4.8.1.

<sup>35</sup>See Chapter 4, section 4.8.1.

<sup>36</sup>See Chapter 4, section 4.8.1.

<sup>37</sup>Chapters 5-7.

<sup>38</sup> See Chapter 4, section 4.8.1.

exception of the retention of the common law *doli incapax* rule (with a minimum age of 7), be built on internationally recognized standards”.<sup>39</sup>

It was considered that a further influence of the CRC is evident in legislative provisions in the new and proposed laws aimed at making provisions on how to handle children below the minimum age of criminal capacity or adjudicated to lack capacity (by virtue of operation of the *doli incapax* rule in Kenya, Lesotho, Namibia and South Africa).<sup>40</sup>

### **9.3.2 Provisions relating to diversion**

‘Diversion’ considered as the channelling away of children from the formal criminal justice systems is an important part of child rights oriented juvenile justice systems.<sup>41</sup>

Diversion has been grounded in state practice particularly in western juvenile justice systems since the 1970s. However, following the adoption of the CRC, the desirability of diversion is now provided for in a legally binding treaty. Article 40(3) of the CRC makes provision for diversion by calling for “measures to deal with children...without resorting to judicial proceedings”. Construed together with the provisions of other relevant international law standards (particularly, the Beijing Rules) and the interpretation of the CROC, this provision affirms that diversion should be a feature of all States’ juvenile justice systems. Although international law does not specifically detail how diversions are to be given effect in domestic juvenile

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<sup>39</sup>Schulz, S and Hamutenya, M (2004) “Juvenile Justice in Namibia: Law Reform Towards Reconciliation and Restorative Justice?” (Unpublished paper on file) 26.

<sup>40</sup>See Chapter 4, section 4.9 above discussing the envisaged child care and protection regimes, as opposed to criminal procedures, for these children.

<sup>41</sup>See Chapter 2 section 2.8.1 and Chapter 5.

justice systems, it provides for a number of standards with which diversion must comply.<sup>42</sup>

The history of the juvenile justice systems under study revealed the absence of prior legal provisions in recognition of diversion. The limited past practice of post-trial diversions was discussed.<sup>43</sup> In relation to pre-trial diversions, it was demonstrated that with the exception of Namibia and South Africa (which have experimented with diversion since the early 1990s), pre-trial diversions were rarely used (if at all) in Ghana, Kenya, Lesotho and Uganda prior to the recent juvenile justice reforms. Against this background, Chapter 5 considered that the new and proposed juvenile justice laws provide considerable evidence of compliance with international children's rights law by the inclusion of provisions on diversion.<sup>44</sup>



It was contended that three diverse approaches characterise provisions that enable diversion in the laws and Bills of the countries under study. The first approach considered was that in the Kenyan Act, in respect of which it was discussed that the provisions limiting detention as last resort and for the shortest period of time may offer an opportunity for pre-trial diversions. In addition, it was argued that the wide

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<sup>42</sup>These standards are particularly provided for in detail in the Beijing Rules, Rule 11. The standards include the need for viable diversionary measures, the availability of diversion at any point of decision-making by juvenile justice officials and all stages of the juvenile justice procedure, the consideration of diversion in each and every case including where more serious offences are alleged to have been committed by the child and the equal and non-discriminatory access to diversion. Further, any diversionary options must respect children's human rights and procedural safeguards. See Chapter 5, section 5.5.

<sup>43</sup>Chapter 5, section 5.6 discussed that there was limited practice with post-trial diversion while the practice of pre-trial diversion was only limited to the Namibian and South African juvenile justice systems.

<sup>44</sup>In relation to the need for diversions in juvenile justice systems whenever appropriate.

powers vested in the newly established National Council for Children may be used to authorise, foster and support the development of diversion programmes in Kenya. However, it was contended that these indirect provisions in the Kenyan Act do not sufficiently guard against the possibility of arbitrariness in prosecutorial decisions on referrals to diversion or even the failure to exercise this decision. This is especially in view of the fact that the provisions leave the prosecutorial power on whether to divert intact. That said, it was submitted that the provisions constitute a significant departure from the previous legal and practical position which shows that diversion was rarely invoked in Kenya, especially at the pre-trial stage.

The second approach considered was that in the new Ghanaian and Ugandan juvenile justice laws. It was considered that the Ghanaian and Ugandan legislation tasks community-based forums with the adjudication of children's matters. In Ghana, the adjudication process involves local child panels while in Uganda, this function is vested in local council (village) courts. The Ghanaian panels and Uganda's courts are presided over by lay members of the public who are publicly elected (in Uganda's case) or selected by the relevant government minister in consultation with local councils (in Ghana's case). The relevant provisions of these two new laws envisage these courts to be courts of first instance in relation to particular offences. The fact that these courts are vested with jurisdiction in relation to particular designated offences means that there will be no need for the exercise of discretion on whether to divert or not.<sup>45</sup> Also, by including elected or appointed members of the public in

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<sup>45</sup>In the Ugandan Statute these offences are specifically listed (sections 93 and Schedule 3). They include among others, the offences of affray, assault, theft, criminal trespass, and malicious damage to property. Child panels in Ghana are expressly stated to be in charge of 'minor criminal matters'. In

dispute resolution process, these two statutes allow for cases involving children to be adjudicated within the child's own community. The orders that these local courts or panels may issue are characterised by alternatives to custodial sentences and include orders for reconciliation, compensation, restitution, apology or caution in respect of a child against whom an offence has been proved.<sup>46</sup> This introduces a limited role for the state and hence an enhanced role for local communities and the centrality of families in the Ghanaian and Ugandan new systems. As a result, the approach in these two statutes contributes to a limit on the use of institutionalization in accordance with the principle of detention as a last resort (expressly provided in article 37(b) of the CRC). Moreover, the enactment of the role of community structures as conduits for diversion denotes an attempt to ensure that the diversion process is not anchored in unaffordable formal structures involving the employment of personnel and the building of corresponding infrastructure. In this way, the these two countries' approach illustrate how compliance with international law standards may be achieved within the reality of scarcity of financial and human resources in an African context.

The third approach is that adopted by the Lesotho, Namibian and South African Bills entailing provision for a novel procedure called the Preliminary Inquiry (the P.I). The three Bills envisage that the P.I will be the central point of decision making regarding referrals to diversion. The intention is to involve far more stakeholders in the decision making process on referrals besides the prosecutor. It was submitted that this reduces the potential for arbitrariness and inconsistencies regarding decisions on referrals to pre-trial diversion. It was further considered that the three Bills introduce a range of

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contrast, the new Ghanaian Act does not specifically list the 'minor' offences leaving this to be determined in practice. See Chapter 5, section 5.7.2.

<sup>46</sup>Ghanaian Children's Act section 32; Ugandan Statute, section 93 (4).

levels of diversions in order to widen access to diversion and encourage innovation in the use of diversion, particularly in rural areas where formal programmes may be non-existent. Third, the three Bills incorporate restorative justice oriented measures such as the use of family group conferences (FGCs). It was submitted that this idea draws from a number of Western models (such as New Zealand's legislative recognition of FGCs). However, the inclusion of these measures was considered to find acceptance and support in African concepts of restorative justice and reconciliation.<sup>47</sup>

It was considered in Chapter 5 (section 5.7) and Chapter 7 (section 7.5.4) that there are a range of alternative sentences in the new laws of the countries under study. These alternative dispositions can be used as post-trial diversion options particularly in instances when they may involve the suspension of custodial sentences. By virtue of these provisions, sentencing officers will have the power to use diversion programmes and a range of alternative dispositions which will have the effect of removing the child from formal criminal sanctions such as custodial sentences. The specific restrictions and prohibitions on the use of custodial sentences considered in Chapter 7, section 7.5.3.1 will, it is argued, ensure that the use of diversion options either in the pre-trial or post-trial stages is more attainable than in the past laws of the countries under study.<sup>48</sup>

The inclusion of minimum standards and human rights safeguards with which these different diversion approaches must comply was considered as further testimony of the influence of international children's rights law.

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<sup>47</sup>Considered in Chapter 5, section 5.7.3.3.

<sup>48</sup>The past practice in these countries was marked by the predominant use of custodial sentences despite the existence of a wide-range of alternative sentences (Chapter 7, section 7.3.3).

However, Chapter 5 identified one shortcoming in regard to all the new provisions on diversion. This is in relation to the bifurcated system of diversion which will amount to the total exclusion of certain categories of child offenders (deemed to have committed a serious crime) from being considered for diversion.<sup>49</sup> It was argued that this is seemingly against the essence of international law standards which require that a decision on the appropriateness of diversion should be made in each individual case, taking into consideration both the circumstances of the child and the interests of society.<sup>50</sup>

### **9.3.3 Provision on a separate juvenile justice system at pre-trial and trial levels**

A ‘juvenile justice system’ requires the institution of separate laws, procedures and institutions that apply specifically to children in conflict of law in contrast to, or alongside but distinct from, the criminal justice system applicable to adult offenders. This is the requirement of the CRC in Article 40(3).<sup>51</sup> Chapter 6 considered that the ideal of separate procedures commences at the pre-trial phase where the principle of

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<sup>49</sup>With the exception of Lesotho and Namibia which still reflect the original South African position (prior to the Parliamentary debates expected to result in the automatic exclusion of specified serious cases from diversion). As the Lesotho and Namibian Bills, currently stand, the decision on whether to divert or not will be made at the Preliminary Inquiry following the pre-trial assessment of each and every child upon arrest by the police. The position in the Lesotho and Namibian Bills is therefore such that the appropriateness of diversion would (upon enactment of the laws) be decided in each individual case, taking into consideration the circumstances of the child. For discussion in this regard, see Chapter 5, section 5.7.3.1.

<sup>50</sup>See Chapter 5, section 5.7 (in respect of the three approaches).

<sup>51</sup>Article 40(3) provides: “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 penal law.”

pre-trial detention is emphasized as a last resort and for the shortest period of time (under article 37 of CRC). The practice of the countries under study has been characterised by wide discretion to the police regarding arrests and the predominance of arrests and ensuing pre-trial detention of children.<sup>52</sup> In light of the inclusion of provisions aimed at limiting pre-trial detention, Chapter 6 therefore considered that the principle of detention as a last resort has had considerable influence in shaping the new laws and Bills of the countries under study. This is in relation to provisions on the powers of the police to use alternatives to arrest and detention, provisions which provide guidelines for the judicial determination of pre-trial detention,<sup>53</sup> provisions which liberalize the granting of bail in the pre-trial stage and general provisions on the pre-trial release of children.<sup>54</sup>

In relation to children who may not be diverted at the pre-trial stage following arrest, the requirement of distinct procedures applicable to children continues through to the trial phase. In this regard international law emphasizes the need to establish separate procedures and courts which apply to children in conflict with the law. Chapter 6 specifically discussed that international law express the desirability of specialised courts so as to realize the aims of juvenile justice. In establishing these courts and procedures, there must be a balance in the emphasis for informality in juvenile justice proceedings on the one hand, and, protection of due process safeguards, on the other.

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<sup>52</sup>Chapter 6, section 6.3.

<sup>53</sup>This is especially in relation to fixed time limits for the conclusion of cases involving children, discussed in Chapter 6, section 6.4.1.

<sup>54</sup>See, Chapter 6, section 6.4.1.



Further, in instances when courts or tribunals other than specialised courts (such as regular courts) are used, this balance must be ensured.<sup>55</sup>

A number of provisions existed in the past laws of the countries under study in recognition of the need for specialised courts. Hence, a few concessions were made in the prior laws of the countries under study in relation to the protection of children from regular public criminal trials (such as provisions which required court proceedings to be held *in camera*).<sup>56</sup> In contrast to these provisions, the practice in all the countries was marked by the lack of separate and dedicated juvenile justice systems for children in conflict with the law.<sup>57</sup> The conduct in the past of most trials and the physical unfriendliness of *ad hoc* juvenile courts (involving the use of regular adult courts), fell short of compliance with international law standards in this regard. Against this background, Chapter 6  therefore considered that the enactment of improved provisions in the new laws under study constitutes a significant advance in relation to the requirement of a separate juvenile justice system.

The ideal of having separate and distinct procedures that are child rights-centred was considered to be clearly evident in the novel introduction of an inquisitorial procedure – the Preliminary Inquiry (P.I) in the otherwise adversarial legal systems of Lesotho, Namibia and South Africa. The introduction of the P.I is also an example of further incorporation of international child law standards in these three proposed juvenile justice systems. This is motivated by the fact that the P.I is intended to widen access

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<sup>55</sup>See, Chapter 6, section 6.2.2.2.

<sup>56</sup>See, Chapter 6, section 6.3.

<sup>57</sup>Chapter 6, section 6.3 considered that separate children's or juvenile courts were hardly existent in the past practice of all the countries under study.

to diversion and limit reliance on the use of detention in general<sup>58</sup> and pre-trial detention in particular.<sup>59</sup>

The discussion on the establishment of ‘specialized courts’ reveals a clear intention to put in place systems that will be sensitive to a child’s ability to participate in proceedings.<sup>60</sup> However, all six new laws and Bills reveal a reluctance to establish ‘truly’ (physically) separate systems of courts. This cautious approach is no doubt motivated by the substantial investment of resources that a completely separate system with physically separate distinct courts, buildings and personnel may entail. Instead, the laws emphasize the need for specialization of courts. Chapter 6 argued that the emphasis on specialization rather than erection of physical structures is still in keeping with the considerable leeway that international law accords to States in regard to the form of separate procedures and courts. It was considered significant that the new laws all seek to give a national reach to the concept of specialised courts in contrast to past practice where these courts were either non-existent (Namibia and South Africa) or limited to the capitals (Ghana, Kenya, Lesotho and Uganda).

The influence of international law standards regarding the need for separate systems was also considered to be evident through the incorporation of relevant standards in relation to the ambiance and procedures in these courts and due process guarantees, including the child’s right to legal representation in all the six different laws or Bills discussed. Further, it was argued that the Lesotho, Namibian and South African Bills

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<sup>58</sup>Through an increased diversion of majority of cases from the formal justice system.

<sup>59</sup>Through an obligation of the P.I and the Inquiry Magistrate to review any pre-trial detention of a child appearing before a P.I.

<sup>60</sup>Chapter 6, section 6.6.2 in relation to new provisions on the ambiance and procedures of the specialized courts.

challenge the traditional understanding of lawyer-client representation in order to give primacy to the notion of child autonomy. This is by virtue of the provision for the child's right to be heard in decisions during legal representation.<sup>61</sup> These three Bills also seek to promote the practice of diversion by specifically enacting the duty of legal representatives "to promote diversion where appropriate, but without unduly influencing the child to acknowledge responsibility for an alleged crime".<sup>62</sup> Chapter 6 discussed that the recognition of the child's right to legal representation (in certain cases at the State's expense) in all the countries under study is a landmark having regard to the endemic lack of legal representation in current and past juvenile justice practice in these countries.

#### **9.3.4 Provisions on the new and proposed sentencing and alternative sentencing regimes**



A child rights-oriented juvenile justice system requires the limitation of certain sentences and the need for alternative sentences applicable to child offenders.<sup>63</sup> International children's rights law applies to juvenile sentencing in two respects. The first involves the principles which should underpin the aims of sentencing. The second relates to limitations on sentences that may be imposed on children, namely; prohibitions on juvenile death penalty (now constituting a *jus cogens* norm); life

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<sup>61</sup> Lesotho Bill, section 151(2); Namibian Bill, section 98(1) (a) and South African Bill, section 73(1) (a) providing for the duty of legal representatives to allow, "as far as is reasonably possible for the child to give independent instructions concerning the case."

<sup>62</sup> Lesotho Bill, section 151(2); Namibian Bill, section 98(1) (c) and South African Bill, section 73(1) (c).

<sup>63</sup> Considered in Chapter 8.

imprisonment without the possibility of parole; judicial corporal punishment and a restriction on the use of deprivation of liberty.

In relation to the prohibition of sentences, a number of conclusions were made regarding compliance of the new and proposed laws with international children's rights law. Firstly, the prohibition of juvenile death penalty long before the recent juvenile justice law reforms in all the six countries under study is in line with the prohibition of juvenile death penalty in international law (now constituting a norm of *jus cogens* character). This prohibition was confirmed by all the new and proposed laws. However, it was submitted that the Kenyan and Ghanaian positions which allow for the detention, at the pleasure of the president, of any child convicted of a capital offence may lead to long periods of imprisonment and even life imprisonment for such children and that this is in violation of provisions of the CRC (Article 37). Secondly, it was considered that the prohibition of life imprisonment in the new laws of these countries (having not been part of these countries' laws) is not only another pointer to the influence of international law, but also an instance where domestic provisions may go further than the provisions in international law.<sup>64</sup> Thirdly, the prohibition on the use of judicial corporal punishment in all the countries under study bears further testimony to the influence of international law in relation to the new juvenile sentencing laws.

The discussion of the previous sentencing laws of the countries under study established that there existed legislative provisions for a wide range of alternative sentences which theoretically complied with the need for alternative dispositions as

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<sup>64</sup>CRC, Article 37 (a) prohibits the sentence of life imprisonment without the possibility of parole and not life imprisonment, per se.

provided for in the CRC (article 40(4)). However, past sentencing practices in these countries have shown the over-reliance on the use of custodial sentences. It was contended that this was in violation of the restriction in international law as regards the requirement for detention, to be used as a last resort and if used, to be for the shortest period of time. The failure to fully utilize the array of alternative sentences in the past sentencing laws of these countries was attributed to the lack of sentencing policy in respect of custodial sentences.<sup>65</sup> This lacuna was qualified in respect of South Africa where the inclusion of the restriction on detention in the children's rights clause of the South African Constitution has led to judicial decisions affirming restrictions in international law on detention (particularly imprisonment) and standards on the desirable aims of juvenile sentencing.<sup>66</sup>

In contrast to the past law and practice in the countries under study, the new and proposed laws illustrate the influence of international law in a number of respects. In relation to the lack of a sentencing policy for custodial sentences in the past, it was highlighted that the laws now considerably restrict the sphere of judicial discretion.<sup>67</sup> This restriction applies to three main areas. The first area is characterised by provisions for alternative post-trial dispositions and the inclusion of new forms of alternative sentences.<sup>68</sup> Second, there is a prohibition on the use of imprisonment (in the laws of Ghana, Kenya and Uganda) on the one hand, and on the other, explicit restrictions on its use (in the proposed laws of Lesotho, Namibia and South Africa). Third, all six new or proposed laws place restrictions on the use and duration of

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<sup>65</sup>See Chapter 7, section 7.3.3.

<sup>66</sup>See Chapter 7, section 7.3.5.

<sup>67</sup>In addition, the Namibian and South African Bills explicitly provide for the 'purposes of sentencing'.

<sup>68</sup>In the Lesotho, Namibian and South African Bills, these are characterised as 'community-based sentences' and 'restorative justice sentences'

custodial sentences to be served in facilities other than prison.<sup>69</sup> Fourthly, the provisions of the new laws in relation to a range of alternative sentences suggest that the provisions of CRC (Article 40(4))<sup>70</sup> were influential in the drafting of these laws. In addition, the prohibitions and restrictions in relation to the use of imprisonment bear evidence of the substantial influence of the principle that detention should be used as a last resort and for the shortest period of time.

Furthermore, provisions in the new laws which require the consideration of pre-sentencing reports in the process of sentencing are aimed at making the use of alternative sentences more attainable. They specifically draw from the requirement in Rule 16 of the Beijing Rules to the effect that pre-sentence reports should be mandatory in all but minor cases.<sup>71</sup>



#### **9.4 Future prospects and challenges to the implementation of the new and proposed laws**

The successful implementation of child rights' oriented juvenile justice systems discussed in this thesis will depend on broader socio-economic, political and cultural realities of the different countries. Chapter 8 considered that the implementation process will be accompanied by a number of challenges.

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<sup>69</sup>The exception was stated to be the Ghanaian and Kenyan positions in respect of which children found guilty of committing capital offences may be detained in prison at the President's pleasure, see Chapter 7, section 7.5.2.1. Further, the Kenyan position which still allows for the exercise of administrative discretion to extend periods of detention in child-specific facilities was faulted in this regard, see Chapter 7, section 7.5.3.1.

<sup>70</sup>CRC, Article 40(4) provides that juvenile justice systems must provide for a variety of dispositions and alternatives to institutional care.

<sup>71</sup>Chapter 7, section 7.5.5.

First, there is the question whether juvenile justice laws primarily underpinned by a children's rights approach are sustainable when viewed in light of the ever-present pressure of public opinions regarding the need to be 'tough on crime'. The delay in the enactment of the Namibian and South African Bills into law was considered as a 'possible' illustration of the challenge relating to how children's rights can be defended against a more populist and punitive model of child justice. Stout and Wood have therefore argued that "if the South African Bill does not survive the political process intact, the risk that crime control rather than children's rights will become established as the motive behind juvenile justice policy in South Africa will be greatly increased".<sup>72</sup> However, even after the enactment of child rights oriented juvenile justice laws (such as in Ghana, Kenya and Uganda), it is worth noting that their durability on the statute book will never cease to be under threat in light of the pressure to hold the line against a strategy which may be more populist and punitive.<sup>73</sup> Children's rights activists must therefore remain alive to the possibility of legislative amendments to the child rights oriented juvenile justice laws and the possibility for the adoption of retrogressive measures.<sup>74</sup> Therefore, the process of

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<sup>72</sup>Stout and Wood (n 12 above) 134 citing the argument of Sloth-Nielsen, J "The Juvenile Justice Law Reform Process in South Africa: Can a Children's Rights Approach Carry the Day?" (1999) 18 *Quinnipiac Law Review* 469-489.

<sup>73</sup>Chapter 8, section 8.3 considered that governments all over the world are grappling with how to undertake juvenile justice law reforms amidst fears for the potential of a public backlash.

<sup>74</sup>The example of the 1994 and 1996 amendments to the South African Correctional Services Act 1959 discussed in Chapter 6, section 6.3, is instructive. The first amendment abolished the use of pre-trial detention of children in prisons. It instead legislated in preference of pre-trial detention of children in child-specific places of safety. However, there was ensuing chaos due to the lack of provisioning for the implementation of this amendment. The release of child offenders, including those who were on a cycle of arrests, due to the inadequacy of the child-specific facilities led to negative media coverage and public outcry on the perceived impunity of child offenders. This led to the second (1996)

lobbying (governments) on the desirability and value of a children's rights approach (mainly by the civil society) must be maintained from the pre-legislative stage through to the enactment of the new laws and into the implementation phase. This must extend to the creation of public awareness on the concept of children's rights and the role of children's rights in the general reduction of crime and the potential for long term crime prevention benefits.

Secondly, the necessary infrastructure to ensure the practical realization of the new laws requires investment of (human and financial) resources which are scarce in the context of developing countries. It was however considered in this regard that implementation of the new laws will tap into a number of existing juvenile justice practices which have already been experimented with and in some cases are now entrenched in the various systems.<sup>75</sup> Also, a number of provisions of the new laws and Bills are not (financially) resource intensive and their successful implementation will only require the goodwill and commitment of the implementers. Enforcement of provisions relating to the setting of a minimum age of criminal capacity and those prohibiting the use of particular sentences are two examples at hand. Further, a powerful motivating point in support of the new systems should be their potential for costs-savings in comparison with formal justice processes, which would ordinarily permit incarceration (with the attendant resources involved). By virtue of the recognition of diversion in all six new and proposed juvenile justice systems, there is an expected decrease on the use of detention and the involvement of formal criminal

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amendment which allowed for pre-trial imprisonment in specific circumstances and as a result, was more permissive of the use of pre-trial detention in prison than the preceding amendment.

<sup>75</sup>Chapter 8, section 8.5 detailing examples of 'good practice' which have pre-dated law reforms in the countries under study.



justice officials.<sup>76</sup> Provisions aimed at procedural reforms and time limits for the determination of cases involving children are motivated by an expectation that the proposed juvenile justice systems will be more efficient.<sup>77</sup> It is therefore clear that cost saving on time and finances otherwise incurred through the involvement of the formal criminal justice systems is envisaged.<sup>78</sup> The costing process of the South African Bill confirmed this point.<sup>79</sup> A global study has also noted that “resort to alternatives to deprivation of liberty often allows for savings to be made in the juvenile justice system, a feature which should increase the attractiveness of such options for states looking to tighten fiscal spending in the justice area”.<sup>80</sup>

Third, placed as they are within a children’s rights approach, there is a challenge to ensure the substantial reduction of child/juvenile delinquency, which is the overall aim of any child rights-centred juvenile justice system. This requires far-reaching socio-economic reforms aimed at the empowerment of economically deprived families.<sup>81</sup>

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<sup>76</sup>Chapter 8, section 8.4.

<sup>77</sup>Chapter 6, section 6.4 discusses the provisions in this regard. This is in light of the delays that characterise the adjudication of children’s cases as was discussed in Chapter 6, section 6.3.

<sup>78</sup>Sloth-Nielsen, J and Gallinetti, J (eds) (2004) *Child Justice in Africa: A Guide to Good Practice* Bellville: Community Law Centre 53 point out that: “Many gains for children’s rights can be made simply by speeding up decision-making processes. One of the key common characteristics of child justice systems throughout Africa is the length of time it takes to process trials. This means that children spend lengthy periods in welfare facilities and prisons, awaiting the conclusion of their cases.” See the discussion in this regard in Chapter 6, section 6.3.

<sup>79</sup>See Chapter 3, section 3.5 and Chapter 8, section 8.2 explaining that the costing brought to light the envisaged cost savings as a result of improved efficiency, enhanced diversion and reduced rates of incarceration.

<sup>80</sup>Cappelaere, G, Grandjean, A and Naqvi, Y (2005) *Children Deprived of Liberty Rights and Realities* Amsterdam: Defence for Children International 417.

<sup>81</sup>Chapter 8, section 8.7.

The fourth challenge is that laws, policies and resources based on children's rights are meaningless if not enforced by the professionals who draw upon them in their work with and for children. Hence there must be concerted efforts to create awareness and inculcate good attitudes through training sessions and awareness raising campaigns for key juvenile justice role players such as judicial officers, the police, prosecutors, probation officers, diversion service providers both in the short and long term.

Chapter 8 considered that while implementation of the new laws will require the government to be the key agent for practical reform, different sectors of society including the family, communities, the media, civil society (national and international) and the international community (such as inter and intra-governmental organisations and donor agencies) bear different levels of responsibility.



In addition, independent national monitoring bodies consisting of government and non-government representatives, such as Children's Commissions, Children's Ombudspersons or independent National Human Rights Commissions should be put in place to monitor violations of children's rights in the juvenile justice system. The establishment of bodies which are specifically in charge of monitoring juvenile justice (rather than general children's rights monitoring bodies) should also be encouraged wherever possible. Non-governmental organisations should play a complementary role in relation to monitoring and advocacy. Their monitoring role should not be limited to non-compliance with the provisions of the new laws. It should extend to issues of budgetary allocations for the administration of the juvenile justice system and the broader investments in the realization of children's developmental rights, such

as the right to education, health care, social security and so forth. Such a role would involve scrutinizing governments' budgetary allocations and spending on these issues.

## 9.5 Conclusion

The primary role of a children's rights approach in defining the content of the new laws shows that this model provides an overarching framework within which to place juvenile justice law reforms in any country. This Chapter has however re-emphasized that broad-based pre-legislative processes which involve governments, law reformers and the civil society are a prerequisite to guaranteeing dialogue on the viability of a children's approach. This is in view of competing themes, especially a more punitive and populist model of juvenile justice as witnessed in contemporary Western juvenile justice systems.



This thesis has shown that the countries under study have incorporated a children's rights approach to provisions on the setting of a minimum age of criminal capacity (with the exception of Kenya and Namibia), the legal recognition and expansion of access to diversion, recognition of the need for separate juvenile justice systems and new juvenile sentencing laws.

The practical realization of these laws will, however, hinge on the implementation process. Chapter 8 considered that this would involve work in four key areas thus; (a) sensitisation of professionals and the general public, (b) training of professionals, (c) budgeting at all levels of government (national, regional and local) and (d) procedural

reform within state institutions requiring innovation and dedication of different officials in the implementation process.<sup>82</sup>



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<sup>82</sup>Chapter 8, section 8.9.

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